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RAILWAY DECISIONS.

EMBRACING

ALL THE CASES FROM THE EARLIEST PERIOD OF RAILWAY LITIGATION TO THE PRESENT TIME

IN THE

UNITED STATES, ENGLAND AND CANADA.

BY

STEWART RAPALJE

AND

WILLIAM MACK.

VOLUME VII

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DIGEST

OF

RAILWAY DECISIONS.

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1. When ordered. — Upon trial of an action to restrain defendant from operating an elevated railroad in a street in front of plaintiff's premises, after hearing proof in regard to plaintiff's title, etc., the court, against defendant's objection, appointed a referee to take testimony as to the value of any easements and property taken, appropriated or interfered with by defendant, and as to the amount of the rental loss, if any, and to report the same with his opinion thereon; but, as to the value of the easements, the referee was directed to estimate only the impairment of light, air, and access. *Held*, that the court had no power to direct a compulsory reference for the purpose stated; and that the order was erroneous. (Gray, J., dissenting.) *Doyle* v. *Metropolitan El. R. Co.*, 136 *N. Y.* 505, 32 *N. E. Rep.* 1008, 49 *N. Y. S. R.* 746; *affirming* 1 *Misc.* 376, 29 *Abb. N. Cas.* 272, 49 *N. Y. S. R.* 118, 20 *N. Y. Supp.* 865.

Action was brought to recover damages for breach of contract by which defendant leased to plaintiffs its franchises and rights to construct and operate a street railroad and covenanted to secure the necessary consents to enable plaintiffs to construct a cable road. The complaint alleged that in order to enable plaintiffs to fulfil their contract it was necessary for them to expend large sums of money in the purchase of real estate, machinery, cars, etc., and in hiring employés and other expenses; that by reason of defendant's failure to obtain the consents, the enterprise contemplated by the agreement became abortive to plaintiffs' damage of $300,000. *Held*, that the action did not involve the examination of a long account within the meaning of N. Y. Code of Civ. Pro., § 1013; and that the granting of a compulsory order of reference was error. *Johnson* v. *Atlantic Ave. R. Co.*, 139 *N. Y.* 449, 34 *N. E. Rep.* 925, 54 *N. Y. S. R.* 705; *reversing* 51 *N. Y. S. R.* 188, 21 *N. Y. Supp.* 1056, 67 *Hun* 649, *mem.*

Where the claim of plaintiff includes rent and numerous violations of the covenants of the lease of a railroad resulting in dam-

ages, the fact that defendant files a counter claim for $5000 for services and expenses in obtaining a right of way for the road does not prevent a compulsory reference under N. Y. Code of Civ. Pro., § 974, providing for a reference in cases which involve the examination of long accounts. *Brooklyn & R. B. R. Co.* v. *Reid*, 21 *Hun* (*N. Y.*) 273.

The transfer agent of any corporation existing beyond the jurisdiction of the state is required at all reasonable times during business hours to exhibit to any stockholder the transfer books of such corporation, and a list of the stockholders thereof, if in his power to do so; but where a stockholder applies for a mandamus to compel the inspection of books, the court may order a reference to take proof of the facts alleged in the affidavits filed by the respondents, and direct the persons making the same to appear before the referee for examination, if the court desires fuller information. *People ex rel.* v. *St. Louis & S. F. R. Co.*, 44 *Hun* 552, 7 *N. Y. S. R.* 415, 19 *Abb. N. Cas.* 1.

In an action to wind up the affairs of an insolvent railroad corporation, in which different classes of creditors embracing, it may be, many individuals, have been made parties by publication, an order directing the receiver to change the location of a part of the road and build a bridge with the income of the corporation should not be made upon the recommendation of a receiver and the report of an engineer, but only upon the report of the master showing that necessity for the change exists. *Hand* v. *Savannah & C. R. Co.*, 10 *So. Car.* 406.

The whole transaction connected with the closing of an account by note being in writing and set forth in the pleadings, there is no error in passing upon a petition to have such account paid out of the receiver's fund without ordering a reference to take testimony. *Ex parte Williams*, 12 *Am. & Eng. R. Cas.* 425, 17 *So. Car.* 396.

2. Qualifications of referees. — A defendant railroad company objected to the report of a committee filed in certain litigation, because the committee's wife was a stockholder in an incorporated bank which had stock in the railroad as security for a loan. *Held*, that neither the committee nor his wife was so far a party to the suit as to disqualify him. A suit by or against a corporation does not make the stockholders parties. But the committee had such an interest in the result of the suit as to disqualify him, if the objection had been made in time. *Windham Cotton Mfg. Co.* v. *Hartford, P. & F. R. Co.*, 23 *Conn.* 373.

In such case where there is nothing to show that the interest of the committee was not known to the company at the time of his appointment, a failure to object until after his report is filed, is a waiver of the objection, and his report will be accepted. *Windham Cotton Mfg. Co.* v. *Hartford, P. & F. R. Co.*, 23 *Conn.* 373.

3. Authority and powers of the referees. — A construction contract reserved the right to the company to alter the line of the road or the grades, without extra compensation to the contractor, if the engineer decided such changes were necessary. *Held*, that, where such matter is referred to a referee, it is within his authority to allow extra compensation for alterations involving large expense to the contractor. *Porter* v. *Buckfield Branch R. Co.*, 32 *Me.* 539.

And in such case where the company reserved the right to substitute piling instead of an embankment, an extra allowance to the contractor, where the change increased the expense, was not above the authority of the referee. *Porter* v. *Buckfield Branch R. Co.*, 32 *Me.* 539.

And where the submission of such case to the referee provides that he shall take the contract between the parties as the basis of a settlement, and the contract requires that a portion of the work shall be paid in the stock of the company, it is not beyond the authority of the referee to ascertain the amount thus payable, and to direct that certificates for the same shall be issued to the contractors. *Porter* v. *Buckfield Branch R. Co.*, 32 *Me.* 539.

4. Sufficiency of their report. — Where a party intervenes in a chancery proceeding and files a claim for a personal injury, the finding of the master on a question of fact will be treated much as the verdict of a jury; and where the evidence is conflicting the finding of the master as to just how the injury was caused, which is based upon the evidence of a single eyewitness, will not be disturbed, though there is considerable other evidence tending to support a different theory. *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.*, 31 *Fed. Rep.* 246. *Missouri Pac. R. Co.* v. *Texas & P. R. Co.*, 33 *Fed. Rep.* 803.

Interveners, a husband and wife, filed a

claim for damages for personal injuries received by falling off a platform at night just after leaving a train. The evidence showed that they had safely alighted on the platform, and in their search for friends came near the edge of the platform, when a railway official warned them of their danger, when they turned back for a moment, but immediately returned to the same place and walked off the platform. The report of the master only referred to the warning as being insufficient. *Held*, that as the right to recover depended directly upon the sufficiency of the warning and of the conduct of the interveners, the report should be recommitted to the master for a further hearing. *Missouri Pac. R. Co.* v. *Texas & P. R. Co.*, 33 *Fed. Rep.* 359.

In an action to recover damages for breach of an agreement to pay over the earnings of a certain line of telegraph during a period of years, the report of a referee giving the sum in gross for each office on the line to which the plaintiff is entitled will not be set aside for failure to give the annual earnings of each office, or the average annual receipts of two or more of them. *Pittsburgh & C. R. Co.* v. *Shaw*, (*Pa.*) 36 *Am. & Eng. R. Cas.* 453, 14 *Atl. Rep.* 323.

5. Filing report.—The mere failure of a referee to file his report within the time fixed in the order of reference does not invalidate it. *Dietrichs* v. *Lincoln & N. W. R. Co.*, 13 *Neb.* 43, 13 *N. W. Rep.* 13.

6. Entering judgment upon report.—In a reference to take proof of claims in foreclosure of a railway mortgage, where a bondholder fails to except to the master's report for not including certain interest coupons, he should not be heard to urge the omission as an objection to the final decree. *Coghlan* v. *South Carolina R. Co.*, 51 *Am. & Eng. R. Cas.* 79, 142 *U. S.* 101, 12 *Sup. Ct. Rep.* 150.

Where plaintiff's claim is based upon defendant's negligence, and a referee finds as a fact that negligence existed, the report will warrant a judgment for plaintiff. *Toppan* v. *Eastern R. Co.*, 61 *N. H.* 640.

7. Removal of referee.—Referees are under the control of the court at all times, and may be removed in its discretion for cause shown; but they will not be summarily removed without some substantial legal ground calling for the exercise of the summary power of discipline. *Goldberger* v. *Manhattan R. Co.*, 3 *Misc.* 441, 52 *N. Y. S. R.* 320, 23 *N. Y. Supp.* 176.

The removal of the referee in an action against defendant elevated railway company was demanded, because in certain proceedings by other parties against defendant he received from defendant his *per diem* as referee at the end of each month, and because he brought an action against one H. to recover his fees as referee in an action prosecuted by the attorneys for plaintiffs herein, who were also the attorneys for H. *Held*, that an order declining to remove the referee should be affirmed, with costs. As the referee was appointed on the nomination of plaintiffs' attorneys and by the consent of all parties, and with knowledge of the practice as to the payment of referees' fees in elevated railway cases, there was no force in the first objection. The second objection furnished no just ground for imputing bias or unfriendly relations between plaintiffs' attorneys and the referee. *Goldberger* v. *Manhattan R. Co.*, 3 *Misc.* 441, 52 *N. Y. S. R.* 320, 23 *N. Y. Supp.* 176.

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Where there is nothing in a lease as to how the premises shall be used, it

does not give the privilege to the lessee of making any use thereof that he sees fit, but he has a right to "enjoy the premises according to the use for which it was intended by the lease." *So held*, where lessee used premises for coffee-room and bar-room. *New Orleans & C. R. Co.* v. *Darms*, 39 *La. Ann.* 766, 2 *So. Rep.* 230.

2. Agreement to stop trains at.—Where a postmaster-general requires a railway company to run a train carrying mails at a certain hour and to stop at a certain station for five minutes only, such train is a train "not under the control of the company" within the meaning of the agreement between the company and the builders of refreshment rooms at such station, whereby all trains, except those not under the control of the company, and certain others, were to stop for ten minutes. *Phillips* v. *Great Western R. Co.*, *L. R.* 7 *Ch.* 409, 41 *L. J. Ch.* 614, 26 *L. T.* 532, 20 *W. R.* 562.

3. Obstructing access to.—A company had several tracks between its passenger depot and an eating house of a party, and trains were made up at that station, so that it was dangerous for persons to cross over to the eating house. *Held*, that the company was not liable to the proprietor of the house for leaving freight and other cars on its side track, so as to make it difficult for passengers to cross over to his house. The company is not obliged to keep open an unobstructed way for the passage of persons to and fro across its track, for the accommodation of the private business of an individual; and the obstruction was a lawful means to adopt for the safety of passengers, and to protect itself from liability for injury to others in crossing. *Disbrow* v. *Chicago & N. W. R. Co.*, 70 *Ill.* 246.

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I. GENERAL PRINCIPLES.*

1. What constitutes—Covenant not to sue.—A covenant perpetual not to claim damages will be construed to be a release if necessary to give effect to the intention of the parties. The principle on which this construction rests is to avoid circuity of action—the damages recovered by the covenantor in his suit being the same as the covenantee would recover back in an action for the breach of the covenant. *Costigan* v. *Pennsylvania R. Co.*, 54 *N. J. L.* 233, 23 *Atl. Rep.* 810.

2. Form of the release.—Whether a receipt "in full for all damages or injuries resulting from said accident to us, or either of us, or to our children," attached to a statement of account in the form of a bill, reciting the accident, and signed by plaintiff and her husband, would, in the absence of fraud or any facts impeaching its validity, be an absolute bar to plaintiff's right of action for the injury—*quære*. *Michigan C. R. Co.* v. *Dunham*, 30 *Mich.* 128.

3. Who may give, generally.—A release executed by the shipper, not by

* Release of damages for personal injuries, see notes, 30 AM. & ENG. R. CAS. 606; 19 *Id.* 233; 48 *Id.* 42.

authority or on behalf of the consignee, is no defense to an action by the latter for an injury to the property shipped. *Cream City R. Co.* v. *Chicago, M. & St. P. R. Co.*, 21 *Am. & Eng. R. Cas.* 70, 63 *Wis.* 93, 23 *N. W. Rep.* 425, 53 *Am. Rep.* 267.

4. Mental capacity.—If a party not insane seeks to avoid a release of a claim for damages against a railway given by her while her mental faculties were temporarily impaired, the burden of proof is upon her to show the mental incapacity, and not upon the other party to show that her mind was not impaired. *Chicago W. D. R. Co.* v. *Mills*, 91 *Ill.* 39.—QUOTING Lilly *v.* Waggoner, 27 Ill. 397.

The plaintiff executed a release to the company of all her claim against it. *Held*, that the jury were properly instructed that if plaintiff did not have sufficient intelligence at the time of executing the release it was not binding upon her. *Chicago W. D. R. Co.* v. *Mills*, 11 *Am. & Eng. R. Cas.* 128, 105 *Ill.* 63.

Defendant set up a release executed by plaintiff soon after the injury; there was testimony showing that plaintiff, at the time he signed the release, was mentally incompetent to appreciate the character of the instrument. *Held*, that the question as to the validity of the release was properly left to the jury. *Dixon* v. *Brooklyn City & N. R. Co.*, 26 *Am. & Eng. R. Cas.* 203, 100 *N. Y.* 170, 3 *N. E. Rep.* 65.

Plaintiff testified that he had no recollection of ever signing a certain release, or agreeing to any compromise, and pleaded that he was *non compos mentis* when he signed it. The evidence was conflicting, and from all the testimony the jury might well have concluded that such was plaintiff's condition when he signed the release. *Held*, that a verdict for plaintiff will not be disturbed. *Texas & P. R. Co.* v. *Crow*, 3 *Tex. Civ. App.* 266, 22 *S. W. Rep.* 928.

All the conversations pertinent to the alleged release, which occurred at the time of its execution, are admissible as tending to throw light on the mental capacity of plaintiff at the time. *Missouri Pac. R. Co.* v. *Brazzil*, 72 *Tex.* 233, 10 *S. W. Rep* 403.

5. Person under influence of drugs and opiates.—If a person, while under the influence of opiates to such an extent as to be incapacitated to contract, is induced to execute a release of damages for a personal injury, it will not be obligatory upon him, and will be no defense to an action brought by him. *Chicago, R. I. & P. R. Co.* v. *Lewis*, 19 *Am. & Eng. R. Cas.* 224, 109 *Ill.* 120; *affirming* 13 *Ill. App.* 166.

Such a release is voidable, and not a defense to an action. *Chicago, R. I. & P. R. Co.* v. *Doyle*, 18 *Kan.* 58, 15 *Am. Ry. Rep.* 187.—DISTINGUISHED IN Gulliher *v.* Chicago, R. I. & P. R. Co., 59 Iowa 416.

6. Infants.—An infant's release of a demand against a railroad company for personal injuries is voidable at his election, and the bringing of suit upon the demand is an unequivocal disaffirmance of the release. *St. Louis, I. M. & S. R. Co.* v. *Higgins*, 21 *Am. & Eng. R. Cas.* 629, 44 *Ark.* 293.

A minor releasing a company from liability on consideration of a cork leg being furnished him is not bound by such contract beyond accounting for the value of the artificial leg furnished. *Bonner* v. *Bryant*, 79 *Tex.* 540, 15 *S. W. Rep.* 491.

7. Married women.—A release of damages executed by a married woman, without her husband joining her, does not bind her. *Delaware, L. & W. R. Co.* v. *Burson*, 61 *Pa. St.* 369.—FOLLOWING Glidden *v.* Struplèr, 52 Pa. St. 400.—*Mayberry* v. *Second & T. St. R. Co.*, 15 *Phila.* (*Pa.*) 253. —FOLLOWING Delaware, L. & W. R. Co. *v.* Burson, 61 Pa. St. 369.

A married woman, since the Married Woman's Act of 1875 (Mo. Rev. St., § 3296), can execute a valid release of damages for injuries to her person, without joining her husband in the release. *Blair* v. *Chicago & A. R. Co.*, 89 *Mo.* 383, 1 *S. W. Rep.* 350. —REFERRED TO IN Blair *v.* Chicago & A. R. Co., 89 Mo. 334.

The principles of private international law are a part of the common law in the District of Columbia; therefore, if by the laws of any state certain movables belong to a wife domiciled there, as absolutely as if she were unmarried, that law must be applied here to any movable actually here. But this principle does not apply to a right of action for an injury to the person, and a release by a married woman domiciled elsewhere, of a right of action therefor, is a nullity here. *Snashall* v. *Metropolitan R. Co.*, 8 *Mackey* (*D. C.*) 399.

8. Validity and effect, generally.—A release of a claim for personal injuries, the effect of which is understood when agreed to, is binding, although the releasor had sustained serious injuries of which he

had no idea at the time he entered into the arrangement. *Rideal* v. *Great Western R. Co.*, 1 *F. & F.* 706.

Plaintiff shipped goods over defendant's road, through agents, who gave a release to the company for any damages that might occur in transportation. There was no evidence that the agents disclosed their principal. *Held*, that the company was authorized to consider the agents as the principal, in which case the release was a protection; and plaintiff having recognized the agency by claiming the benefit of the contract and suing on it, was equally affected by the release. *McCann* v. *Baltimore & O. R. Co.*, 20 *Md.* 202.

The mere acceptance by a street-car company of a release of all causes of action from a person who claims to have been injured by the negligence of a driver, is not an admission of the company's liability. At most it is but an admission that the person had made a claim that the company was liable. *Baldwin* v. *New York C. & H. R. R. Co.*, 2 *N. Y. Supp.* 481, 18 *N. Y. S. R.* 958.

After an action has been commenced and counsel employed, no release obtained from the plaintiff, in the absence and without the consent or knowledge of his counsel, should be held valid, unless the utmost good faith is shown on the part of the defendant in obtaining the same. *Bussian* v. *Milwaukee, L. S. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 716, 56 *Wis.* 325, 14 *N. W. Rep.* 452.

9. Conclusiveness — What claims are barred.—Where one who has sundry claims or demands against another, upon settlement, executes to him a release and discharge "from all claims and demands of every name and nature" which he holds against him, such release will cover all articles of property known by the releasor at the time to be held and claimed by the releasee as his own. *Little Rock & Ft. S. R. Co.* v. *Page*, 7 *Am. & Eng. R. Cas.* 36, 35 *Ark.* 304.

A release of all claim for damages growing out of a personal injury, if fairly obtained by the agents of a company, and understandingly executed by the plaintiff, is a bar to an action to recover for such injury. *Chicago, R. I. & P. R. Co.* v. *Lewis*, 19 *Am. & Eng. R. Cas.* 224, 109 *Ill.* 120; *affirming* 13 *Ill. App.* 166.

In an action against a company for failure to comply with its contract (made in compensation for injuries received) in not paying plaintiff for services rendered under such contract, it appeared that plaintiff executed a release for a sufficient consideration covenanting not to sue, and discharging defendant from all further liability. *Held*, to be a sufficient bar to an action for a balance unpaid for services rendered under said contract since the injury was received. *White* v. *Richmond & D. R. Co.*, 110 *N. Car.* 456, 15 *S. E. Rep.* 197.

A release partakes of the nature of a deed, and is not susceptible, unless fraud or mutual mistake be set up, of contradiction or variation by parol. *Texas & P. R. Co.* v. *Burke*, 1 *Tex. App.* (*Civ. Cas.*) 531.

While plaintiff was suffering from injuries received in a collision on the railroad of defendant, the agent of the latter procured him to execute, in consideration of $50, a release under seal of all claims against defendant by reason of his property being destroyed at the time of the collision, and also for personal injuries received at that time. The jury found that the release for the injuries was not talked about during the negotiations, and that neither plaintiff nor the agent understood that the release covered such injuries. The value of the property destroyed exceeded $50. The release was not read to plaintiff, who was sick in bed, and when handed to him he tried to read it but could not by reason of dizziness caused by the injuries. *Held*, that the release as to the personal injuries was not binding, and plaintiff's ignorance of its contents was not the result of such negligence as would preclude him from avoiding it. *Lusted* v. *Chicago & N. W. R. Co.*, 71 *Wis.* 391, 36 *N. W. Rep.* 857.—FOLLOWING Schultz *v.* Chicago & N. W. R. Co., 44 Wis. 638; Bussian *v.* Milwaukee, L. S. & W. R. Co., 56 Wis. 326.

10. Release of one of two or more joint tortfeasors.*—A party receiving an injury from the wrongful acts of others is entitled to but one satisfaction, and an accord and satisfaction with, or a release or other discharge by the voluntary act of the party injured, of one of two or more joint tortfeasors, is a discharge of all. *Barrett* v. *Third Ave. R. Co.*, 45 *N. Y.* 628; *affirming* 8 *Abb. Pr. N. S.* 205, 1 *Sweeny* 568. *Chapin* v. *Chicago & E. I. R. Co.*, 18 *Ill. App.* 47.

* See also *post*, **20, 27.**

—QUOTING Leddy *v.* Barney, 139 Mass. 394, 2 N. E. Rep. 107.

But a release to, or the receipt of money from one who is not in fact liable with another, will not discharge such other. In order to discharge the other the satisfaction received from one joint wrong-doer must be received in satisfaction of the whole injury, or in full satisfaction. *Wagner* v. *Union S. Y. & T. Co.*, 41 *Ill. App.* 408.

An attorney may discontinue an action, but his authority, unless it be expressed, does not extend to a compromise or a release of a cause of action. So where plaintiff, a female, commenced an action against two corporations for an injury, evidence that her attorney had compromised and released the cause of action against one of the companies for a small sum, and that she called upon her attorney, when she was out of work and in need, and received $25 from him, without anything to show that she knew the source of the money, or that she authorized her attorney to settle the claim, is not sufficient to bind her. *Barrett* v. *Third Ave. R. Co.*, 45 *N. Y.* 628; *affirming* 8 *Abb. Pr. N. S.* 205, 1 *Sweeny* 568.

11. Effect of fraud. — A release of a claim for personal injuries, procured by fraudulent misrepresentation of fact, is not a bar to an action for the injuries. *Hirschfeld* v. *London, B. & S. C. R. Co.*, 46 *L. J. Q. B. D.* 94, *L. R.* 2 *Q. B. D.* 1, 35 *L. T.* 473.

Whether a release is valid, or was procured by fraud, is a question of fact, to be determined by the jury. *Green* v. *Southern Exp. Co.*, 41 *Ga.* 515.

The son of plaintiff was killed by defendant's train while walking on the track. In consideration of defendant's paying the funeral expenses, plaintiff signed a release, under seal, of all damages for his son's death. He afterwards brought suit and endeavored to invalidate the release on the ground of fraud. The court charged that the evidence of fraud was too slight to justify the jury in setting aside the release, but left the question of fraud to them upon the evidence. *Held*, that this was error, and that the case should have been withdrawn from the jury. *Pennsylvania R. Co.* v. *Shay*, 82 *Pa. St.* 198, 15 *Am. Ry. Rep.* 462.—FOLLOWED IN Ross *v.* West Phila. Pass. R. Co., 17 Phila. (Pa.) 361. QUOTED IN Hoffman *v.* Bloomsburg & S. R. Co., 157 Pa. St. 174.

Plaintiff and his stepson were both injured at the same time. After investigation defendant offered to pay the stepson $200, if he would procure a release from plaintiff for $100, at the same time denying its legal liability. The stepson importuned plaintiff while he was weak in body and mind from the effects of the injury, and made him believe that he would never receive more, and perhaps nothing, and induced him to accept the $100 and sign a release. A master found that the company was liable and plaintiff entitled to $4000 damages. *Held*, that the release should be set aside, and a decree entered for the amount awarded by the master. *Magoric* v. *Little*, 23 *Blatchf.* (*U. S.*) 399, 25 *Fed. Rep.* 627.

12. How pleaded and proved.— In pleading a release of a claim it is not necessary to aver that it was under seal. A release *ex vi termini* imports a seal, and it is a matter of evidence whether it have a seal or not, if a seal be necessary. *Illinois C. R. Co.* v. *Read*, 37 *Ill.* 484.

In an action against a company to recover for personal injuries, a writing was set out in the complaint which stated that in consideration of a sum of money paid plaintiff, and also in consideration of the payment of the doctor's fee, he waived all right to damages against the company. *Held*, that it was not only proper but necessary to allege and prove extrinsic facts in order to give the writing legal effect, as it was incomplete and afforded plaintiff no enforceable right without such extrinsic facts. *Kentucky & I. Cement Co.* v. *Cleveland*, 4 *Ind. App.* 171, 30 *N E. Rep.* 802.

13. Impeachment, generally.—When a person has executed a release under seal, his uncorroborated testimony is not sufficient to impeach it. *Ross* v. *West Phila. Pass. R. Co.*, 17 *Phila.* (*Pa.*) 361.—FOLLOWING Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198.

14. —— Ignorance of contents—Neglect to read.* — It is well settled that where a party having capacity to read an instrument signs it without reading it, and without requesting it to be read to him, he is bound thereby, if no device is used to put him off his guard. *Gulliher* v. *Chicago, R. I. & P. R. Co.*, 59 *Iowa* 416, 13 *N. W. Rep.* 429.—DISTINGUISHING Illinois C. R. Co. *v.*

* Release of claims for personal injuries, Failure to read releasing receipt, see note, 48 AM. & ENG. R. CAS. 500.

Welch, 52 Ill. 183; Schultz *v.* Chicago & N. W. R. Co., 44 Wis. 638; Chicago, R. I. & P. R. Co. *v.* Doyle, 18 Kan. 58.— DISTINGUISHED IN Solomon R. Co. *v.* Jones, 34 Kan. 443.— *Wallace* v. *Chicago, St. P., M. & O. R. Co.*, 67 *Iowa* 547, 25 *N. W. Rep.* 772. *Spitze* v. *Baltimore & O. R. Co.*, 48 *Am. & Eng. R. Cas.* 495, 75 *Md.* 162, 23 *Atl. Rep.* 307.—DISTINGUISHING McConkey *v.* Cockey, 69 Md. 286.

One who signs a discharge or acquittance without knowing its contents or intending to sign such an instrument is not bound by it. *Schultz* v. *Chicago & N. W. R. Co.*, 44 *Wis.* 638, 18 *Am. Ry. Rep.* 146.— DISTINGUISHED IN Gulliher *v.* Chicago, R. I. & P. R. Co., 59 Iowa 416. FOLLOWED IN Lusted *v.* Chicago & N. W. R. Co., 71 Wis. 391.

A release in full of all demands for work and extras, given by a contractor, done under his agreement, cannot be attacked (no fraud or malpractice being alleged) two years afterwards on the ground that it was obtained from him by surprise. *Coulson* v. *Macpherson*, 23 *U. C. Q. B.* 129.

Where a company sets up a written release by one who sues for personal injuries, and the plaintiff alleges that the release was secured by fraud, the allegation is not sufficiently supported by proof that plaintiff was misinformed as to the contents, and did not understand the nature of the writing, where three witnesses testify that they were present and that the release was read over and explained to him twice before he signed it, and that he said he understood it; especially in view of the fact that the plaintiff has the burden of proof in setting aside the release. *Pederson* v. *Seattle Con. St. R. Co.*, 6 *Wash.* 202, 33 *Pac. Rep.* 351, 34 *Pac. Rep.* 665.— REVIEWING Rose *v.* West Phila. R. Co., (Pa.) 12 Atl. Rep. 78.

15. —— for fraud or misrepresentation.* — After plaintiff, a female, had commenced a suit for damages, agents of the company induced her uncle to go to her to procure a settlement. She testified that he said it would be a great disgrace for her to go into court, and that, if she continued the suit, it would be put off from time to time and she would get nothing in the end; that her husband was away at the time, her children were sick, and she was thus induced to agree to a settlement. Soon afterwards the company's station agent and lawyer read her a receipt in full of all demands, which she signed, receiving $8 in money and a due bill for $32, which she returned the next day and repudiated the settlement. She testified that she had no money in the house at the time, and the chief inducement to take the $8 was to buy medicine for her sick children. *Held*, that there was such advantage taken of her and her circumstances as to warrant the court in giving relief against the release. *Stone* v. *Chicago & W. M. R. Co.*, 30 *Am. & Eng. R. Cas.* 600, 66 *Mich.* 76, 9 *West. Rep.* 596, 33 *N. W. Rep.* 24.

In such case the jury were instructed that if plaintiff was induced to make the settlement by reason of wanting money to buy medicines for her children, made it understandingly, and without fraud or undue influence upon the part of those acting for the company, it was binding on her, and a bar to the action. *Held*, that the company could not complain of such instruction. *Stone* v. *Chicago & W. M. R. Co.*, 30 *Am. & Eng. R. Cas.* 600, 66 *Mich.* 76, 9 *West. Rep.* 596, 33 *N. W. Rep.* 24.

To entitle a party to rescind, it is not necessary that he should first have positive knowledge of the falsity of the representations. The right of rescission depends on the existence of the fraud, and not on the certainty of the party's knowledge of the fact. *Peterson* v. *Chicago, M. & St. P. R. Co.*, 38 *Minn.* 511, 39 *N. W. Rep.* 485.

Plaintiff assumed to rescind a release of her claim against defendant, on the ground that it was procured by a false and fraudulent statement of defendant's agent that "her physician had stated that her injuries would soon be cured with proper treatment." *Held*, that it was not necessary that she should have entertained an unquestioned and positive belief in the correctness of the alleged opinion of the physician. It was sufficient if she so far relied on it and was so far influenced by it that it was the inducing cause of her executing the release. *Peterson* v. *Chicago, M. & St. P. R. Co.*, 38 *Minn.* 511, 39 *N. W. Rep.* 485.

A release of all claims, which is pleaded as a bar to an action at law, may, in that action, be shown to have been obtained by fraud, misrepresentation, or undue influence, if all the parties to the release are parties to the action, and the finding of the

* Release of damages for personal injuries procured by fraud, see notes, 30 AM. & ENG. R. CAS. 606; 19 *Id.* 233.

jury upon the question of fraud has the same force as their verdict upon any other issue in the action. *Bussian* v. *Milwaukee, L. S. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 716, 56 *Wis.* 325, 14 *N. W. Rep.* 452.—FOLLOWED IN Lusted *v.* Chicago & N. W. R. Co., 71 Wis. 391.

After plaintiff had commenced an action and had employed counsel, the agent of the company obtained a release from her in the absence of her counsel, and when she had no proper adviser. The execution of the release was urged upon her by her attending physician, acting on behalf of the company, when she desired a postponement until she could consult her counsel. She was uninformed as to the amount of charges her attorneys would be entitled to demand for their services, and defendant's agent represented that the company would probably defeat her in the action, and, if it did not, her counsel would probably absorb whatever damages she might recover after an uncertain and prolonged litigation. *Held*, that the jury were justified in finding that the release was a fraud upon plaintiff. *Bussian* v. *Milwaukee, L. S. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 716, 56 *Wis.* 325, 14 *N. W. Rep.* 452.

16. Restoring consideration on rescission. — (1) *When a return not necessary.* — Where an infant releases a right of action against a railroad company for personal injuries for a consideration, he is not bound to restore the consideration as a condition precedent to his right to disaffirm the release, and sue for damages. *St. Louis, I. M. & S. R. Co.* v. *Higgins*, 21 *Am. & Eng. R. Cas.* 629, 44 *Ark.* 293.

If a release of a cause of action is obtained from a person by fraud and circumvention, at a time when he is incapable of making a contract rationally, and money is paid to him at the time of its execution, he may repudiate the release, and bring his action without first paying or tendering back the money received by him. *Chicago, R. I. & P. R. Co.* v. *Lewis*, 19 *Am. & Eng. R. Cas.* 224, 109 *Ill.* 120; *affirming* 13 *Ill. App.* 166. *Mullen* v. *Old Colony R. Co.*, 127 *Mass.* 86.

On the trial the jury has the right to give the company credit for the money paid at the time the release was signed. *Chicago, R. I. & P. R. Co.* v. *Doyle*, 18 *Kan.* 58, 15 *Am. Ry. Rep.* 187.

(2) *When necessary.*—In an action to recover damages it appeared that the parties had agreed upon a settlement under which plaintiff received a sum of money in satisfaction of his injuries, and in which he released all right of action for further damages. *Held*, that he could not successfully reply by showing that the release was obtained by fraud, without also showing that before commencing suit he had tendered to defendant the sum received with demand of return of what defendant had received from him, thus rescinding the settlement. *East Tenn., V. & G. R. Co.* v. *Hayes*, 83 *Ga.* 558, 10 *S. E. Rep.* 350.

A release is valid, until it is disaffirmed and the consideration received is tendered back; and it is valid as against a lien by the plaintiff's attorney, where he has not followed the statute in protecting his interest in the litigation. *Kreuzen* v. *Forty-second St., M. & St. N. A. R. Co.*, 38 *N. Y. S. R.* 461, 13 *N. Y. Supp.* 588.

II. BY INJURED PASSENGER.

17. Validity and effect, generally. —A release executed by one injured by street-cars, to the company, in the absence of fraud, or proof that the releasor did not know what he was doing, binds the releasor, no matter how hard the bargain may be. *Rose* v. *West Phila. R. Co.*, (*Pa.*) 12 *Atl. Rep.* 78.

A provision in a contract for the shipment of live stock that in consideration of a reduced rate the shipper would release the company "from all damages attending the transportation, custody, and delivery of the stock, except such as might arise from the fraud or wilful misconduct of the company," only applies to the live stock, and does not release the company from liability for injuries to one who is riding on the train to care for the stock. *Porter* v. *New York, L. E. & W. R. Co.*, 36 *N. Y. S. R.* 315, 13 *N. Y. Supp.* 491, 59 *Hun* 177; *affirmed in* 129 *N. Y.* 624, *mem.*, 41 *N. Y. S. R.* 946, 29 *N. E. Rep.* 1029.

A release of a claim against a railroad company for damages for personal injuries to a woman, who feared that the injuries would cause a miscarriage, signed under the advice of her husband and his father and made for a valuable consideration, is binding, notwithstanding the subsequent occurrence of the result which she feared, and which fear caused her to hesitate in signing

such release. *Eccles* v. *Union Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 38, 7 *Utah* 335, 26 *Pac. Rep.* 924.

The relationship of a medical man to his patient is one of trust and confidence, and he must act *bona fide* in advising him, or any settlement made through him, of a claim against a railway for a personal injury, in consequence of advice given *mala fide*, will be set aside. *Rowe* v. *Grand Trunk R. Co.*, 16 *U. C. C. P.* 500.

18. Effect of fraud and misrepresentation.—Where an injured passenger is induced by an officer of the company to accept money and execute a release by fraudulent representations that his injuries were trivial, and that if they should afterwards turn out to be more serious he would still be in a position to obtain further compensation, he is not precluded from maintaining an action for the injuries received, provided such injuries turn out to be more serious than he had anticipated. *Hirschfeld* v. *London, B. & S. C. R. Co.*, *L. R.* 2 *Q. B. D.* 1, 46 *L. J. Q. B. D.* 1.

If an injured passenger is induced to sign a release of all damages by the agents of the company, through their representations or acts, which induce in his mind the belief that he is only signing a receipt for money paid him at the time for loss of time and expenses incident to the delay resulting from the accident, and not as a discharge of the company for the injuries sustained, or if such release is procured by fraud and circumvention, it will be void. *Chicago, R. I. & P. R. Co.* v. *Lewis*, 19 *Am. & Eng. R. Cas.* 224, 109 *Ill.* 120; *affirming* 13 *Ill. App.* 166.

A passenger was severely injured, and in a few hours after being taken to a hotel was induced by the agents of the company to sign a release of his right of action, under the belief that he was signing only a receipt for money, which belief was caused by their fraudulent practices and representations, and it appeared that he was suffering great physical pain and laboring under the effect of opiates. *Held*, that he was not chargeable with such negligence in executing the release, without having first read the same, as to preclude him from asserting the truth as to the manner in which his signature was procured. *Chicago, R. I. & P. R. Co.* v. *Lewis*, 19 *Am. & Eng. R. Cas.* 224, 109 *Ill.* 120; *affirming* 13 *Ill. App.* 166.

Plaintiff, an injured passenger, executed a release in consideration of $225. She claimed she was induced to execute the release by false representations of defendant. The court below, in its charge, submitted to the jury two representations as grounds on which she could avoid the release. As to one of these representations she had learned its falsity, and knew the facts, when she received the money. *Held*, error to submit that representation to the jury as an independent ground to avoid the release. *Peterson* v. *Chicago, M. & St. P. R. Co.*, 36 *Minn.* 399, 31 *N. W. Rep.* 515.

19. Insanity of injured passenger—Ratification.—The contracts of insane persons are not, as a rule, absolute nullities, but may be ratified after the insanity is ended. So where an insane person is injured while riding as a passenger, and executes a release, he may ratify it after becoming sane. *George* v. *St. Louis, I. M. & S. R. Co.*, 1 *Am. & Eng. R. Cas.* 294, 34 *Ark.* 613.

Where an injured passenger has accepted money from defendant, and given a release which is sought to be avoided on the ground that he was insane and unconscious when it was given, a charge is properly given that the release was valid if he used or retained the money, knowing that he had received it in satisfaction of his injuries and did not promptly disaffirm the contract, but acquiesced therein. *International & G. N. R. Co.* v. *Brazzil*, 44 *Am. & Eng. R. Cas.* 437, 78 *Tex.* 314, 14 *S. W. Rep.* 609.

20. Release to one of two carriers releases both.*—Where a passenger is injured by a collision and brings an action against the proprietors of both vehicles, a release of one who was a party in fault for a consideration operates as a release of both, and he is estopped from afterwards asserting that the party to whom the release was given was not in fault, and, therefore, not liable. *Tompkins* v. *Clay St. Hill R. Co.*, 18 *Am. & Eng. R. Cas.* 144, 66 *Cal.* 163, 4 *Pac. Rep.* 1165.—REVIEWING Turner *v.* Hitchcock, 20 Iowa 314.

Where a passenger on a street-car is injured by a collision of his car with the car of another company, and by way of compromise receives a sum of money and releases the carrier company, the release operates to discharge the other company also, though it appear that the negligence of the latter company alone caused the accident. *Seither*

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*See also *ante*, **10**, and *post*, **27**.

v. *Philadelphia Traction Co.*, 125 *Pa. St.* 397, 17 *Atl. Rep.* 338.

21. Burden of proof to show fraud or inadequacy of consideration.—It is the duty of the party setting up that a settlement of a claim for personal injuries received as a passenger has been obtained by misrepresentation to establish not only that the settlement has been so obtained, but also that the amount paid is inadequate compensation for the injuries. *Rowe* v. *Grand Trunk R. Co.*, 16 *U. C. C. P.* 500.

III. BY INJURED EMPLOYÉ.

22. Validity and effect, generally.—An injured employé may release his employer for injuries caused by the latter's negligence, and a release given in consideration of $50 in such case is binding, if fairly procured. *Chicago, W. & V. Coal Co.* v. *Peterson*, 39 *Ill. App.* 114.

A receipt by a brakeman, who had been injured by the negligence of the company, for a month's pay, and "in full satisfaction of all claims, demands, damages, and causes of action against said company"—*held*, sufficient to release the company from damages for the accident, if the receipt was not procured by fraud, which was a question of fact for the jury. *Illinois C. R. Co.* v. *Welch*, 52 *Ill.* 183.—DISTINGUISHED IN Gulliher *v.* Chicago, R. I. & P. R. Co., 59 Iowa 416.

23. Consideration—Mutuality.—A contract between a company and an employé provided that if the employé should be temporarily injured he should be paid his wages until he was able to work, not exceeding six months, and if the injury was permanent, his measure of damages, including wages while not at work, should not exceed $500. Such employé was injured and signed a receipt for $32.50, in full of all wages due to date and of all damages sustained on account of the injury. It appeared that the receipt was signed about a month after the injury. *Held*, that it was error to charge that the contract of settlement barred his right to recover. It did not appear that his wages were in dispute, and he was entitled to more than a month's wages; and any agreement on his part to receive his wages in satisfaction of damages would be a *nudum pactum*, and not a bar to a recovery. *Carlton* v. *Western & A. R. Co.*, 81 *Ga.* 531, 7 *S. E. Rep.* 623.—DISTINGUISHED IN Carroll *v.* East Tenn.,V. & G. R. Co., 41 Am. & Eng. R. Cas. 307, 82 Ga. 452.

Where an employé, injured in the service of a railway company, gives the company a release from all claims for damages, in return for a promise of a steady job, at the same compensation received before the injury, the contract does not lack mutuality, and is enforceable. *Pennsylvania Co.* v. *Dolan*, 6 *Ind. App.* 109, 32 *N. E. Rep.* 802.

24. Effect of fraud or misrepresentation.—Where a company sued by an employé for damages for personal injuries, pleads a release, he may avoid the same by showing that it was signed under the belief, induced by the fraudulent representations of the defendant's agents, that it was merely a receipt for wages. *Welsh* v. *Alabama & V. R. Co.*, 70 *Miss.* 20, 11 *So. Rep.* 723.

Where an employé is injured, and agrees with the company to receive $300 for loss of time and an artificial foot, and a voucher or receipt is presented, so folded as to appear to be only for the $300, but is, in fact, a release of all claims on account of the injury, such receipt is not binding, except as to the $300. *Mateer* v. *Missouri Pac. R. Co.*, (*Mo.*) 15 *S. W. Rep.* 970.

An injured employé having released his right of action by a contract of accord and satisfaction cannot maintain an action against the company for fraudulently inducing him to enter into that contract and accept satisfaction under it by fraudulently persuading him, through its superintendent and its employed physician, to believe that his injury was not a material one and would not be permanent, it not being alleged that any artifice, trick, or contrivance was used to prevent him from ascertaining the true nature of his injury and its probable duration. *Hayes* v. *East Tenn., V. & G. R. Co.*, 89 *Ga.* 264, 15 *S. E. Rep.* 361.

25. Failure to read release before signing.—An employé who, having the opportunity and ability, neglects to read all of a receipt releasing the company from all claims, on account of injuries received, and signs the same, will not afterwards be heard to say that he did not read it. *Mateer* v. *Missouri Pac. R. Co.*, 105 *Mo.* 320, 16 *S. W. Rep.* 839.

26. Validity of covenant not to sue for future injuries.*—An injured em-

*Validity of contracts by employés not to sue employer in case of personal injury, see note, 58 AM. REP. 836.

Power of company to contract with employés against future injuries for which it is liable under Employers' Liability Act, see note, 44 AM. REP. 633.

ployé may by contract waive his right to sue for injuries not arising from criminal negligence on the part of the company, or its other employés; but any negligence, either of omission or commission, on the part of other employés of the road, in connection with their business, from which serious injury results, constitutes criminal negligence, and a contract waiving the right to sue for injuries resulting therefrom is contrary to public policy, and void. *Cook* v. *Western & A. R. Co.*, 28 *Am. & Eng. R. Cas.* 317, 72 *Ga.* 48.—QUOTING Western & A. R. Co. *v.* Bishop, 50 Ga. 465.

Plaintiff, an employé, was injured while in the discharge of his duties. In an action to recover damages, defendant gave in evidence a paper signed by plaintiff, by which, in consideration of his employment, he agreed that the company should in no case be liable for any damage to him by reason of its negligence. It appeared that plaintiff was at the time of the execution of the instrument and had been for some years prior thereto in defendant's employ. His original employment was a general one and for no particular time. He signed the release without compulsion, and continued thereafter in the same employment, and for the same compensation as before; no new employment was tendered to, or accepted by him, and there was no promise that the employment he was then engaged in should be continued, nor was its execution made a condition of continued employment, and no consideration was paid therefor. *Held*, that the instrument was void for want of consideration. *Purdy* v. *Rome, W. & O. R. Co.*, 125 *N. Y.* 209, 26 *N. E. Rep.* 255, 34 *N. Y. S. R.* 737; *affirming* 52 *Hun* 267, 23 *N. Y. S. R.* 469, 5 *N. Y. Supp.* 217.—APPROVED AND DISTINGUISHED IN Runt *v.* Herring, 21 N. Y. Supp. 244, 2 Misc. 105.

As to whether if defendant had given some consideration for the paper it would have been valid as a release—*quære*. *Purdy* v. *Rome, W. & O. R. Co.*, 125 *N. Y.* 209, 26 *N. E. Rep.* 255, 34 *N. Y. S. R.* 737; *affirming* 52 *Hun* 267, 23 *N. Y. S. R.* 469, 5 *N. Y. Supp.* 217.

27. Release of one of two joint tortfeasors.*—In case of an injury resulting from a joint tort, a satisfaction by one tortfeasor discharges both. So where an employé is injured through the joint negligence of two companies, and sues each separately and obtains judgments, upon the satisfaction of one judgment the other should be canceled. *Gross* v. *Pennsylvania, P. & B. R. Co.*, 47 *N. Y. S. R.* 374, 20 *N. Y. Supp.* 28, 65 *Hun* 191.

The execution of a release by plaintiff to the railroad corporation which employed him will not release a bridge corporation sued, if from the evidence the jury might conclude that the corporation to which the release was executed was in no way responsible for the accident. *Kentucky & I. Bridge Co.* v. *Hall*, 125 *Ind.* 220, 25 *N. E. Rep.* 219.

* See also *ante*, **10, 20.**

IV. BY LANDOWNER.

28. Of right of way.*—A landowner released to a railroad the right of way in consideration of one dollar, and sold a lot on which to erect a depot. In an action against the company for not erecting the depot, parol evidence that its erection was the real consideration of the release is admissible. *Watterson* v. *Allegheny Valley R. Co.*, 74 *Pa. St.* 208, 8 *Am. Ry. Rep.* 30.

The release by a mother of a right of way to a railroad over land held in common by her and her minor children, will not convey the rights of the minors, and, in this case, did not purport to do so. *Charleston, C. & C. R. Co.* v. *Leech*, 43 *Am. & Eng. R. Cas.* 588, 33 *So. Car.* 175, 11 *S. E. Rep.* 631.

29. Of damages by reason of the construction and operation of the road.—Where a lot owner, for a valuable consideration, releases a railroad company from all claims for damages by reason of the construction and maintenance of its railroad in the street, neither the changing of the road from a narrow gauge to a wide gauge, nor any subsequent use of the street for railroad purposes, can give the lot owner a right of action, without proof that the new use, or the new mode of operating the road, has damaged him. *Denver, U. & P. R. Co.* v. *Toohey*, 15 *Colo.* 297, 25 *Pac. Rep.* 166.

A release of all damages on account of the laying out or construction of a railroad through and over the land of the releasor does not cover damages occasioned to the remaining land of the releasor by the construction of the railroad over the land of other persons. *Eaton* v. *Boston, C. & M. R. Co.*, 51 *N. H.* 504, 1 *Am. Ry. Rep.* 44.

* See also RIGHT OF WAY, **6.**

A release by a landowner of all claim for damages caused by the construction and operation of a railroad over his land, does not convey to the company operating the road any title to the land. *Groh* v. *Eckert*, 3 *Brews.* (*Pa.*) 116.

A landowner said to the president of a railroad company when endeavoring to settle for damages that if they would run the road "further over" from his house and spring he would give the land occupied for nothing and the president said he would "try to accommodate" him. *Held*, that this was too slight to prove the grant of a right of way or release of damages, for there was no designation of the land released. *East Pa. R. Co.* v. *Schollenberger*, 54 *Pa. St.* 144.

A release, for a valuable consideration, of a company from "all suits, claims, demands, and damages by reason of its entry; and the location and construction thereon of its railroad and works connected therewith," is a bar to an action by a subsequent lessee of said owners, brought to recover damages for injuries caused by an insufficient culvert constructed prior to the execution of the release. *Hoffeditz* v. *Southern Pa. R. & M. Co.*, 38 *Am. & Eng. R. Cas.* 654, 129 *Pa. St.* 264, 18 *Atl. Rep.* 125.—DISTINGUISHED IN McMinn *v.* Pittsburgh, M. & Y. R. Co., 147 Pa. St. 5.

A release of all claims for damages which may accrue by reason of the construction and maintenance of a railroad is a bar to a recovery for injuries caused by a ditch and culvert constructed by the company upon its right of way subsequently to the original location and construction of the railroad. *Updegrove* v. *Pennsylvania S. V. R. Co.*, 132 *Pa. St.* 540, 19 *Atl. Rep.* 283.—DISTINGUISHED IN McMinn *v.* Pittsburgh, M. & Y. R. Co., 147 Pa. St. 5. FOLLOWED IN Kemp *v.* Pennsylvania R. Co., 156 Pa. St. 430.

A release of a right of way, together with all damages "now accrued, or thereafter to accrue, for or by reason of the location, construction, maintenance and operation" of the railroad, does not cover injuries resulting from subsequent negligence of the company in failing to make or maintain sufficient drains or culverts. *McMinn* v. *Pittsburgh, M. & Y. R. Co.*, 147 *Pa. St.* 5, 23 *Atl. Rep.* 325.—DISTINGUISHING Hoffeditz *v.* Southern Pa. R. & M. Co., 129 Pa. St. 264; Updegrove *v.* Pennsylvania S. V. R. Co., 132 Pa. St. 540.

A landowner conveyed a strip of land to a railroad company, and released it from all claims or damages which might accrue by reason of constructing, maintaining, and operating the railroad on and over the land. At the time there was on the strip a private way connecting one part of the owner's land with another. Where the way crossed the tracks there was a plank crossing between the rails. Subsequently the company laid twenty-four tracks on the strip, practically converting it into a yard. No plank crossing was laid between any of the rails, and the way was seriously obstructed. *Held*, that the release covered the injury done by the obstruction of the way. *Kemp* v. *Pennsylvania R. Co.*, 156 *Pa. St.* 430, 26 *Atl. Rep.* 1074.—FOLLOWING Updegrove *v.* Pennsylvania S. V. R. Co., 132 Pa. St. 540. QUOTING North & W. B. R. Co. *v.* Swank, 105 Pa. St. 555; Pennsylvania R. Co. *v.* Jones, 50 Pa. St. 417.

30. Of damage for injuries to live stock.*—An agreement by a plaintiff to release a railroad company from a claim for stock killed by the operation of its road, in consideration that the company will construct a certain cattle pass for plaintiff's use, does not operate as a release until the pass is constructed. *Terre Haute & I. R. Co.* v. *Flanigan*, 20 *Am. & Eng. R. Cas.* 452, 94 *Ind.* 336.

RELETTING.

Of contract by subcontractor, see CONSTRUCTION OF RAILWAYS, **87.**

RELEVANCY.

Of evidence, see ANIMALS, INJURIES TO. **392-402.**
— — **in actions for causing death**, see DEATH BY WRONGFUL ACT, **223.**
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RELIEF.

Against irregular service of process, see PROCESS, **47.**
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RELIEF ASSOCIATIONS.

1. What benefits recoverable, generally.†—A certificate of membership de-

* See also ANIMALS, INJURIES TO, **387.**
† Railroad relief associations, see note, 1 L. R. A. 75.

scribed the assured, who was killed while acting as a brakeman, as a "spare conductor," and provided that, if he should be injured while engaged in an occupation more hazardous than his regular employment, the indemnity to be paid should be that fixed for the more hazardous employment. The association classified the employment of brakemen as more hazardous than that of conductors, and fixed an indemnity for each, but did not classify or fix an indemnity for that of "spare conductor." *Held*, that the beneficiary was only entitled to the indemnity allotted a brakeman. *Aldrich* v. *Mercantile M. A. Assoc.*, 149 *Mass.* 457, 21 *N. E. Rep.* 873.

In such case evidence that the duties of a "spare conductor" included those of a brakeman as well as of a conductor was improperly admitted. *Aldrich* v. *Mercantile M. A. Assoc.*, 149 *Mass.* 457, 21 *N. E. Rep.* 873.

In an action of assumpsit against a relief association to recover benefits alleged to be due to a member, only such benefits can be recovered as were due at the commencement of the action, and judgment cannot be rendered for benefits accruing subsequently thereto. *Baltimore & O. E. Relief Assoc.* v. *Post*, 39 *Am. & Eng. R. Cas.* 283, 122 *Pa. St.* 579, 15 *Atl. Rep.* 885.

A corporation organized to afford relief to railroad employés, in one article of its constitution provided for relief to those injured "by accidents while in the discharge of duty, and in the service of the B. & O. railroad company, or of any other railroad company whose employés shall be admitted to the privileges of membership"; and in another article, "while in the discharge of duty in the service of either of the companies aforesaid." An employé who, from four to fifteen minutes before, had quit work for the day was killed by cars while crossing the railroad tracks on his way home from work. *Held*, that his beneficiary was entitled to relief. *Kinney* v. *Baltimore & O. E. Relief Assoc.*, 53 *Am. & Eng. R. Cas.* 34, 35 *W. Va.* 385, 13 *S. E. Rep.* 1009.

2. Benefits for "total inability to labor."—The words "total inability to labor" contained in the constitution and by-laws of a relief association do not confer upon a member the right to receive benefits during the whole time he was disabled from following the employment in which he was engaged at the time when the disability occurred, if he was capable of earning as much or more in some other employment. *Baltimore & O. E. Relief Assoc.* v. *Post*, 39 *Am. & Eng. R. Cas.* 283, 122 *Pa. St.* 579, 15 *Atl. Rep.* 885.

3. Evidence of rules and regulations.—In an action to recover benefits from a relief association, the rules and regulations of the association cannot be shown by receipts of plaintiff for benefits as a former member. *Baltimore & O. E. Relief Assoc.* v. *Post*, 39 *Am. & Eng. R. Cas.* 283, 122 *Pa. St.* 579, 15 *Atl. Rep.* 885.

4. Evidence of membership. — Although the constitution and by-laws of a railroad relief association authorized the company to deduct from its employés' wages, dues owing by employés to the association, the declarations of the paymaster that he had deducted dues are not admissible, in an action against the relief association, for the purpose of proving the plaintiff's membership, in the absence of any evidence to show that the company or its paymaster had authority to make the deduction. *Baltimore & O. E. Relief Assoc.* v. *Post*, 39 *Am. & Eng. R. Cas.* 283, 122 *Pa. St.* 579, 15 *Atl. Rep.* 885.

When, by the by-laws of the relief association, persons applying for admission as members are required to submit themselves to medical examination, evidence of the medical examiner of the association that he had never examined the plaintiff is admissible for the purpose of showing that he had never become a member. *Baltimore & O. E. Relief Assoc.* v. *Post*, 39 *Am. & Eng. R. Cas.* 283, 122 *Pa. St.* 579, 15 *Atl. Rep.* 885.

5. Effect of dealings with, on right to recover from company.— Where a railroad employé becomes a member of a railroad association, and signs a contract by which he releases the company from liability for any injury which may occur while in the company's service, in consideration that the company guarantees the payment of the benefits promised by the association, and of its contributing to the funds of the association, he cannot maintain an action against the company, especially where he receives the benefits of the association and gives a receipt discharging the company. *Martin* v. *Baltimore & O. R. Co.*, 41 *Fed. Rep.* 125. *Graft* v. *Baltimore & O. R. Co.*, (*Pa.*) 8 *Atl. Rep.* 206.

Where a railroad employé and a member of the "Relief Association," after an injury,

accepts benefits from the "Relief Fund," he cannot afterwards recover from the company on the ground that his injury was caused by its negligence. *Johnson* v. *Philadelphia & R. R. Co.*, 2 *Pa. Dist.* 229.

6. Such dealings when no bar.—If a member of a railroad relief association obtains payment of benefits by falsely representing that his inability to work resulted from malaria, when in fact it was caused by a railroad collision, he is not estopped by such misrepresentation from maintaining an action against the company to recover damages for the injury. *Owens* v. *Baltimore & O. R. Co.*, 39 *Am. & Eng. R. Cas.* 276, 35 *Fed. Rep.* 715.

The widow of a railroad employé, after the death of her husband, released any claim she might have against the company for causing his death, for the purpose of enabling her husband's mother to obtain from a railroad relief association payment of an amount of life insurance, which, under its constitution, was payable only on condition that all persons entitled to sue the railroad company for his death should release it from liability. *Held*, in a suit by the widow against the railroad company, that the release was not invalid as against public policy. *State* v. *Baltimore & O. R. Co.*, 36 *Fed. Rep.* 655.—REVIEWING Fuller *v.* Baltimore & O. E. Relief Assoc., 67 Md. 433, 10 Atl. Rep. 237.

Plaintiff was paid $250 by a railway benefit insurance society, of which her deceased husband was a member, and gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company was no party to the receipt. *Held*, that the receipt formed no bar to an action against the company, nor had it any right to deduct the amount received from the benefit society from the sum plaintiff was entitled to as damages. *Farmer* v. *Grand Trunk R. Co.*, 21 *Ont.* 299.—DISTINGUISHING Hicks *v.* Newport, A. & H. R. Co., 4 B. & S. 403, *n.*

7. By-laws—Election of remedies.—A by-law of a railroad relief association which requires employés to file a release of the railroad company from any claim for damages before receiving any payment of benefits from the relief association, simply requires the member of a relief association to make his election between suing the railroad company for damages, or relying upon the benefits conferred by the relief association, and is not against public policy. *Owens* v. *Baltimore & O. R. Co.*, 39 *Am. & Eng. R. Cas.* 276, 35 *Fed. Rep.* 715.

Nor is such a provision so unreasonable that a court can declare it void. *Fuller* v. *Baltimore & O. E. Relief Assoc.*, 67 *Md.* 433, 10 *Atl. Rep.* 237.—REVIEWED IN State *v.* Baltimore & O. R. Co., 36 Fed. Rep. 655.

A member of such relief association designated his mother as his beneficiary in case of his death, and upon his death his wife and infant child, the persons legally entitled to damages if the death was the result of negligence, refused to release the railroad company, and brought suit and recovered damages by a compromise. *Held*, that the mother could not recover benefits from the relief association. *Fuller* v. *Baltimore & O. E. Relief Assoc.*, 67 *Md.* 433, 10 *Atl. Rep.* 237.

8. Deductions from wages as contribution to sick fund.—Plaintiff, a railway porter, on entering the service of defendant company, signed an agreement that certain deductions should be made weekly from his pay as his contribution to a sick and funeral allowance fund for the benefit of defendant's servants, which was managed on their behalf by defendant. Deductions were made weekly until plaintiff left the defendant's service, when he brought an action to recover the amount of the deductions as having been made in contravention of the provisions of the Truck Acts. During the period in respect of which plaintiff sued, a larger sum had been paid out of the fund for medical attendance on plaintiff and his wife than the total amount of his contributions. *Held*, that the Truck Amendment Act, 1887, § 6, did not apply to written contracts excepted by section 23 of the Truck Act, 1831, from the operation of that act; that the deductions were, therefore, legally made, and that plaintiff was not entitled to recover. *Lamb* v. *Great Northern R. Co.*, [1891] 2 *Q. B.* 281.

9. Assessments to pay death claims.—Where railway employés organize a mutual benefit association, providing for aid to members who are permanently disabled, and for the families of members who are killed, and its constitution provides that all claims against the association shall be referred to the board of directors, whose decision shall be final, and that no assess-

ment shall be made, except upon its authority, no suit can be maintained upon a death claim after the board has refused to pay it. *Rood* v. *Railway Pass. & F. C. M. B. Assoc.*, 31 *Fed. Rep.* 62.

The laws of such association provided that if a member neglected or refused to pay any assessment for a specified time, he should cease to be a member, and the secretary should strike his name from the roll of members. *Held*, that such law was self-executing, and a person neglecting or refusing to pay for the time specified ceased to be a member without his name being stricken from the roll. *Rood* v. *Railway Pass. & F. C. M. B. Assoc.*, 31 *Fed. Rep.* 62.

10. Dissolution.—The committee of a railroad employés' relief association, empowered to adopt a constitution and by-laws, and to alter and amend the same, adopted a constitution providing for relief or benefits to members in case of death, accident, or sickness, and to aid therein the company agreed to pay the annual operating expenses, amounting to $25,000, and donated a further sum of $100,000. Subsequently it was decided to add a pension feature for aged employés, and that the railroad company should contribute $25,000 annually thereto, and that the association should pay its own operating expenses, but no change was made in the constitution or by-laws. *Held*, that the company was not released from paying the operating expenses of the association, and on its dissolution all moneys paid by the association for such expenses should be treated as assets. *Baltimore & O. R. Co.* v. *Baltimore & O. E. Relief Assoc.*, 77 *Md.* 566, 26 *Atl. Rep.* 1045.

The constitution and by-laws of such association provided for the payment to members of certain specified sums in case of sickness or accident, and of a certain sum to the personal representative in case of death. *Held*, on a distribution of the assets of the association after dissolution, that all claims accruing by reason of death, sickness, or accident before the dissolution were entitled to preference, and were not cut off by the dissolution. *Baltimore & O. R. Co.* v. *Baltimore & O. E. Relief Assoc.*, 77 *Md.* 566, 26 *Atl. Rep.* 1045.

11. Receiver for.—A receiver will not be appointed for a railway relief association which has been dissolved by the legislature, and which has transferred all its assets to a railroad company which has guaranteed its obligations, and a new association has been formed to take the place of the old, into which the great majority of the members have entered for the purpose of saving their interests, and where the railroad company acknowledges itself to be a trustee of the assets, ready to account for the same as the court shall order, and ready and able to give ample security for the payment of any sum complainants may be entitled to. *Baltimore & O. R. Co.* v. *Cannon*, 72 *Md.* 493, 20 *Atl. Rep.* 123.

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REMOVAL OF CAUSES.

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I. CONSTITUTIONALITY OF STATUTES.

1. Acts of congress. — Act of Congress of March 2, 1867, amending the act of July 27, 1866, for the removal of causes from state courts, by which amendatory act it is provided that if suits then pending, or which might be subsequently brought in a state court "in which there is a controversy between the citizens of a state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of $500 exclusive of costs," the suit may be removed to a federal court upon petition of the non-resident party, whether plaintiff or defendant, at any time before final hearing or trial, upon filing in the state court an affidavit, stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, is constitutional and valid. *Chicago & N. W. R. Co.* v. *Whitton*, 13 *Wall.* (*U. S.*) 270, 4 *Am. Ry. Rep.* 462.

2. Minnesota. — Minn. Act of 1881, ch. 219, entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to acquire, construct, maintain, and operate railroads in the state of Minnesota," it being a Wisconsin corporation, does not create a new corporation, but merely enables a foreign corporation to enter the state; therefore, the provisions of the act that it shall be deemed a domestic corporation are void so far as they attempt to prevent the removal of suits from state to federal courts. *Moore* v. *Chicago, St. P., M. & O. R. Co.*, 21 *Fed. Rep.* 817.—DISTINGUISHING Stout *v.* Sioux City & P. R. Co., 8 Fed. Rep. 794. FOLLOWED IN Chicago, St. P., M. & O. R. Co. *v.* Dakota Co., 28 Fed. Rep. 219.

Minnesota Act of March 9, 1885, entitled "An act relating to foreign corporations doing business in this state," is repugnant to the constitution of the United States, and void, so far as it provides for certain penalties against foreign corporations which make application to move a suit into a federal court. *Chicago, M. & St. P. R. Co.* v. *Becker*, 32 *Fed. Rep.* 849.

3. Ohio. — The proviso of section 24 of Ohio Act for the creation and regulation of incorporated companies, as amended March 19, 1869, so far as it provides that the leasing, purchasing, or operating a railroad in the state by a railroad company of another state shall be a waiver of the right of such foreign company to remove cases brought against it in the state courts to those of the United States, is repugnant to the constitution and laws of the United States, and is, therefore, ineffective as a statutory waiver of the right of such removal. *Baltimore & O. R. Co.* v. *Cary*, 28 *Ohio St.* 208, 14 *Am. Ry. Rep.* 97.—APPROVED IN Morgan *v.* East Tenn. & V. R. Co., 4 Woods (U. S.) 523. DISTINGUISHED IN Baltimore & O. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431. FOLLOWED IN Morgan *v.* East Tenn. & V. R. Co., 48 Fed. Rep. 705.

II. WHAT CONTROVERSIES ARE REMOVABLE.

4. In general — Subject-matter of suit.* — If the *res* has been seized as an incident of a controversy between citizens of different states, then the removal of the cause into a federal court transfers the *res* with it as a necessary part of the proceedings, and the fact that collateral issues, as connected with the *res*, have sprung up in the state court, cannot destroy the right of removal, provided the parties themselves are within the federal statute. *Osgood* v. *Chicago, D. & V. R. Co.*, 6 *Biss.* (*U. S.*) 330.

The rights of mortgage bondholders are paramount to the rights of stockholders of a company. So where the stockholders have commenced suit in a state court and have put the mortgage trustees in possession of the company's property, this does not prevent a removal of another suit brought by the bondholders to enforce the trust, and possession of the property must also be transferred to the federal court. *Scott* v. *Clinton & S. R. Co.*, 6 *Biss.* (*U. S.*) 529.

A suit by state railroad commissioners to enforce obedience to their regulations by a railroad company cannot be removed to the United States court, although the parties are citizens of different states, and the answer raises a federal question. *Dey* v. *Chicago, M. & St. P. R. Co.*, 47 *Am. & Eng. R. Cas.* 17, 45 *Fed. Rep.* 83.—QUOTING Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265.

5. Suits in equity, generally. — An act of ejectment against a tenant in possession under a railroad company which claimed title to the land was commenced in a state court. Pending the suit, the company made a perpetual lease of the land to another company, though neither company made itself a formal party to the ejectment suit; the lessee company, however, filed a bill in equity praying an injunction against the further prosecution of the ejectment suit, and for relief, but no matters were set up in the bill which could not have been pleaded in the ejectment suit. *Held*, that the suit in equity did not constitute a separate controversy, such as could be removed to a federal court, unless the ejectment suit could have been removed, though there was some difference in the parties to the two suits. *Richmond & D. R. Co.* v. *Findley*, 32 *Fed. Rep.* 641.

6. Suits by or against corporations, generally.—Where stockholders of a railroad company commence suit against their company to have certain stock held by another company declared invalid, the fact that an officer of such other company who is an inhabitant of another state makes application to remove the cause to a federal court is no ground for removal, where there is no controversy as to who owns the stock. *Shumway* v. *Chicago & I. R. Co.*, 4 *Fed. Rep.* 385.

Under the federal constitution, and laws of congress, an action by a state to recover taxes levied against a corporation organized under the laws of the state cannot be removed from a state to a federal court. *People* v. *Southern Pac. R. Co.*, 65 *Cal.* 553, 4 *Pac. Rep.* 568.

7. Suits by or against federal corporations.—(1) *Federal decisions.* — The Texas Pacific railway and the Union Pacific railway are corporations existing under the laws of the United States, although certain other roads chartered under state and territorial laws have been consolidated with them. *Union Pac. R. Co.* v. *Myers*, 20 *Am. & Eng. R. Cas.* 324, 115 *U. S.* 1, 5 *Sup. Ct. Rep.* 1113. — FOLLOWED IN California *v.* Central Pac. R. Co., 33 Am. & Eng. R. Cas. 451, 127 U. S. 1; Texas & P. R. Co. *v.* Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

A state brought suit in its court, against a railroad, to collect a tax. The company defended on the ground that it derived its charter from the United States and was not taxable under state laws, and that the law imposing the tax violated the 14th amendment to the United States constitution. *Held*, that the case was removable to a federal court, under the Act of Congress of March 3, 1875. *Southern Pac. R. Co.* v. *California*, 25 *Am. & Eng. R. Cas.* 525, 118 *U. S.* 109, 6 *Sup. Ct. Rep.* 993.

Where a railroad company created by act of congress consolidates with another company created under state laws, the former does not lose its rights as such, and may remove a suit against it from a state to a federal court, notwithstanding a state law provides that if any company organized under the laws of the state shall consolidate with another organized under the laws of another state, or the United States, the same shall

* Removal of suits to federal courts where the question to be tried is the value of land, see note, 14 AM. & ENG. R. CAS. 422.

not thereby become a foreign corporation. *Allen* v. *Texas & P. R. Co.*, 24 *Am. & Eng. R. Cas.* 18, 25 *Fed. Rep.* 513.—FOLLOWING Texas & P. R. Co. *v.* Kirk, 115 U. S. 2, 5 Sup. Ct. Rep. 1113.

A suit by a railroad corporation created by an act of congress is a suit arising under the laws of the United States, and, as such, is removable into a federal court, under the act of March 3, 1875, § 2 (18 U. S. St. at L. 470). *Union Pac. R. Co.* v. *McComb*, 17 *Blatchf.* (*U. S.*) 510, 1 *Fed. Rep.* 799, 58 *How. Pr.* 478. *Turton* v. *Union Pac. R. Co.*, 3 *Dill.* (*U. S.*) 366.

Defendant was sued for his alleged misuse of the funds of the Union Pacific railroad and for his fraudulent acts as vice-president of the company, and not by reason of his membership of the corporation. *Held*, that his petition under the Act of Congress of July 27, 1868 (Rev. St., § 640), to have the case removed to the United States court must be denied. *Gard* v. *Durant*, 4 *Cliff.* (*U. S.*) 113.

(2) *State decisions.*—In an action against a railroad corporation to recover damages for the destruction of a field of rye by the diversion of a natural watercourse, the corporation filed a petition for removal to the federal court on the ground solely that it was a corporation organized under the act of congress to aid in the construction of a railroad to the Pacific. *Held*, that the petition was properly denied. *Union Pac. R. Co.* v. *Dyche*, 14 *Am. & Eng. R. Cas.* 272, 31 *Kan.* 120, 1 *Pac. Rep.* 243.

Actions commenced in state courts against corporations created by acts of congress are suits arising under the laws of the United States, and as such may be removed to the United States courts; but this rule does not apply to corporations organized under the laws of a territory, and upon which, after their organization, certain rights and privileges are conferred by the act of congress. *Conlon* v. *Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 462, 28 *Pac. Rep.* 501.

A suit by or against a railroad company chartered by the United States may be removed from a state to a federal court at any time before a final hearing. *Eby* v. *Northern Pac. R. Co.*, 13 *Phila.* (*Pa.*) 161.

A company and its receiver were sued for a personal injury while the road was in the hands of the receiver. It was alleged in the petition that the receiver had been discharged before suit. The company filed its separate application for removal to the United States circuit court, regular in form. *Held*, that any liability of the receiver ended with his discharge, and the right of the company, a corporation organized under an act of congress, to remove could not be affected by the fact that the receiver had been made a party, or that he had not joined in the application or had made an imperfect application in his own behalf for removal. *Texas & P. R. Co.* v. *Bloom*, 85 *Tex.* 279, 20 *S. W. Rep.* 133.—FOLLOWING Texas & P. R. Co. *v.* Johnson, 76 Tex. 421.

8. Suits by or against foreign corporations.*—A railroad construction company began a suit in a state court to establish and enforce a mechanic's lien as prior to the lien of a mortgage on the road. When a decree was entered, the controversy was between the mortgage trustees, citizens of Pennsylvania and Ohio, on the one side, and the construction company and the railroad company, citizens of Iowa, on the other. *Held*, that the case was removable, without reference to who were plaintiffs or defendants. *Meyer* v. *Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.

Plaintiff, a citizen of Colorado, filed a stockholder's bill in a court of that state against his company, which was a citizen of the state, and the directors, only two of whom were citizens of the state, and against whom no relief was asked, joining also as defendants a corporation of another state and certain citizens of other states. *Held*, that the suit was removable to a federal court on the application of a foreign corporation and the individual defendants connected with that company. *Arapahoe County Com'rs* v. *Kansas Pac. R. Co.*, 4 *Dill.* (*U. S.*) 277.—FOLLOWED IN Barry *v.* Missouri, K. & T. R. Co., 29 Am. & Eng. R. Cas. 384, 27 Fed. Rep. 1.

Where a railroad chartered in Pennsylvania consolidates with two other roads chartered in adjoining states, but the consolidated road retains the name of the original road, a suit against the consolidated road in Pennsylvania by a citizen of that state is not removable from a state to a federal court on the ground of diverse citi-

* Removal of proceedings from state to federal courts where foreign corporation is party, see note, 1 L. R. A. 65.

Right cannot be abridged by state legislation, see note, 3 L. R. A. 572.

zenship. *Johnson* v. *Philadelphia, W. & B. R. Co.*, 9 *Fed. Rep.* 6.

9. Cases "arising under a law of the United States."—A case in law or equity consists of the right of one party, as well as the other, and may be said to arise under the constitution or the laws of the United States, whenever its correct decision depends on the construction of either. *Cohens* v. *Virginia*, 6 *Wheat.* (*U. S.*) 264.

Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. *Tennessee* v. *Davis*, 100 *U. S.* 257.

A state brought suit in one of its courts against a railroad company to have a bridge across a navigable river removed. The company in its defense relied on an act of congress authorizing the bridge. *Held*, that it was a case arising under the laws of the United States, and therefore removable to the federal courts, under act of March 3, 1875. *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 *U. S.* 135.—APPLIED IN Illinois ex rel. *v.* Illinois C. R. Co., 16 Fed. Rep. 881. DISTINGUISHED IN Alabama *v.* Wolffe, 18 Fed. Rep. 836. FOLLOWED IN Kentucky *v.* Louisville Bridge Co., 42 Fed. Rep. 241.

Railroads chartered by congress have a right to remove suits against them from the state to the federal courts under the act of March 3, 1875, providing for the removal of suits "arising under the laws of the United States." *Union Pac. R. Co.* v. *Myers*, 20 *Am. & Eng. R. Cas.* 324, 115 *U. S.* 1, 5 *Sup. Ct. Rep.* 1113.—DISTINGUISHED IN Seattle & M. R. Co. *v.* State, 52 Fed. Rep. 594. FOLLOWED IN Allen *v.* Texas & P. R. Co., 24 Am. & Eng. R. Cas. 18, 25 Fed. Rep. 513; Mineral Range R. Co. *v.* Detroit & L. S. Copper Co., 25 Fed. Rep. 515. REFERRED TO IN People ex rel. *v.* Colorado C. R. Co., 45 Am. & Eng. R. Cas. 599, 42 Fed. Rep. 638.

A case arises "under the constitution or laws of the United States," within the act of 1875, § 2, whenever, upon the whole record, there is a controversy involving the construction of either. *Van Allen* v. *Atchison, C. & P. R. Co.*, 1 *McCrary* (*U. S.*) 598, 3 *Fed. Rep.* 545.

A suit by or against a corporation formed under an act of congress is not necessarily a suit arising under the laws of the United States, so as to be removable on that ground from a state to a federal court, under the act of March 3, 1875. *Myers* v. *Union Pac. R. Co.*, 3 *McCrary* (*U. S.*) 578.

In order to deprive a state court of jurisdiction of a cause by removing it to a federal court, on the ground that the controversy involves a question arising under the constitution, laws, or treaties of the United States, it must be made to appear clearly and unmistakably from the record that the cause or controversy necessarily involves the consideration and determination of such federal question. It is not sufficient for it to appear that a federal question may possibly arise. *State* v. *Chicago, M. & St. P. R. Co.*, 33 *Fed. Rep.* 391.

The mere allegation in a complaint that plaintiff is a corporation created by act of congress shows that the suit is one arising under the laws of the United States. *Union Pac. R. Co.* v. *McComb*, 17 *Blatchf.* (*U. S.*) 510, 1 *Fed. Rep.* 799, 58 *How. Pr.* (*N. Y.*) 478.

10. Cases arising under the Interstate Commerce Act.*—Where a shipper sues an interstate carrier, charging an unjust discrimination in rates, and in affording other shippers better facilities, and for extortion in rates, though the action be in form one at common law, without specially referring to the Interstate Commerce Act, yet it is removable to a federal court, under the Act of Congress of March 3, 1887, where defenses are set up under the Interstate Commerce Act. *Lowry* v. *Chicago, B. & Q. R. Co.*, 46 *Fed. Rep.* 83.

The plaintiff may be content to rest his case on the common law liability of common carriers, but he cannot thereby deprive the defendant, as a carrier of interstate commerce, of any defense it has under the Interstate Commerce Act. A case arises under a law of the United States, whenever that law is the basis of the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom it is set up. It is enough that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant. *Lowry* v. *Chicago, B. & Q. R. Co.*, 46 *Fed. Rep.* 83.

* Removal of causes to federal court under Interstate Commerce Act. When a federal question is raised, see 46 AM. & ENG. R. CAS. 636, *abstr.*

11. Actions against federal officers.— A suit by a railroad against a custom-house officer to recover freights collected on imported goods, though the collection is no part of his official duties, is removable from a state to a federal court, as an "act done under color of office," within the meaning of U. S. Rev. St., § 643. *Cleveland, C., C. & I. R. Co.* v. *McClung*, 28 *Am. & Eng. R. Cas.* 70, 119 *U. S.* 454, 7 *Sup. Ct. Rep.* 262.

12. Actions for causing death.— A statute of Wisconsin provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." *Held*, that the proviso, requiring that the action be brought in a state court, does not prevent a non-resident plaintiff from removing the action under the Act of Congress of March 2, 1867, to a federal court and maintaining it there. *Chicago & N. W. R. Co.* v. *Whitton*, 13 *Wall.* (*U. S.*) 270, 4 *Am. Ry. Rep.* 462.—APPLIED IN Mineral Range R. Co. *v.* Detroit & L. S. Copper Co., 25 Fed. Rep. 515. QUOTED IN St. Louis, A. & T. H. R. Co. *v.* Indianapolis & St. L. R. Co., 9 Biss. (U. S.) 144; Holmes *v.* Oregon & C. R. Co., 6 Sawy. (U. S.) 262, 5 Fed. Rep. 75. REVIEWED IN Pacific R. Co. *v.* Missouri Pac. R. Co., 5 McCrary (U. S.) 373.

A non-resident defendant may remove a suit brought under a state statute giving a right of action for wrongfully causing death. *Brisenden* v. *Chamberlain*, 53 *Fed. Rep.* 307.—APPLYING Texas & P. R. Co. *v.* Cox, 145 U. S. 594, 12 Sup. Ct. Rep. 905; Dennick *v.* Central R. Co., 103 U. S. 11; Ex parte McNiel, 13 Wall. (U. S.) 243.

13. Ejectment suits. — Where a railroad company takes a perpetual lease of land pending an ejectment suit against the lessor, the company's right of removal is only such as existed in the lessor. *Richmond & D. R. Co.* v. *Findley*, 32 *Fed. Rep.* 641.—FOLLOWING Gibson *v.* Bruce, 108 U. S. 561, 2 Sup. Ct. Rep. 873; Cable *v.* Ellis, 110 U. S. 389, 4 Sup. Ct. Rep. 85; Houston & T. C. R. Co. *v.* Shirley, 111 U. S. 358, 4 Sup. Ct. Rep. 472.

14. Foreclosure suits. — Trustees in a railway mortgage, who were citizens of Massachusetts, commenced a foreclosure proceeding in a state court of Iowa against a company which was organized under the laws of the latter state, but united two other corporations of other states as defendants, which claimed liens on the property, and subsequently the plaintiffs had the cause removed to a federal court under the act of 1867 (U. S. Rev. St., § 639). The debtor corporation moved to remand the same on the ground that the defendants were not all citizens of the same state. *Held*, that the case was clearly within the act of March 3, 1875, § 2, and involved the priority of liens between citizens of different states, and that the federal court, therefore, had jurisdiction. *Burnham* v. *Chicago, D. & M. R. Co.*, 4 *Dill.* (*U. S.*) 503.

15. Eminent domain proceedings —When removable.*—Eminent domain proceedings may be removed to federal courts like other suits, after being transferred from commissioners to a state court of appeals. *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 *U. S.* 403. — APPLIED IN Mt. Washington R. Co. *v.* Coe, 50 Fed. Rep. 637. FOLLOWED IN Mineral Range R. Co. *v.* Detroit & L. S. Copper Co., 25 Fed. Rep. 515; Minneapolis, St. P. & S. St. M. R. Co. *v.* Nestor, 50 Fed. Rep. 1.—*Searl* v. *School Dist. No.* 2, 124 *U. S.* 197, 8 *Sup. Ct. Rep.* 460.—FOLLOWED IN Kansas City & T. R. Co. *v.* Interstate Lumber Co., 37 Fed. Rep. 3.—*Northern Pac. Terminal Co.* v. *Lowenberg*, 14 *Am. & Eng. R. Cas.* 418, 9 *Sawy.* (*U. S.*) 348, 18 *Fed. Rep.* 339. *Kansas City & T. R. Co.* v. *Interstate Lumber Co.*, 37 *Fed. Rep.* 3.—FOLLOWING Searl *v.* School Dist. No. 2, 124 U. S. 197, 8 Sup. Ct. Rep. 460.

But the federal court must adapt the procedure to the state statute. *Warren* v. *Wisconsin Valley R. Co.*, 6 *Biss.* (*U. S.*) 425.

And a case may be removed directly from a probate court to the federal court. *Mineral Range R. Co.* v. *Detroit & L. S.*

* Right to remove condemnation proceedings from state to federal court, see 47 AM. & ENG. R. CAS. 25, *abstr.*

Copper Co., 25 *Fed. Rep.* 515.—APPLYING In re New York C. R. Co., 66 N. Y. 407; Warren *v.* Wisconsin Valley R. Co., 6 Biss. (U. S.) 425; Chicago & N. W. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; Weston *v.* Charleston City Council, 2 Pet. (U. S.) 449; Kohl *v.* United States, 91 U. S. 367. EXPLAINING Toledo, A. A. & G. T. R. Co. *v.* Dunlap, 47 Mich. 456; Port Huron & S. W. R. Co. *v.* Voorheis, 50 Mich. 506. FOLLOWING Mississippi & R. R. Boom Co. *v.* Patterson, 98 U. S. 403; Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 Sup. Ct. Rep. 1113.

Where the parties to a condemnation proceeding are citizens of different states, and there is nothing in controversy except the value of the land to be taken, the proceeding may be removed to a federal court, notwithstanding the statutes provide a special mode for the assessment of damages. *Colorado Midland R. Co.* v. *Jones*, 29 *Fed. Rep.* 193.—QUOTING Baltimore & O. R. Co. *v.* Pittsburg, W. & K. R. Co., 17 W. Va. 812.

Where a state delegates the right of eminent domain, and the proceeding is between a landowner and a railroad company, the state is not a party to the proceeding so as to deprive a federal court of jurisdiction of such proceeding, on removal of it from a state court. *Warren* v. *Wisconsin Valley R. Co.*, 6 *Biss.* (*U. S.*) 425.—APPLIED IN Mineral Range R. Co. *v.* Detroit & L. S. Copper Co., 25 Fed. Rep. 515.

16. — when not removable. — A petition by a city against two railroad companies as lessor and lessee of certain lands, for the purpose of condemning a portion of it in order to extend a street, is not removable from the state court to a United States circuit court on the ground of a separable controversy between the lessee company and the city. *Bellaire* v. *Baltimore & O. R. Co.*, 146 *U. S.* 117, 13 *Sup. Ct. Rep.* 16.—FOLLOWED IN Washington *v.* Columbus & C. M. R. Co., 53 Fed. Rep. 673.

A petition filed under the Connecticut statutes, by a railroad company with the railroad commissioners of the state, to obtain their consent to condemn certain lands, is not a civil suit within the meaning of the federal statutes, and is, therefore, not removable, since the proceeding involves only the consent of the railroad commissioners. *New York, N. H. & H. R. Co.* v. *Cockcroft*, 46 *Fed. Rep.* 881.

Where a condemnation proceeding is commenced in a state court, and various parties, both domestic and foreign, are made defendants, the proceeding is not removable to a federal court on the application of two corporations of other states which have been joined as defendants, unless the record shows a separable controversy. The bare assertion in the petition for removal by one defendant that there is a separable controversy is not sufficient. *Seattle & M. R. Co.* v. *State*, 52 *Fed. Rep.* 594.

And such proceeding cannot be removed by a corporation created under federal laws, which is made a defendant, where the record does not show that it is concerned in the litigation. In such case no question arises under the constitution or laws of the United States. *Seattle & M. R. Co.* v. *State*, 52 *Fed. Rep.* 594. — APPLYING Mitchell *v.* Smale, 140 U. S. 406, 11 Sup. Ct. Rep. 819. DISTINGUISHING Union Pac. R. Co. *v.* Kansas City, 115 U. S. 1, 5 Sup. Ct. Rep. 1113.

In a proceeding to condemn a right of way by a railway company over lands held by another company, partly under grant of the United States and partly by condemnation, the latter company moved the court to transfer the cause to the circuit court of the United States, on the ground that it owes duties to the United States which it could not discharge efficiently if its right of way was taken, which motion was overruled. *Held*, that there was no error in refusing to transfer the cause under act of 1875. *Illinois C. R. Co.* v. *Chicago, B. & N. R. Co.*, 30 *Am. & Eng. R. Cas.* 287, 122 *Ill.* 473, 13 *N. E. Rep.* 140, 11 *West. Rep.* 133.

A foreign corporation cannot in the United States courts condemn the land of a citizen of the state for the use of the corporation, and proceedings of that nature instituted in the state courts cannot be removed to the federal courts. *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.*, 10 *Am. & Eng. R. Cas.* 444, 17 *W. Va.* 812.

17. Mandamus proceedings. — A mandamus proceeding in a state court, under Kan. Gen. St., 1868, p. 766, to compel a railroad company to register a transfer of certificates of stock, is "a suit of a civil nature" within the meaning of the Act of Congress of March 3, 1875, providing for the removal of causes. *Washington Imp. Co.* v. *Kansas Pac. R. Co.*, 5 *Dill.* (*U. S.*) 489.

A circuit court of the United States has no jurisdiction in mandamus, except in aid of a jurisdiction previously acquired, and,

therefore, an original mandamus proceeding brought at the relation of a city to compel railroads to lower a street crossing is not removable on the application of non-resident defendants. *State ex rel.* v. *Columbus & X. R. Co.*, 48 *Fed. Rep.* 626.—FOLLOWING Rosenbaum *v.* Bauer, 120 U. S. 450, 7 Sup. Ct. Rep. 633.

Where such proceeding is in the name of the state, at the relation of the city, it is a proceeding in which the state is the real party, which in itself deprives the circuit court of jurisdiction. *State ex rel.* v. *Columbus & X. R. Co.*, 48 *Fed. Rep.* 626.—FOLLOWING New Hampshire *v.* Louisiana, 108 U. S. 76, 2 Sup. Ct. Rep. 176; New Jersey *v.* Babcock, 4 Wash. (U. S.) 344; Adams *v.* Bradley, 5 Sawy. (U. S.) 217.

And the fact that one of the railroads claims a vested right in the crossing, which is entitled to protection under the constitution of the United States, will not give the circuit court jurisdiction. The question may be raised in a state court, and if proper protection is not given an appeal may be had to the supreme court of the United States. *State ex rel.* v. *Columbus & X. R. Co.*, 48 *Fed. Rep.* 626.

And where the several roads which are made defendants use such crossing jointly, the proceeding does not involve a separable controversy as between the state and one of the companies. *State ex rel.* v. *Columbus & X. R. Co.*, 48 *Fed. Rep.* 626.

18. Probate proceedings.—A proceeding in a state court exercising probate jurisdiction, by a creditor of a railroad, against the estate of one who had bought depreciated stock of the company, to charge the estate with the difference between what was paid for and the face value of the stock, is a "suit," within the meaning of the federal law, providing for the removal of suits from state to federal courts, and the removal may be made, though the state statute gives the state court exclusive jurisdiction of the settlement of estates. *Clark* v. *Bever*, 139 *U. S.* 96, 11 *Sup. Ct. Rep.* 468; *affirming* 31 *Fed. Rep.* 670.

In such case the amount of the claim determines the jurisdiction of the supreme court on writ of error, and that being above $5000, the court has jurisdiction, without reference to what might be realized from the estate if the claim should be established. *Clark* v. *Bever*, 139 *U. S.* 96, 11 *Sup. Ct. Rep.* 468; *affirming* 31 *Fed. Rep.* 670.

19. Quo warranto proceedings.—A civil suit in the nature of a *quo warranto*, brought by a state in a state court, against a railroad organized under state laws, may, where it presents questions arising under the laws of the United States, be removed to the U. S. circuit court, under the Act of Congress of March 3, 1875, providing "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity, * * * arising under the constitution or laws of the United States;" and also that suits of the same nature may be removed to the circuit courts. *Ames* v. *Kansas ex rel.*, 16 *Am. & Eng. R. Cas.* 522, 111 *U. S.* 449, 4 *Sup. Ct. Rep.* 437.

Under the code practice of Kansas where the common law forms of action are abolished, a proceeding by the state against a railroad, by information, in the nature of a *quo warranto*, is a civil action, within the meaning of the laws providing for the removal of civil causes from state to federal courts. *Ames* v. *Kansas ex rel.*, 16 *Am. & Eng. R. Cas.* 522, 111 *U. S.* 449, 4 *Sup. Ct. Rep.* 437.

And such a proceeding against a railroad chartered under a state law, to test the validity of a consolidation with other companies under an act of congress, presents questions arising under the laws of the United States, within the meaning of the law for the removal of such questions to the federal courts. *Ames* v. *Kansas ex rel.*, 16 *Am. & Eng. R. Cas.* 522, 111 *U. S.* 449, 4 *Sup. Ct. Rep.* 437.

An information in the nature of a *quo warranto*, under Ill. Rev. St. ch. 112, to inquire by what authority a railroad company exercises possessory rights over certain lands, is a civil action, within the meaning of the Act of Congress of March 3, 1887, providing for the removal of causes. *Illinois ex rel.* v. *Illinois C. R. Co.*, 33 *Fed. Rep.* 721.

20. Proceedings by counsel to collect fees.—After the property of a railroad had been sold under a decree and passed into the hands of the purchasers, and while the matter was before a master to ascertain the amounts of certain declared liens, the purchasers of the road settled all liens and claims, refusing counsel for complainants any compensation for their services with respect to a certain class of liens. Thereupon the attorneys filed a petition in the same

court, against the purchasers to establish their lien for fees. *Held*, that this petition was not a mere appendage of the original suit, but was a new suit in equity, which might be removed from the state to a federal court under the act of March 3, 1875. *Pettus* v. *Georgia R. & B. Co.*, 3 *Woods* (*U. S.*) 620

21. Criminal prosecutions.—An action in the form of a civil suit to recover the penalty prescribed by section 27 of the Iowa Act of April 5, 1888, which enacts that any railroad company "guilty of extortion shall forfeit and pay the state of Iowa not less than $1000 nor more than $5000, to be recovered in a civil action by ordinary proceedings instituted in the name of the state," is, notwithstanding its form, criminal in its nature, and is not removable to the federal courts. *Iowa* v. *Chicago, B. & Q. R. Co.*, 37 *Am. & Eng. R. Cas.* 721, 37 *Fed. Rep.* 497.

22. Right of removal as dependent upon amount in controversy.—As affecting the right to remove a cause to the federal court, the amount in controversy is the amount claimed in the declaration. *Gordon* v. *Longest*, 16 *Pet.* (*U. S.*) 97.—APPROVED IN Beery *v.* Chicago, R. I. & P. R. Co., 64 Mo. 533.

A suit brought in a state court of New York, by a citizen of that state against a citizen of Connecticut, as treasurer of an express company, a joint-stock association of New York, which is a partnership and not a corporation, and is, by a statute of New York, suable by its treasurer, the suit being to restrain the maintenance of an awning over part of a street adjoining the plaintiff's premises, involves more than $500, if the value of the right to maintain the awning is more than $500, and is a suit between citizens of different states, and, therefore, triable in the United States courts. *Whitman* v. *Hubbell*, 24 *Blatchf.* (*U. S.*) 240.

In an action sounding in tort, where the sole right of action is for the recovery of unliquidated damages, the amount, if stated in the complaint, or in the prayer for judgment, must, for the purposes of removal, be taken as the true measure of the value of the matter in dispute. So where a complaint, in an action for damages for negligently causing death, states that the surviving relatives have been damaged by reason of the death "in the sum of —— thousand dollars," and the prayer demands judgment "for —— thousand dollars," it will be construed as a suit for $1000, and cannot be removed to a federal court because the petition for removal charges that the amount in controversy exceeds $2000, the amount necessary to give the court jurisdiction. *Yarde* v. *Baltimore & O. R. Co.*, 57 *Fed. Rep.* 913.

23. Amendments of the ad damnum.—Where a complaint asks damages in a sum less than $500, and is, after the evidence has been introduced, amended by leave of the court so as to claim judgment for a sum exceeding $500, thereby bringing the claim within the amount necessary to secure a removal to the federal courts, a judgment for plaintiff will not be reversed on writ of error from the United States supreme court on the ground that defendant was thereby deprived of his right of removing the cause to the federal courts, when it appears that he only excepted to the action of the court in permitting the amendment, and did not make any application for the removal of the cause. *Northern Pac. R. Co.* v. *Austin*, 43 *Am. & Eng. R. Cas.* 7, 135 *U. S.* 315, 10 *Sup. Ct. Rep.* 758.

A motion was made to dismiss a suit to recover damages to property, for the want of jurisdiction in that the *ad damnum* in the writ and declaration was less than $2000, the amount fixed as the minimum limit of the jurisdiction of a federal circuit court by the Act of Congress of March 3, 1887. It appeared that the suit was commenced a few days after that act was passed, and evidently in ignorance of the changes made by it. The plaintiff moved to amend the writ and declaration by increasing the *ad damnum* to $2500. *Held*, that the amendment should be allowed, as the court could not judicially know that the increased amount was but factitious to give the court jurisdiction. It is only when the court can plainly see that its jurisdiction is being fraudulently invoked that it will deny the amendment or dismiss the cause. *Davis* v. *Kansas City, S. & M. R. Co.*, 32 *Fed. Rep.* 863.—DISTINGUISHING Bowman *v.* Chicago & N. W. R. Co., 115 U. S. 611, 6 Sup. Ct. Rep. 192; Hartog *v.* Memory, 116 U. S. 588, 6 Sup. Ct. Rep. 521.—*Austin* v. *Northern Pac. R. Co.*, 34 *Minn.* 473, 26 *N. W. Rep.* 607.

So far as affects the right of removal from a state to a federal court, in actions based upon tort, the amount in controversy is the amount stated in the *ad damnum* of plain-

tiff's declaration, though a less sum may be claimed in the body of the declaration; and where the amount in the *ad damnum* is fixed at more than $500, the cause is removable, and it is error for the court to permit the plaintiff to amend his complaint by reducing the damages below $500 after petition, bond, and motion are filed for a removal. *Louisville & N. R. Co.* v. *Roehling*, 11 *Ill. App.* 264.

III. GROUNDS FOR REMOVAL.

24. When a federal question is raised, generally.—A state brought an action in a state court, against a railroad company for unjust discrimination in the violation of a state law; and the company petitioned a removal to a federal court on the ground that the state statute impaired its charter, in violation of the constitution of the United States. *Held*, that it was not necessary, for the purpose of removal, to decide that the claim of the company could be sustained. It is sufficient if it appears that a question arises under the constitution of the United States. *People* v. *Chicago, B. & Q. R. Co.*, 11 *Biss.* (*U. S.*) 584, 16 *Fed. Rep.* 706.

A state commenced an action in the nature of *quo warranto*, to prevent a railroad company from controlling certain lands, and in a petition by the company for removal to a federal court, it claimed ownership to the land under an act of the legislature, which it claimed as a contract, and which had been subsequently repealed, in violation of the constitution of the United States. *Held*, that this showed a federal question, within the meaning of the Act of Congress of March 3, 1887, though the state filed a disclaimer that no reliance was placed on the repealing act. *Illinois ex rel.* v. *Illinois C. R. Co.*, 33 *Fed. Rep.* 721.

A state filed a bill in its own court seeking to forfeit the charter of a railroad, on the ground that it was chartered by the state to facilitate communication between the interior and the seaboard, but that a rival company, chartered in an adjoining state, had secured control of a majority of the stock and the management of the road, which it was using to divert business from the road and to crush competition. It was also charged that such rival company had no power under its charter to hold such stock; but a petition for a removal alleged that such company was an instrument of interstate commerce, and, under the constitution and laws of the United States, it had the power to hold such stock and to control the road. *Held*, sufficient for the purposes of removal to show that a federal question was involved. *South Carolina* v. *Port Royal & A. R. Co.*, 56 *Fed. Rep.* 333.

The complaint in such case prayed that the holding of stock in defendant company by such rival company be declared *ultra vires*, and that defendant's charter be declared forfeited. *Held*, that, as this would have the effect of rendering the stock worthless, it did not matter, for the purposes of a removal, that the rival company was not made a defendant. *South Carolina* v. *Port Royal & A. R. Co.*, 56 *Fed. Rep.* 333.

It was also charged that the state constitution, where the rival company was chartered, forbade the holding of such stock, where it would have the effect of destroying competition. The petition for removal alleged that such constitution impaired the obligation of the rival company's charter contract, which was older than the constitutional provision. *Held*, that this presented a federal question, though the supreme court of the state had already decided that the charter did not confer the rights claimed. *South Carolina* v. *Port Royal & A. R. Co.*, 56 *Fed. Rep.* 333.

25. When no federal question is involved.—A ferry company sued a railroad company in a state court of Missouri on a contract made in Illinois by which the railroad company agreed to employ the ferry exclusively in conveying freights and passengers across a river. The railroad set up as a defense that the contract was *ultra vires*, and in violation of the laws of Illinois. To avoid the effect of this the ferry company set up by way of estoppel a former judgment in a Missouri court holding that the company, under the laws of Illinois, had the power to make the contract. *Held*, that the pleadings did not make a case that was removable to a federal court on the ground that the Missouri court had not in such judgment given full faith and credit to the public acts of Illinois. *Chicago & A. R. Co.* v. *Wiggins Ferry Co.*, 9 *Am. & Eng. R. Cas.* 509, 108 *U. S.* 18.

A company built a bridge across a navigable river under authority from congress, which declared it to be a lawful structure, and afterwards the company obtained the

right to lay tracks on certain streets leading to the bridge. *Held*, that a proceeding to prevent it from using the tracks did not raise a federal question, as the act of congress did not attempt to confer the right to use the streets. *Kentucky* v. *Louisville Bridge Co.*, 42 *Fed. Rep.* 241.—FOLLOWING New Orleans, M. & T. R. Co. *v.* Mississippi, 102 U. S. 135.

No federal question is raised in a case by an answer that is bad in substance without reference to the federal question. *Fitzgerald* v. *Missouri Pac. R. Co.*, 50 *Am. & Eng. R. Cas.* 622, 45 *Fed. Rep.* 812.

A cause is not removable simply because in its progress it may become necessary to construe or apply an act of congress. Unless there is a dispute between the parties as to the meaning of the act, there is no federal controversy between them. The decision of the case or some material issue in it, must depend upon a construction of the act claimed by one party and denied by the other. A simple averment that such is the fact is stating a conclusion, and is not sufficient; the facts that show it to be true must be set out. *Fitzgerald* v. *Missouri Pac. R. Co.*, 50 *Am. & Eng. R. Cas.* 622, 45 *Fed. Rep.* 812.

Both the parties to the suit being citizens of Louisiana, it cannot be removed unless there is some federal question involved. Conceding that the defendant's charter is a protected contract in the sense of the United States constitution, and that the ordinance sought to be enforced is such a law as may impair its obligation, yet the facts do not sustain such contention. *State ex rel.* v. *New Orleans & N. E. R. Co.*, 43 *Am. & Eng. R. Cas.* 263, 42 *La. Ann.* 11, 7 *So. Rep.* 84.

26. Diverse citizenship, generally.*—A township in Illinois and a taxpayer thereof, on behalf of himself and other resident taxpayers, filed their bill in a state court against certain state, county, and township officers and the "unknown owners and holders" of certain township bonds, for an injunction to restrain the levy and collection of a tax to pay the principal of the bonds or any interest thereon. A citizen of another state was the owner of all of them. *Held*, that he was entitled, under the act of March 3, 1875, to remove the suit to the circuit court of the United States. *Harter* v. *Kernochan*, 3 *Am. & Eng. R. Cas.* 82, 103 *U. S.* 562.—DISTINGUISHING Schaffer *v.* Bonham, 95 Ill. 378.

In order to be a non-resident of a state, so as to be entitled to removal of a cause under the Act of Congress of March 3, 1887, providing for removal of causes between citizens of different states, the defendant must be a citizen of another state, or a corporation created by the laws of another state. *Martin* v. *Baltimore & O. R. Co.*, 151 *U. S.* 673, 14 *Sup. Ct. Rep.* 533.

The test of the residence of a corporation is the place of its creation, and not its principal place of business, as it may reside in one state and have its principal place of business in another. *Guinn* v. *Iowa C. R. Co.*, 4 *McCrary* (*U. S.*) 566, 14 *Fed. Rep.* 323.—FOLLOWING McCabe *v.* Illinois C. R. Co., 4 McCrary 492.

Where both parties are citizens of the same state at the time a petition for removal is filed, there is no right then in existence under the constitution of the United States upon which jurisdiction in the federal court can be based, and the petition must be denied, though there was diverse citizenship when the action was brought. *Laird* v. *Connecticut & P. R. R. Co.*, 55 *N. H.* 375.—DISTINGUISHING Kanouse *v.* Martin, 15 How. (U. S.) 198.

27. There must be no common citizenship among opposing parties.—Under the "Removal Act" of March 3, 1875, when the controversy in the state court is between citizens of one or more states on one side, and citizens of other states on the other side, either party may remove the case to the U. S. circuit court without regard to the position they occupy in the pleadings as plaintiffs or defendants. *Meyer* v. *Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.—QUOTED IN Texas & P. R. Co. *v.* McAllister, 59 Tex. 349.—*Young* v. *Parker*, 132 *U. S.* 267, 10 *Sup. Ct. Rep.* 75.—FOLLOWED IN Marsh *v.* Atlanta & F. R. Co., 53 Fed. Rep. 168; Gann *v.* Northeastern R. Co., 57 Fed. Rep. 417.—*Hervey* v. *Illinois Midland R. Co.*, 7 *Biss.* (*U. S.*) 103. *Gudger* v. *Western N. C. R. Co.*, 19 *Am. & Eng. R. Cas.* 144, 87 *N. Car.* 325. *O'Kelly* v. *Richmond & D. R. Co.*, 89 *N. Car.* 58.

Certain taxpayers filed a bill to enjoin a

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* On ground of diverse citizenship, see note, 12 AM. & ENG. R. CAS. 299.

Personality, residence, and citizenship, see note, 35 AM. & ENG. R. CAS. 507.

tax that had been voted in aid of a railroad. Plaintiffs and all the defendants, which included the county officers and the railroad company, were citizens of the same state, except one defendant, who was assignee of the railroad. These were all necessary defendants, and there was no separable controversy. *Held*, that the case was not removable to the federal court under the act of 1875. *Sully* v. *Drennan*, 113 *U. S.* 287, 5 *Sup. Ct. Rep.* 453.—DISTINGUISHING Harter *v.* Kernochan, 103 U. S. 562.

One of the two plaintiffs in a suit originally commenced in a state court, and removed by the defendant into the United States circuit court, under the act of September 24, 1789, § 12 (1 U. S. St. at L. 79), was a citizen of New Hampshire, and the other was a citizen of Vermont, and defendant, a railroad company, was a citizen of New York. *Held*, that the United States circuit court had no jurisdiction, and the case could not be removed into that court. *Hubbard* v. *Northern R. Co.*, 3 *Blatchf.* (*U. S.*) 84.

Under United States Rev. St. § 639, a suit in which there are two or more defendants cannot be removed, on the petition of a defendant who is a citizen of another state, unless it can be finally determined as to him, without the presence of the other defendants; and it is not removable on the ground of prejudice or local influence, unless the controversy is wholly between citizens of different states. *Burch* v. *Davenport & St. P. R. Co.*, 46 *Iowa* 449.—FOLLOWING Delaware R. Constr. Co. *v.* Davenport & St. P. R. Co., 46 Iowa 406.—FOLLOWED IN Stanbrough *v.* Griffin, 52 Iowa 112.

A corporation was formed by uniting three Missouri with three Kansas corporations, and was sued in Kansas by a citizen of Missouri. *Held*, that such corporation was presumed to be composed of citizens of both states, and could not remove the cause to a federal court. *Pacific R. Co.* v. *Missouri Pac. R. Co.*, 5 *McCrary* (*U. S.*) 373.—FOLLOWING Ohio & M. R. Co. *v.* Wheeler, 1 Black 297. QUOTING Baltimore & O. R. Co. *v.* Harris, 12 Wall. 65. REVIEWING Chicago & N. W. R. Co. *v.* Whitton, 13 Wall. 270.

Suit was commenced in a state court against several railroad companies and others to enforce the lien of certain bonds, and by plaintiff's consent many other holders of the bonds of the same series were permitted to become parties and set up their liens. *Held*, that all of the parties asserting the lien under the series of bonds should be considered as plaintiffs, in determining the citizenship of the parties, on a motion to remove the case to a federal court. *Adelbert College* v. *Toledo, W. & W. R. Co.*, 47 *Fed. Rep.* 836.

And when thus arranged, if it appears that part of the plaintiffs are aliens, and others reside in the same state with the defendants that petition for the removal, a federal court has no jurisdiction. *Adelbert College* v. *Toledo, W. & W. R. Co.*, 47 *Fed. Rep.* 836.

28. Citizenship of parties to record, only, considered. — A citizen of New York and citizens of Maryland brought suit, in a state court of New York, against a railroad corporation created by North Carolina, South Carolina, and Georgia, and its directors, one of whom was a citizen of Maryland, and the rest citizens of New York, and a Virginia corporation, to enjoin defendants from executing a lease to the Virginia corporation of the road of the other corporation. The suit was removed to this court on petition of the latter corporation, setting forth that there was a controversy between plaintiffs and the two corporations, which could be fully determined as between them, and that the Virginia corporation had not been served with process. Plaintiffs moved to remand the cause to the state court. *Held:* (1) that the individual defendants were parties only as agents and officers of the corporation, and only nominal parties, and that the sole controversy, as respected that corporation, was between plaintiffs and it; (2) that the Virginia corporation was a necessary party to that controversy, and it could not be served with process from this court, and, as it had not been served in the state court and had not appeared the suit was not, when it was removed, pending or brought against it, within the act of March 3, 1875, § 2 (18 U. S. St. at L. 470), and so could not be removed. *Pond* v. *Sibley*, 19 *Blatchf.* (*U. S.*) 189.—DISTINGUISHING Fisk *v.* Union Pac. R. Co., 8 Blatchf. 243.

29. Necessary and nominal parties.—Where the cause of action is vested in the trustees of a railroad mortgage, the citizenship of such trustees may be looked to in determining the question of whether a federal court can acquire jurisdiction by re-

moval from a state court, and not to the residence of the beneficiaries in the mortgage. *Knapp* v. *Troy & B. R. Co.*, 20 *Wall.* (*U. S.*) 117, 10 *Am. Ry. Rep.* 95. — FOLLOWED IN Davies *v.* Lathrop, 12 Fed. Rep. 353, 20 Blatchf. (U. S.) 397.

The Removal Act of 1867 which extends the act of 1789 so as to allow either plaintiff or defendant to remove a cause, does not change the settled rule as to who are to be regarded as plaintiff and defendant. *Knapp* v. *Troy & B. R. Co.*, 20 *Wall.* (*U. S.*) 117, 10 *Am. Ry. Rep.* 95.

A defendant, which is not a real or actual or necessary party, but is merely a formal party, to the controversy, as it stands when the petition for removal is filed, is to be considered as not a party. *Chicago, St. L. & N. O. R. Co.* v. *McComb*, 17 *Blatchf.* (*U. S.*) 371. *Hervey* v. *Illinois Midland R. Co.*, 7 *Biss.* (*U. S.*) 103. *Adelbert College* v. *Toledo, W. & W. R. Co.*, 47 *Fed. Rep.* 836. *Rivers* v. *Bradley*, 53 *Fed. Rep.* 305. *United States ex rel.* v. *Douglas*, 113 *N. Car.* 190, 18 *S. E. Rep.* 202. —REVIEWING Maryland *v.* Baldwin, 112 U. S. 490.

A Missouri statute gives contractors and material-men a lien on a railroad for materials furnished or work done, but leaves it optional with a subcontractor in enforcing a lien whether he will make the contractor a party, and provides for a personal judgment against him if he is made a party. *Held*, that the joining of the contractor as a defendant does not make two separate causes of action so as to make the controversy separable as between the plaintiff and company, within the meaning of the Act of Congress of 1887, § 2. *Ames* v. *Chicago, S. F. & C. R. Co.*, 39 *Fed. Rep.* 881.

30. Interveners. — Citizens of a state filed a petition in a state court to assert laborers' liens against a railroad company of the state; and certain other lien-holders, citizens of other states, intervened and set up liens against the property, which, it was claimed, were superior. *Held*, that the controversy was wholly between citizens of different states, and was, therefore, removable to a federal court. *Snow* v. *Texas Trunk R. Co.*, 4 *Woods* (*U. S.*) 394, 16 *Fed. Rep.* 1.

31. Assignees.* — An action against a railroad company based upon an assigned claim for overcharges in freight may be removed from the state to the federal courts, where the parties are citizens of different states, regardless of the citizenship of the assignor of such claim. Such a claim is not a "chose in action" within the meaning of the proviso in the amendatory act of 1888. *Conn* v. *Chicago, B. & Q. R. Co.*, 50 *Am. & Eng. R. Cas.* 640, 48 *Fed. Rep.* 177.

A non-resident who has a claim against a company for a personal injury may assign it to a citizen of the same state as the company, so as to defeat the removal of a suit thereon, if the assignment is law, though done to defeat the removal. *Vimont* v. *Chicago & N. W. R. Co.*, 13 *Am. & Eng. R. Cas.* 176, 19 *Am. & Eng. R. Cas.* 215, 64 *Iowa* 513, 21 *N. W. Rep.* 9.—FOLLOWED IN Vimont *v.* Chicago & N. W. R. Co., 69 Iowa 296

Where an employé commences suit against his company for a personal injury, and in the course of the proceeding, non-residents (assignees of the road) voluntarily become parties defendant, and ask for a removal of the case to the federal court, their motion is properly refused. *Gudger* v. *Western N. C. R. Co.*, 19 *Am. & Eng. R. Cas.* 144, 87 *N. Car.* 325.

32. Receivers. — A suit for injuries causing death was commenced against a receiver of a road in a state court of New York, and was removed to a federal court for the reason that the receiver was a citizen of New Jersey. The suit was originally brought under the New York statute, which limited the recovery to $5000; but was amended by inserting a claim under the New Jersey statute, which did not limit the amount of the recovery. *Held*, that the federal court had jurisdiction under the Removal Act of 1875, § 5, though the receiver had been appointed by an ancillary proceeding in New York. *Davies* v. *Lathrop*, 12 *Fed. Rep.* 353, 20 *Blatchf.* (*U. S.*) 397.

A receiver's personal citizenship will be regarded on a motion to remand a cause to the state court; and not the place of his appointment. *Davies* v. *Lathrop*, 12 *Fed. Rep.* 353, 20 *Blatchf.* (*U. S.*) 397.—FOLLOWING Rice *v.* Houston, 13 Wall. (U. S.) 66; Knapp *v.* Troy & B. R. Co., 20 Wall. 117.— *Brisenden* v. *Chamberlain*, 53 *Fed. Rep.* 307. *Texas & P. R. Co.* v. *Bloom*, 85 *Tex.* 279, 20 *S. W. Rep.* 133.

The property of a construction company went into the hands of a receiver, but, un-

* Right of removal; when vested in assignee of chose in action, see note, 13 AM. & ENG. R. CAS. 180.

der orders of court, he continued the work of construction, and for that purpose made contracts. *Held*, that a controversy arising between the receiver and a contractor, or between the contractor and other claimants, should be settled in the state court where the receiver was appointed; and a contractor is not entitled to have the matter removed to a federal court on the ground of diverse citizenship. *Buell* v. *Cincinnati, E. & Q. Constr. Co.*, 10 *Biss.* (*U. S.*) 555, 9 *Fed. Rep.* 351.

No "federal question" can arise upon the construction of a bond given by a receiver of a railroad appointed by the United States court as to whether the liability of the sureties be joint or several, it being simply a question of law to be determined by the settled rules of construction. Neither is a question arising upon the construction of decrees and orders of the United States circuit court relating to said bond and ascertaining the receiver's liability such a "federal question," where there is nothing to show that any question of construction of such decrees, etc., will arise, other than their interpretation according to their plain meaning. *United States ex rel.* v. *Douglas*, 113 *N. Car.* 190, 18 *S. E. Rep.* 202.

Act of Congress of August 13, 1888, § 3 (25 U. S. St. at L., p. 436), relating to suits against receivers, has no reference to an action against the sureties on the bond of a receiver of a railroad, but merely asserts the general equity of jurisdiction of the appointing court over the receiver so appointed. *United States ex rel.* v. *Douglas*, 113 *N. Car.* 190, 18 *S. E. Rep.* 202.

33. Corporations, generally.—Under the Act of Congress of March 3, 1875, a defendant who is a citizen of the state where suit is brought may have it removed to a federal court, and certain defendants may have a removal, though their co-defendants do not join in the petition, if the controversy as between them and the plaintiff can be fully determined without the other defendants. *So held*, where a bondholder of a company filed a bill, and the company and its officers and trustees petition for a removal. *Osgood* v. *Chicago, D. & V. R. Co.*, 6 *Biss.* (*U. S.*) 330.

Corporations have citizenship for the purposes of suing and being sued, and are embraced in the United States legislation with reference to the removal of causes to its courts from state courts. *Stanley* v. *Chicago, R. I. & P. R. Co.*, 62 *Mo.* 508.—FOLLOWED IN Beery *v.* Chicago, R. I. & P. R. Co., 64 Mo. 533.

Though a corporation is ordinarily regarded as a citizen of the state where it is created, yet it may be a citizen of another state, within the meaning of the Act of Congress of March 2, 1867, relating to the removal of causes from state to federal courts. *Quigley* v. *Central Pac. R. Co.*, 11 *Nev.* 350.

A corporation is not, *per se*, a citizen within the meaning of the third article of the constitution of the United States. So, when a corporation sues or is sued, the governing officers, by whatever name called, are the substantial party; and if they are citizens of the state which created the corporation, and the other party is a citizen of another state, the federal courts have jurisdiction, and the cause is removable under the Judiciary Act of 1789. *Wheeden* v. *Camden & A. R. Co.*, 1 *Grant's Cas.* (*Pa.*) 420.

34. Corporations chartered in two or more states.—Where a railroad company is duly organized under the laws of two states, and is sued in the state court of one of the states by a citizen of that state, it cannot remove the action to a federal court on the ground of citizenship. *Colglazier* v. *Louisville, N. A. & C. R. Co.*, 20 *Am. & Eng. R. Cas.* 611, 22 *Fed. Rep.* 568. —FOLLOWING Chicago & W. I. R. Co. *v.* Lake Shore & M. S. R. Co., 10 Biss. (U. S.) 122, 5 Fed. Rep. 19; Copeland *v.* Memphis & C. R. Co., 3 Woods (U. S.) 651; Uphoff *v.* Chicago, St. L. & N. O. R. Co., 5 Fed. Rep. 545; Nashua & L. R. Corp. *v.* Boston & L. R. Corp., 8 Fed. Rep. 458; Johnson *v.* Philadelphia, W. & B. R. Co., 9 Fed. Rep. 6; Horne *v.* Boston & M. R. Co., 18 Fed. Rep. 50; St. Louis, A. & T. H. R. Co. *v.* Indianapolis & St. L. R. Co., 9 Biss. (U. S.) 144; Muller *v.* Dows, 94 U. S. 444.—DISTINGUISHED IN Chicago, I. & N. P. R. Co. *v.* Minnesota & N. W. R. Co., 29 Fed. Rep. 337.—*Memphis & C. R. Co.* v. *Alabama*, 13 *Am. & Eng. R. Cas.* 172, 107 *U. S.* 581, 2 *Sup. Ct. Rep.* 432. *Stephens* v. *St. Louis & S. F. R. Co.*, 50 *Am. & Eng R. Cas.* 618, 47 *Fed. Rep.* 530. *Horne* v. *Boston & M. R. Co.*, 62 *N. H.* 454. *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.*, 10 *Am. & Eng. R. Cas.* 444, 17 *W. Va.* 812.—QUOTED IN Colorado Midland R. Co. *v.* Jones, 29 Fed. Rep.

193.—*Henen* v. *Baltimore & O. R. Co.*, 9 *Am. & Eng. R. Cas.* 496, 17 *W. Va.* 881. *Quarrier* v. *Baltimore & O. R. Co.*, 18 *Am. & Eng. R. Cas.* 535, 20 *W. Va.* 424.

A railroad company formed by the consolidation of corporations of two states remains, for the purposes of jurisdiction, a citizen of both states, and when sued in a state court of one of the states by a citizen of the other state, it is not entitled to a removal to a federal court. *Pacific R. Co.* v. *Missouri Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 590, 23 *Fed. Rep.* 565. *Johnson* v. *Philadelphia, W. & B. R. Co.*, 9 *Fed. Rep.* 6. —FOLLOWED IN Colglazier *v.* Louisville, N. A. & C. R. Co., 20 Am. & Eng. R. Cas. 611, 22 Fed. Rep. 568.—*Uphoff* v. *Chicago, St. L. & N. O. R. Co.*, 5 *Fed. Rep.* 545.—FOLLOWED IN Colglazier *v.* Louisville, N. A. & C. R. Co., 20 Am. & Eng. R. Cas. 611, 22 Fed. Rep. 568.

35. Foreign corporations, generally.*—A railroad corporation created by the laws of one state may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, or by virtue of a license, permission, or authority, granted by the laws of the latter state, so as to act in that state under its charter from the former state. In the first alternative, it cannot remove a suit to the federal court on account of citizenship of a different state, but it may in the latter alternative. *Martin* v. *Baltimore & O. R. Co.*, 151 *U. S.* 673, 14 *Sup. Ct. Rep.* 533.

The Baltimore & Ohio railroad company is not a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, and has the right, under the constitution and laws of the United States, when sued by a citizen of the state to remove the suit into the circuit court of the United States, and cannot be deprived of its right by any provision in the statutes of the state. *Martin* v. *Baltimore & O. R. Co.*, 151 *U. S.* 673, 14 *Sup. Ct. Rep.* 533.†—APPROVING Baltimore & O. R. Co. *v.* Harris, 12 Wall. (U. S.) 65; Mississippi & R. R. Boom Co. *v.* Patterson, 98 U. S. 403; Union Pac. R. Co. *v.* Kansas City, 115 U. S. 1; Searl *v.* School Dist. No. 2, 124 U. S. 197.—DISAPPROVING Baltimore & O. R. Co. *v.* Pittsburg, W. & K. R. Co., 17 W. Va. 812. DISTINGUISHING Baltimore & O. R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, Goshorn *v.* Ohio County Sup'rs, 1 W. Va. 308, Baltimore & O. R. Co. *v.* Marshall County Sup'rs, 3 W. Va. 319.

Virginia Act of 1827 merely conferred on the above company, a Maryland corporation, a license to transact business in that state, and did not make it a Virginia corporation; therefore, it is entitled to remove a cause from a state court of what is now West Virginia to a federal court on account of citizenship. *Baltimore & O. R. Co.* v. *Ford*, 35 *Fed. Rep.* 170.

A state cannot by a mere legislative declaration make all corporations created by charter or by the laws of other states domestic corporations of such state; at least it cannot by such declarations deprive the foreign corporation of its right to resort to the federal courts, in cases where such right is conferred by the constitution and laws of the United States. *Rece* v. *Newport News & M. V. Co.*, 32 *W. Va.* 164, 9 *S. E. Rep.* 212.

So much of W. Va. Code, ch. 54, § 30, as declares that foreign railroad corporations doing business in this state shall in all suits and legal proceedings be held and treated as domestic corporations, and requires every such corporation to file an agreement to that effect, is, so far as it attempts to deprive such corporations of the right to remove to the federal courts suits brought against them in the courts of this state, inoperative and void; and such foreign corporation may exercise such right in any proper case, notwithstanding it has executed and filed such agreement. *Rece* v. *Newport News & M. V. Co.*, 32 *W. Va.* 164, 9 *S. E. Rep.* 212.

A domestic railroad company filed a bill against a foreign company to restrain it from interfering with the plaintiff's roadbed, and for damages, and after the defendant had filed a petition for removal to a federal court, it consolidated with a domestic corporation. *Held*, that this did not prevent a removal. *Chicago, I. & N. P. R. Co.* v. *Minnesota & N. W. R. Co.*, 29 *Fed. Rep.* 337.—DISTINGUISHING Colglazier *v.* Louisville, N. A. & C. R. Co., 22 Fed. Rep. 568;

*Citizenship of railroad company. Foreign corporations, see note, 20 AM. & ENG. R. CAS. 622.

†See also *ante*, **34**; BALTIMORE & O. R. Co., **8**.

Pacific R. Co. *v.* Missouri Pac. R. Co., 23 Fed. Rep. 565.

And the fact that such foreign corporation has filed its articles of association with the secretary of state, as required by a state statute, upon entering the state, does not make it a domestic corporation, nor prevent it from removing the suit. *Chicago, I. & N. P. R. Co.* v. *Minnesota & N. W. R. Co.*, 29 *Fed. Rep.* 337.

For the purpose of removing litigation from a state to a federal court a defendant corporation must be considered as dwelling in the state of its creation, notwithstanding that it may do business in other states; and the action must be regarded as prosecuted against citizens of another state. *Fisk* v. *Chicago, R. I. & P. R. Co.*, 3 *Abb. Pr. N. S.* (*N. Y.*) 453, 53 *Barb.* 472.—APPROVING Ohio & M. R. Co. *v.* Wheeler, 1 Black (U. S.) 286. QUOTING Dennistoun *v.* New York & N. H. R. Co., 1 Hilt. (N. Y.) 62.

The purpose of N. Y. Act of 1853, ch. 466, as amended in 1855, ch. 279, requiring foreign corporations, before doing business in New York, to appoint an agent here upon whom service of process against the corporation may be served, is to afford the citizens of the state means of suing in the state; and is not intended to prevent a corporation when so sued from removing the litigation to a federal court. *Fisk* v. *Chicago, R. I. & P. R. Co.*, 3 *Abb. Pr. N. S.* (*N. Y.*) 453, 53 *Barb.* 472.

Where a corporation of another state, not being a citizen of Ohio, is sued by a citizen of the state, in the state court, it is entitled to have the case removed to a United States court, under the Judiciary Act of 1789, § 12. *Baltimore & O. R. Co.* v. *Cary*, 28 *Ohio St.* 208, 14 *Am. Ry. Rep.* 97. — FOLLOWED IN Erie R. Co. *v.* Stringer, 32 Ohio St. 468.—*Southern Pac. R. Co.* v. *Harrison*, 73 *Tex.* 103, 11 *S. W. Rep.* 168.

36. Foreign corporation buying or leasing domestic road. — A Maryland railroad company which leases and operates the property of a Virginia railroad company does not thereby become a citizen of Virginia, or lose its right to a removal of a cause when sued in a Virginia court. *Baltimore & O. R. Co.* v. *Koontz*, 4 *Am. & Eng. R. Cas.* 105, 104 *U. S.* 5; *reversing* 29 *Gratt.* (*Va.*) 431, 17 *Am. Ry. Rep.* 351, 32 *Gratt.* 394.—DISTINGUISHED IN Morgan *v.* East Tenn. & V. R. Co., 4 Woods (U. S.) 523. FOLLOWED IN Morgan *v.* East Tenn. & V. R. Co., 48 Fed. Rep. 705. QUOTED IN Williams *v.* East Tenn., V. & G. R. Co., 90 Ga. 519; Booth *v.* St. Louis Fire-Engine Mfg. Co., 40 Fed. Rep. 1; Texas & P. R. Co. *v.* McAllister, 59 Tex. 349; Rece *v.* Newport News & M. V. Co., 32 W. Va. 164.

The same rule applies to an Illinois company operating a leased road in Iowa. *Treadway* v. *Chicago & N. W. R. Co.*, 21 *Iowa* 351.

Where a corporation of another state is authorized to purchase a road incorporated in the state, to have "all the rights and privileges" of the selling company, the purchase of the road for the purpose of an extension does not make the foreign corporation a domestic corporation, so as to prevent it from removing a cause from a state to a federal court. *Morgan* v. *East Tenn. & V. R. Co.*, 48 *Fed. Rep.* 705.—FOLLOWING Callahan *v.* Louisville & N. R. Co., 11 Fed. Rep. 536; Baltimore & O. R. Co. *v.* Koontz, 104 U. S. 5; Baltimore & O. R. Co. *v.* Cary, 28 Ohio St. 208.

When a foreign railroad corporation purchases the rights, titles, properties, and franchises of a domestic railroad corporation, which is by its charter authorized to sell such rights, titles, properties, and franchises, and the purchasing company assumes all the liabilities of the purchased road and becomes merged and consolidated with it, doing business under its charter, such purchasing company is so far a domestic corporation that it has no right on the ground that it is a citizen of another state to remove causes from the state courts to the United States courts. *Angier* v. *East Tenn., V. & G. R. Co.*, 20 *Am. & Eng. R. Cas.* 618, 74 *Ga.* 634. — FOLLOWED IN Schaefer *v.* East Tenn., V. & G. R. Co., 76 Ga. 99. REVIEWED IN Williams *v.* East Tenn., V. & G. R. Co., 90 Ga. 519.

37. Domestic corporation leasing to foreign corporation.—A leased railroad in Iowa, under the Code of that state, § 1300, does not become so absorbed in the lessee company as to lose its identity. Hence, in a suit in Iowa by citizens of that state against a foreign railroad leasing an Iowa road to enforce an obligation of the latter, both roads are necessary parties, and the suit is not removable to the federal courts under the act of 1875, on account of diverse citizenship. *Chicago & N. W. R. Co.* v. *Crane*, 20 *Am. & Eng. R. Cas.* 600, 113 *U. S.* 424, 5 *Sup. Ct. Rep.* 578.—DIS-

TINGUISHED IN Arrowsmith *v.* Nashville & D. R. Co., 57 Fed. Rep. 165.

The fact that a corporation of Kentucky leases and operates a railroad chartered by Tennessee, does not make it a citizen of Tennessee, nor prevent it from removing a suit from a state court of Tennessee to the federal court. *Callahan* v. *Louisville & N. R. Co.*, 11 *Fed. Rep.* 536.—FOLLOWED IN Morgan *v.* East Tenn. & V. R. Co., 48 Fed. Rep. 705.

The fact that a railroad company is under a perpetual lease to a foreign company is not sufficient to make it a foreign company; therefore where both the lessor and lessee are sued in a state court, the cause cannot be removed to a federal court, where the plaintiff resides in the same state with the lessor company, unless it is not a material party. *Crane* v. *Chicago & N. W. R. Co.*, 17 *Am. & Eng. R. Cas.* 174, 20 *Fed. Rep.* 402.

38. Alienage of a party.—Under the Removal Act of 1887, providing that defendants who are citizens of states other than that in which a suit is brought may remove the action to the federal courts for local prejudice, a removal is not authorized where the party is an alien. *Cohn* v. *Louisville, N. O. & T. R. Co.*, 40 *Am. & Eng. R. Cas.* 338, 39 *Fed. Rep.* 227.

But under the above act, as amended by the act of Aug. 13, 1888, a suit brought by aliens against a foreign corporation may be removed to a federal court by the defendant. *Sherwood* v. *Newport News & M. V. Co.*, 55 *Fed. Rep.* 1.

Where a citizen of another state is sued in the courts of New York, he is not entitled to remove the cause to a circuit court of the United States, unless all the plaintiffs are citizens of the state. So where three aliens unite with a citizen of the state, in suing a foreign railroad company, the cause is not removable. *Dennistoun* v. *New York & N. H. R. Co.*, 1 *Hilt.* (*N. Y.*) 62, 2 *Abb. Pr.* 278, 415.—QUOTED IN Fisk *v.* Chicago, R. I. & P. R. Co., 3 Abb. Pr. N. S. (N. Y.) 453, 53 Barb. 472.

39. When cause is removable on the ground of separable controversy.—(1) *General rules.*—A cause of action cannot be split up, and a part only removed to a federal court. The case must be so removed as to be wholly determined in the federal court. *Hervey* v. *Illinois Midland R. Co.*, 7 *Biss.* (*U. S.*) 103.

In order to remove a cause, under the act of 1875, it is not necessary that all the defendants be residents of a state other than the one wherein the plaintiff resides. It is sufficient, if there is a separable controversy between the plaintiff and any one of the defendants who is a citizen of a different state. *Sheldon* v. *Keokuk N. L. Packet Co.*, 9 *Biss.* (*U. S.*) 307, 1 *Fed. Rep.* 789.

Where an action of tort is brought against two roads, one a resident and the other non-resident, and each is liable, the plaintiff cannot, by joining the non-resident defendant, debar it from removing the cause to the federal court, under the act of 1875, where the controversy is severable. *Clark* v. *Chicago, M. & St. P. R. Co.*, 3 *McCrary* (*U. S.*) 591, 11 *Fed. Rep.* 355. *Spangler* v. *Atchison, T. & S. F. R. Co.*, 42 *Fed. Rep.* 305.—APPLYING Pullman Palace Car Co. *v.* Speck, 113 U. S. 84, 5 Sup. Ct. Rep. 376.

(2) *Illustrations.*—The state of Illinois filed a bill against defendant company and the city of Chicago, praying that the title of the state to certain lands covered by the waters of Lake Michigan be established. It appeared that the lands had been granted to the company by the legislature, but this act was subsequently repealed. The company claimed that the repealing act was in violation of the federal constitution, but the city answered, admitting the title of the state. *Held*, that the case was one arising under the constitution and laws of the United States, and, under the act of 1875, was removable to a federal court; and that there was a separable controversy between the company and the state which could be determined without reference to the city. *Illinois ex rel.* v. *Illinois C. R. Co.*, 16 *Fed. Rep.* 881.—APPLYING New Orleans, M. & T. R. Co. *v.* Mississippi, 102 U. S. 140.

In an action against two or more persons to appropriate property held by them as tenants in common, to the use of a railway corporation, there is a separable controversy between such corporation and each of said tenants, which can be fully determined as between them, and if either of such tenants is a citizen of a different state from such corporation he may remove the whole case into the circuit court under the second clause of section 2 of the act of 1875. *Northern Pac. Terminal Co.* v. *Lowenberg*, 14 *Am. & Eng. R. Cas.* 418, 9 *Sawy.* (*U. S.*) 348, 18 *Fed. Rep.* 339.

Where a company and others are made

defendants to a suit, and the company has the suit removed to a federal court on the ground of citizenship, the federal court takes jurisdiction where the bill discloses a separable controversy between the plaintiff and the company, and a motion to remand will be denied. *Chicago & A. R. Co.* v. *New York, L. E. & W. R. Co*, 22 *Am. & Eng. R. Cas.* 265, 24 *Fed. Rep.* 516.—APPLYING Wolverhampton & W. R. Co. *v.* London & N. W. R. Co., L. R. 16 Eq. 433.

Where a joint action is commenced against a foreign railroad company and one of its engineers for negligently causing the death of a track watchman, the plaintiff and the engineer being residents of the same state, there is a separable controversy, and the company is entitled to remove the suit to a federal court. *Beuttel* v. *Chicago, M. & St. P. R. Co.*, 26 *Fed. Rep.* 50.—FOLLOWING Louisville & N. R. Co. *v.* Ide, 114 U. S. 52, 5 Sup. Ct. Rep. 735.

A bill was filed against two railroad companies, one a short-line resident company, and the other a long-line non-resident company, praying for an injunction to restrain the short line from issuing certain stock to the other company, or, if issued, restraining the company from further transferring it. Both companies answered, by which it appeared that the stock had been transferred more than six months before the institution of the suit. *Held*, that this made a separable controversy between the plaintiffs and the long-line road, which was removable to a federal court. *Taylor County* v. *Baltimore & O. R. Co.*, 35 *Fed. Rep.* 161.

A railroad company commenced a proceeding to acquire additional land, a part of which was for a highway in lieu of one which the railroad company desired to take. The statute required the company to provide a substitute for the highway, and put it in as good situation as the highway was previous to the alteration. The landowner petitioned for a removal of the proceeding to a federal court on the ground that he was a resident of another state. *Held*, that the controversy between the railroad and the landowner was separable from that between the railroad and the town which had charge of the highways; and, therefore, the proceeding was removable. *New York, N. H. & H. R. Co.* v. *Cockcroft*, 46 *Fed. Rep.* 881.

40. When cause is not removable on ground of separable controversy.—A suit in a state court by a citizen of Missouri against a railroad company of that state and citizens of New York, where both are necessary parties, is not removable to the United States circuit court under the act of March 3, 1875. The fact of separate issues under separate answers does not make it removable. *St. Louis & S. F. R. Co.* v. *Wilson*, 20 *Am. & Eng. R. Cas.* 595, 114 *U. S.* 60, 5 *Sup. Ct. Rep.* 738.

A creditor's bill to subject encumbered railroad property to payment of a judgment, and for a sale and distribution of the proceeds among the various creditors according to priorities, constitutes but a single cause of action, and is not removable to a federal court, though the various parties are citizens of different states, and interpose separate defenses. *Fidelity I., T. & S. D. Co.* v. *Huntington*, 117 *U. S.* 280, 6 *Sup. Ct. Rep.* 733.—FOLLOWED IN Marsh *v.* Atlanta & F. R. Co., 53 Fed. Rep. 168.

Where two railroads are sued jointly for a trespass, but plead separately, under the Act of Congress of March 3, 1875, § 2, one of the corporations cannot remove the case into the circuit court of the United States, on the ground of separable interest, without alleging and proving that the two corporations were fraudulently joined to prevent such removal. *Louisville & N. R. Co.* v. *Wangelin*, 132 *U. S.* 599, 10 *Sup. Ct. Rep.* 203.—QUOTED IN Chesapeake, O. & S. W. R. Co. *v.* Hendricks, 88 Tenn. 710.

No right of removal of a cause from a state to a federal court exists on the ground of separable controversy, where several insurance companies, having paid a loss on goods while in the hands of a carrier, begin suit in equity to be subrogated to the rights of the insured, and make a compress company, which had obtained insurance from a number of companies for the benefit of the carrier, a co-defendant, as the primary controversy is between the complainants and the carrier, but the compress company is a necessary party. *Merchants' C. P. & S. Co.* v. *Insurance Co. of N. A.*, 151 *U. S.* 368, 14 *Sup. Ct. Rep.* 367. See also *Insurance Cos.* v. *Carrier Cos.*, 91 *Tenn.* 537, 19 *S. W. Rep.* 755.

The employés of a construction company managed a train so negligently as to injure an employé, who commenced a joint suit against the owner of the train and the owner of the track where the train was being operated, and the construction company removed the suit to a federal court on the ground of

local prejudice. *Held*, that there was not such a separable controversy as would give the other defendant the right to have the suit remanded, under the Act of Congress of March 3, 1887, § 2. *Haire* v. *Rome R. Co.*, 57 *Fed. Rep.* 321.—APPROVING Whelan *v.* New York, L. E. & W. R. Co., 35 Fed. Rep. 849. DISAPPROVING Anderson *v.* Bowers, 43 Fed. Rep. 321. QUOTING Fisk *v.* Henarie, 32 Fed. Rep. 417.—DISTINGUISHED IN Gann *v.* Northeastern R. Co., 57 Fed. Rep. 417.

A city commenced a proceeding against two railroad companies, one a resident and the other a non-resident, to condemn certain land for street purposes. The principal controversy was as to the right of the city to condemn the particular land, and if the right should be upheld, then the question turned upon the amount of damages to be awarded. One company owned the land and the other controlled it under a lease. *Held*, that there was not a separable controversy which would enable the non-resident company to remove the proceeding to a federal court on the ground of citizenship alone. *LeMars* v. *Iowa Falls & S. C. R. Co.*, 4 *McCrary* (*U. S.*) 218.

A bill was filed against a railroad company to enforce what was claimed to be a first lien on the company's track, and the mortgagee of the company and a mechanic's lien-holder were made parties, and the latter filed a cross-petition asserting his lien, to which the mortgagee was made a party. In a petition for removal the mortgagee averred that he held the first lien, and that the holder of the mechanic's lien was estopped from setting up his as a first lien. *Held*, that the real questions presented were as to the priority of the several liens, and there was no separable controversy between the mortgagee and either of the other claimants which could be determined without the railroad company. *Bissell* v. *Canada & St. L. R. Co.*, 39 *Fed. Rep.* 225.

A city commenced a proceeding to condemn land occupied by a non-resident railroad company under a perpetual lease from a resident company. The resident company filed a disclaimer showing that the lease was renewable forever, and that the non-resident company was practically the owner, and entitled to all the damages suffered. *Held*, that notwithstanding the disclaimer the resident company had some interest in the property, so that there was not a separable controversy between the city and the non-resident company, within the meaning of the removal statutes. *Washington* v. *Columbus & C. M. R. Co.*, 53 *Fed. Rep.* 673.—FOLLOWING Bellaire *v.* Baltimore & O. R. Co., 146 U. S. 117, 13 Sup. Ct. Rep. 16.

A complaint against two railway companies, one of which is a resident and the other a non-resident, to recover damages for injuries resulting from their joint negligence as common carriers, does not state such a separable controversy as will authorize the removal thereof to the United States court upon the application of the non-resident corporation. *Bowley* v. *Richmond & D. R. Co.*, 110 *N. Car.* 315, 14 *S. E. Rep.* 777.

41. Illustrations of controversies not separable.—Certain citizens of New Jersey filed a bill in the state court against a railroad of that state in which they were stockholders, a Pennsylvania railroad, and certain other citizens of different states, to annul a lease of their road. There was no separable controversy. *Held*, that it was not removable to the federal court under the act of March 3, 1875, as a controversy between citizens of different states. *Central R. Co.* v. *Mills*, 20 *Am. & Eng. R. Cas.* 613, 113 *U. S.* 249, 5 *Sup. Ct. Rep.* 456; *affirming* 16 *Am. & Eng. R. Cas.* 491, 20 *Fed. Rep.* 449.—DISTINGUISHED IN Hamilton *v.* Savannah, F. & W. R. Co., 52 Am. & Eng. R. Cas. 130, 49 Fed. Rep. 412. FOLLOWED IN East Tenn., V. & G. R. Co. *v.* Grayson, 119 U. S. 240.

A suit was brought against several railroads, chartered in different states, based on an association of the roads for the purpose of carrying through freights. Two of the roads answered, setting up different defenses. *Held*, that there was but one cause of action, and that it was not removable to a federal court, under the act of 1875, § 2, providing for the removal of suits where there is "a controversy which is wholly between citizens of different states." *Louisville & N. R. Co.* v. *Ide*, 114 *U. S.* 52, 5 *Sup. Ct. Rep.* 735. — FOLLOWED IN Buettel *v.* Chicago, M. & St. P. R. Co., 26 Fed. Rep. 50.

A creditor's bill was filed in a state court against a railroad company, all the parties being citizens of the state, but the trustee in a mortgage on the road, who was a non-resident, intervened. *Held*, that a separable controversy was not presented, within the meaning of the Act of Congress of 1888, § 2,

providing for the removal of any suit by one of several defendants, where "there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them." *In re San Antonio & A. P. R. Co.*, 44 *Fed. Rep.* 145.—FOLLOWED IN Marsh *v.* Atlanta & F. R. Co., 53 Fed. Rep. 168.—*Marsh* v. *Atlanta & F. R. Co.*, 53 *Fed. Rep.* 168.—DISTINGUISHING Foster *v.* Chesapeake & N. R. Co, 47 Fed. Rep. 379. FOLLOWING Ayres *v.* Wiswall, 112 U. S. 187; Fidelity I., T. & S. D. Co. *v.* Huntington, 117 U. S. 280; Young *v.* Parker, 132 U. S. 267; Sharon *v.* Tucker, 144 U. S. 533; In re San Antonio & A. P. R. Co., 44 Fed. Rep. 145.

A citizen of New York brought suit in a state court, against a corporation of New Jersey and two corporations of New York, claiming to be a creditor, without judgment, of the New Jersey corporation. The complaint prayed that certain real estate alleged to have been paid for by that corporation, when insolvent, and conveyed directly to one of the other corporations, in fraud of plaintiff's rights, be sold to satisfy his claims, and that defendants be restrained from disposing of or encumbering the land. No judgment was asked for against the New Jersey corporation. *Held*, that the United States circuit court could not entertain jurisdiction of the case, by a removal of the suit by the New Jersey corporation, there being no separate controversy between plaintiff and the New Jersey corporation. *Moore* v. *North River Constr. Co.*, 22 *Blatchf.* (*U. S.*) 115.

A stockholder in a resident corporation instituted an action against it and a non-resident corporation, alleging that, under a contract between them, the latter holds a majority of the stock of the former and dominates it; that it has wrongfully diverted its funds; that, under its control, the former is about to issue, unlawfully, certain mortgage bonds, and asking for an account and an injunction, and for other relief. *Held*, that the resident corporation was a proper and necessary defendant, and that the action was not removable into the United States circuit court, on petition of the non-resident defendant corporation. *Douglas* v. *Richmond & D. R. Co.*, 106 *N. Car.* 65, 10 *S. E. Rep.* 1048.

In such action, the controversy is not wholly between citizens of different states, nor is there a separable controversy between plaintiffs and the non-resident corporation. *Douglas* v. *Richmond & D. R. Co.*, 106 *N. Car.* 65, 10 *S. E. Rep.* 1048.

42. Local prejudice or influence, when ground.—A suit by a non-resident against a city to recover $3000 due on bonds issued by the city for railroad stock, and interest, is removable from a state court to a U. S. circuit court on account of local prejudice, under the Judiciary Act, § 12, providing that causes between a citizen of the state where the suit is brought and a citizen of another state may be removed by either party, where the matter exceeds $500, upon making affidavit that he believes that justice cannot be obtained on account of prejudice or local influence, and giving bond. *Lexington* v. *Butler*, 14 *Wall.* (*U. S.*) 282.

Where such bonds are made payable to the order of the company, and indorsed to bearer, the jurisdiction of said U. S. circuit court, upon such removal, is not defeated by said Judiciary Act, § 11, providing that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless such suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. *Lexington* v. *Butler*, 14 *Wall.* (*U. S.*) 282.

Under United States Rev. St. § 639, subd. 3, known as the "local prejudice act," it is not necessary in order to remove a cause that it should appear from the record that the parties were citizens of different states at the time the suit was commenced. *Miller* v. *Chicago, B. & Q. R. Co.*, 3 *McCrary* (*U. S.*) 460, 17 *Fed. Rep.* 97. — REVIEWING Kaeiser *v.* Illinois C. R. Co., 6 Fed. Rep. 1.

Where a citizen of Minnesota sues a Wisconsin corporation doing business in Minnesota, a federal circuit court for the latter state has original jurisdiction of the cause, under the Act of Congress of March 3, 1887, where the jurisdiction depends upon citizenship; and the company may remove the suit to that court on the ground of local prejudice. *Short* v. *Chicago, M. & St. P. R. Co.*, 34 *Fed. Rep.* 225. — FOLLOWING Fales *v.* Chicago, M. & St. P. R. Co., 32 Fed. Rep. 673. OVERRULING Yuba County *v.* Pioneer Gold Min. Co., 32 Fed. Rep. 183.

Where a citizen of one state commences an action against corporations of the state and a foreign corporation, to enforce a

statutory liability for causing personal injuries, the foreign corporation is entitled to have the suit removed to a federal court, under the Act of Congress of March 3, 1887, § 2, relating to removals on account of local prejudice. *Whelan* v. *New York, L. E. & W. R. Co.*, 35 *Fed. Rep.* 849, 1 *L. R. A.* 65. —APPROVED IN Haire *v.* Rome R. Co., 57 Fed. Rep. 321. FOLLOWED IN Cooper *v.* Richmond & D. R. Co., 42 Fed. Rep. 697; Detroit *v.* Detroit City R. Co., 54 Fed. Rep. 1.

A suit was pending against a street-railway company, and a non-resident mortgagee of the company petitioned for a removal to a federal court on the ground of prejudice and local influence. The affidavit filed alleged that a riot against the company had occurred, which had the sympathy of the public, and that the city authorities had refused to protect the employés and property of the company, and that a public meeting, largely attended, had advised the bringing of the suit, and the judges of the state court before whom the suit would come would soon stand for re-election. *Held*, sufficient ground for removal under the statute. *Detroit* v. *Detroit City R. Co.*, 54 *Fed. Rep.* 1.

Where a city commences a suit against a street-railway company and other citizens of the state, and still others who are not citizens of the state, to have the company's franchise annulled, and to compel the company to vacate the streets, a non-resident mortgagee of the company may remove the suit to a federal court on account of local prejudice, under the Act of Congress of Aug. 13, 1888, § 2. *Detroit* v. *Detroit City R. Co.*, 54 *Fed. Rep.* 1. — FOLLOWING Whelan *v.* New York, L. E. & W. R. Co., 35 Fed. Rep. 849; Thouron *v.* East Tenn., V. & G. R. Co., 38 Fed. Rep. 673.

43. Local prejudice, when not ground. — Where defendant corporation has been created by the consolidation of different corporations of different states, and the act of the legislature of the state in which suit is brought which authorizes the consolidation, provides that the consolidated company should be deemed a corporation created by the laws of that state, such corporation is a citizen of the state where the suit is brought and cannot have the cause removed under the local prejudice clause of the act of 1887, although the petition for removal avers that defendant is a corporation under the laws of another state and has its principal office and place of business there. *Cohn* v. *Louisville, N. O. & T. R. Co.*, 40 *Am. & Eng. R. Cas.* 338, 39 *Fed. Rep.* 227.

The supreme court of the United States decided that certain equipment bonds constituted no lien on the property of the company, but subsequently the supreme court of the state, in a suit on other bonds of the same series, decided the opposite. *Held*, that the state decision was not sufficient to show prejudice or local influence, within the meaning of the removal acts, in a third suit on bonds of the same series. *Adelbert College* v. *Toledo, W. & W. R. Co.*, 47 *Fed. Rep.* 836.

Where the plaintiffs are all citizens of the state where suit is brought, and are jointly interested in an action against a non-resident, the suit cannot be removed on the application of the defendant, under the act of March 3, 1887. *Gann* v. *Northeastern R. Co.*, 57 *Fed. Rep.* 417.—DISTINGUISHING Haire *v.* Rome R. Co., 57 Fed. Rep. 321. FOLLOWING Young *v.* Parker, 132 U. S. 267, 10 Sup. Ct. Rep. 75.

The Act of Congress of 1887 as amended by that of 1888 does not authorize the removal of a cause pending in a superior court of the state between a citizen of another state as plaintiff, and a resident corporation and a foreign corporation, doing business and having property in the state, as defendants. *Lawson* v. *Richmond & D. R. Co.*, 112 *N. Car.* 390, 17 *S. E. Rep.* 169.

IV. PROCEDURE.

44. Time of application.—The Removal Act of 1875, § 3, provides that whenever either party, entitled to remove any suit under the act, shall desire to remove a suit from a state to a federal court, "he or they may make and file a petition in such state court before or at the time at which said cause could be first tried, and before the trial." *Held*, that an application in a suit pending at the passage of the act was in time, if made at the first term thereafter. *Meyer* v. *Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.

To bar the right of removal, under said section, on the ground that the application was not made "before the trial," it must appear that the trial had actually begun and was in progress when the application

was made. *Meyer* v. *Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.

If the term at which the cause could otherwise be first tried is one which occurs during the time a trial of the cause is stayed by an order of the state court, it is not such a term as is meant by the statute. *Warner* v. *Pennsylvania R. Co.*, 13 *Blatchf.* (*U. S.*) 231.

The Act of Congress of March 3, 1887, § 3, as amended by the act of Aug. 13, 1888, provides that a party entitled to remove a suit on the ground of non-residence may do so by filing a petition and bond in the state court at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court, to answer or plead to the declaration or complaint. A rule of the supreme court of New Hampshire requires special pleas in proceedings at law to be filed within ninety days from the commencement of the term at which the action is entered. *Held*, that this rule was applicable to a proceeding by a railroad company to condemn land, and a removal can only be had before the expiration of the ninety days. *Mt. Washington R. Co.* v. *Coe*, 50 *Fed. Rep.* 637.—APPLYING Chase *v.* Sullivan R. Co., 20 N. H. 195; Mississippi & R. R. Boom Co. *v.* Patterson, 98 U. S. 403.

The application should be made before or at the term at which the cause is first triable under the law, whether the parties are ready to try it or not. *Chicago, B. & Q. R. Co.* v. *Welch*, 44 *Iowa* 665.

The provision for the removal of causes contained in U. S. Rev. St. § 639, that a removal may be had "at any time before the trial or final hearing of the suit," is not repealed by the act of March 3, 1875, and the fact that it has been on the calendar for five or six circuits before the application is made is no objection to a removal, if the application is made before the final hearing. *Nye* v. *Northern C. R. Co.*, 24 *Hun* (*N. Y.*) 556.

45. Waiver by applying too late.—A company does not lose its right to a removal by contesting the case on its merits in the state court after its application for a removal has been made and refused. *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 *U. S.* 135.

Suit was commenced against a railroad company, and under the state statute it was required to answer the complaint within ten days after the date of the service of summons. On the last day allowed for answering, the company appeared specially and moved to set aside the service of summons, but did not ask for an order extending the time in which it might plead. Thirty days afterwards, but while the motion was still pending, the company answered, and at the same time filed a petition and bond for removal to a federal court. *Held*, that the case should be remanded, the petition and bond not having been filed within the time required. *Wedekind* v. *Southern Pac. Co.*, 36 *Fed. Rep.* 279, 13 *Sawy.* (*U. S.*) 475.

North Dakota Code requires a defendant to answer civil actions in thirty days after the service of summons; and in railroad condemnation proceedings it is provided that either party may demand a trial by jury within thirty days of the filing of the commissioner's report, but requires no further pleadings. *Held*, that the demand for a jury trial is equivalent to filing an answer in ordinary suits, and a federal court must remand a case where the petition for the removal is filed after the expiration of the thirty days. *Minneapolis, St. P. & S. St. M. R. Co.* v. *Nestor*, 50 *Fed. Rep.* 1.—FOLLOWING Mississippi & R. R. Boom Co. *v.* Patterson, 98 U. S. 403.

A landowner waives his right to remove a condemnation proceeding from a state to a federal court by appealing to the supreme court of the state and having the record sent there on certiorari. *Hudson River R. & T. Co.* v. *Day*, 54 *Fed. Rep.* 545.—FOLLOWING Amy *v.* Manning, 144 Mass. 153, 10 N. E. Rep. 737.

46. Affidavit of local prejudice, who may make.—The Act of Congress of 1867 provides that a removal of a cause may be had "at any time before the final hearing or trial," and the provisions of the statute are substantially re-enacted in U. S. Rev. St., 1873, § 639; and an application complying with the Rev. St. is good, though the notice states that the application is under the act of 1867. *Minnett* v. *Milwaukee & St. P. R. Co.*, 3 *Dill.* (*U. S.*) 460.

The president, and perhaps the general manager, of a railway company is *prima facie* entitled to make the required affidavit in such a case. *Minnett* v. *Milwaukee & St. P. R. Co.*, 3 *Dill.* (*U. S.*) 460.

An affidavit by the vice-president of a corporation, that he has reason to believe that, from prejudice and local influence, said defendant corporation will not be able to

obtain justice in said court, is sufficient to authorize the state court to transfer the cause to the federal court. *Quigley* v. *Central Pac. R. Co.*, 11 *Nev.* 350.—QUOTING Mahone *v.* Manchester & L. R. Corp., 111 Mass. 72.

47. Sufficiency of the affidavit.—Act of Congress of 1887 provides for the removal of causes from a state to a United States circuit court "when it shall be made to appear to said circuit court that, from prejudice or local influence, he [the moving party] will not be able to obtain justice in such state court." *Held*, that this changed the rule existing under the act of 1867, which made the right of removal absolute upon the filing of an affidavit stating such prejudice or local influence, and it was not thereafter a matter of inquiry. Under the act of 1887 an affidavit which merely states that the affiant has reason to believe, and does believe, that he will not be able to obtain justice in the state court on account of prejudice and local influence, is not in itself sufficient. *Short* v. *Chicago, M. & St. P. R. Co.*, 34 *Fed. Rep.* 225.

Under the Act of Congress of March 3, 1887, where a petition for removal is accompanied by an affidavit on behalf of a defendant corporation, by a person authorized to make it, stating of his own knowledge the existence of prejudice and local influence, it is sufficient to justify an order for removal, as the statute does not provide how the prejudice and local influence shall be made to appear. *Cooper* v. *Richmond & D. R. Co.*, 42 *Fed. Rep.* 697.—FOLLOWING Whelan *v.* New York, L. E. & W. R. Co., 35 Fed. Rep. 849.

And where such an affidavit is filed, the court will not hear evidence on the subject, nor permit the adverse party to traverse it. *Cooper* v. *Richmond & D. R. Co.*, 42 *Fed. Rep.* 697. — FOLLOWING Whelan *v.* New York, L. E. & W. R. Co., 35 Fed. Rep. 849. —*Quigley* v. *Central Pac. R. Co.*, 11 *Nev.* 350.

Under the act of 1867, requiring the making and filing of an affidavit in the state court by the party seeking the removal, "stating that he has reason to, and does, believe that, from prejudice or local influence, he will not be able to obtain justice in such state court," an affidavit in which the affiant stated "that he has reason to believe, etc., omitting the words "and does"—*held*, sufficient. *Baltimore, P. & C. R. Co.* v. *New Albany & S. R. Co.*, 53 *Ind.* 597.

Where a suit is brought against a corporation in the courts, and an affidavit for removal alleges that the corporation is a citizen of another state, it is insufficient in not stating that the corporation is not domiciled in the state. *Guinault* v. *Louisville & N. R. Co.*, 40 *Am. & Eng. R. Cas.* 340, 41 *La. Ann.*, 571, 6 *So. Rep.* 850.

48. The proper court to apply to.—Where a removal is applied for under the act of 1887 on the ground of prejudice and local influence, the affidavit may be filed in the state court, and a certified copy sent to the federal court. *Short* v. *Chicago, M. & St. P. R. Co.*, 34 *Fed. Rep.* 225.—OVERRULING Fisk *v.* Henarie, 32 Fed. Rep. 417.

The application should be made in the first instance to the circuit court, and not to the state court; and if, upon the hearing of such application, the circuit court shall be of the opinion that the applicant cannot receive justice in the state court on account of such influence or prejudice, it may direct the removal of the cause. *Rome & C. Constr. Co.* v. *Smith*, 84 *Ga.* 238, 10 *S. E. Rep.* 728.

49. Requisites of the petition for removal.—(1) *Federal decisions.* — A suit was pending in a state court to establish a mechanic's lien on a railroad, and to enforce it in preference to a mortgage lien thereon. The petition, filed for a removal of the cause to a federal court, stated that, on account of local prejudice a fair trial could not be had in the state court, but it also showed that they were entitled to a removal, under the Removal Act of 1875, on account of the parties being citizens of different states. The petition was also in the name of two persons, one of whom was not a party, but who had been expected to be made one when the petition was drawn. *Held*, the application being sufficient in form in other respects, that it was the duty of the court to treat it as the application of the one who was a party, and to treat the charge of local prejudice as surplusage. *Meyer* v. *Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.

The petition for removal was not signed. *Held*, that an objection to be available for this cause must be made in the state court. *Meyer* v. *Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.

In a suit by a corporation of one state

against a citizen of another state, it is sufficient, in a petition by defendant for removal, under the first clause of section 2 of the act of March 3, 1875 (18 U. S. St. at L. 470), to state that defendant is a citizen of such other state, and it is not necessary to state that he was such citizen when the suit was commenced. *Chicago, St. L. & N. O. R. Co.* v. *McComb*, 17 *Blatchf.* (*U. S.*) 371.

But under the act of March 3, 1875, as well as under the Revised Statutes, a case cannot be removed, on the ground of citizenship of the parties, unless it appears from the record that at the time the suit was commenced the parties were citizens of different states. *Kaeiser* v. *Illinois C. R. Co.*, 2 *McCrary* (*U. S.*) 187, 6 *Fed. Rep.* 1.—REVIEWED IN Miller *v.* Chicago, B. & Q. R. Co., 3 McCrary 460, 17 Fed. Rep. 97.

A corporation was sued in a state court, and the plaintiff claimed damages amounting to $27,000. Without answering or filing any pleading the company petitioned for a removal to a federal court, stating in the petition that "the matter and amount in dispute" exceeded $2000, the amount necessary to give the federal court jurisdiction. *Held*, sufficient to show that a "controversy" existed between the parties, within the meaning of the removal acts. It is not necessary that an issue be formed before the application for removal is made. *Egan* v. *Chicago, M. & St. P. R. Co.*, 53 *Fed. Rep.* 675.

(2) *State decisions.*—In an action against a receiver it was objected that there was no proof of his appointment as such. The complaint purported to be against him as receiver, and a petition filed in the cause by him for a removal alleged his appointment as such. *Held*, that the court would take judicial notice of this petition, which would avoid the necessity of proof of the appointment, where it was not directly put in issue. *McNulta* v. *Lockridge*, 32 *Ill. App.* 86; *affirmed in* 137 *Ill.* 270, 27 *N. E. Rep.* 452.

It is not necessary that the petition for removal should show that the parties to the action were residents of different states at the time of its commencement. It is sufficient, under the Act of Congress of 1875, if it appears that the requisite citizenship exists at the time of filing the petition for removal. *Nye* v. *Northern C. R. Co.*, 24 *Hun* (*N. Y.*) 556.

It is not sufficient to allege in a pleading that a resident corporation was joined as defendant to prevent a non-resident corporation from removing the cause to the United States courts; that fact, if it can be made available at all, must be affirmatively established by competent evidence. *Bowley* v. *Richmond & D. R. Co.*, 110 *N. Car.* 315, 14 *S. E. Rep.* 777.

A company, in a petition to remove a cause to a federal court, set out that the question involved in the suit was the settling of a tariff rate fixed by the state railroad commission; that the company was a corporation organized under the laws of another state, and that its functions and duties did not depend upon the laws of congress. *Held*, not to show proper grounds for a removal. *State* v. *Southern Pac. Co.*, 55 *Am. & Eng. R. Cas.* 539, 23 *Oreg.* 424, 31 *Pac. Rep.* 960.—QUOTING Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 Sup. Ct. Rep. 1113.

In order to entitle a corporation chartered by congress to remove, under U. S. Rev. St. § 640, to a United States circuit court a suit commenced against it in a state court, its application must show that such corporation is not a banking corporation, and that it has a defense arising under the constitution, or some treaty or law of the United States. The state court has the right to examine into such application to see whether or not it complies with all the requirements of the United States statute. *Texas & P. R. Co.* v. *McAllister*, 12 *Am. & Eng. R. Cas.* 289, 59 *Tex.* 349.—QUOTING Baltimore & O. R. Co. *v.* Koontz, 104 U. S. 14; Kern *v.* Huidekoper, 103 U. S. 490; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457; Phœnix Ins. Co. *v.* Pechner, 95 U. S. 185; Ex parte Wells, 3 Woods (U. S.) 128.

50. Who may make the petition.—The Act of Congress of 1887, as amended in 1888, withdraws from a plaintiff the right to remove a cause from a state to a federal court. Therefore, if a landowner in a condemnation proceeding be regarded as the plaintiff, he has no right of removal. *Mt. Washington R. Co.* v. *Coe*, 50 *Fed. Rep.* 637.

A landowner, who takes an appeal from an award of damages in his favor, in a condemnation proceeding, and the issue is confined solely to the amount of damages, is a defendant, for the purpose of removal to a federal court, though a statute of the state gives him the right to open and close the case on appeal. *Hudson River R. & T. Co.* v. *Day*, 54 *Fed. Rep.* 545.

51. Verification of petition. — It is not necessary, under the Act of Congress of 1875, that a petition for removal be verified by affidavit. *Osgood* v. *Chicago, D. & V. R. Co.*, 6 *Biss. U. S.*) 330.

52. Presenting the petition to state court.—The petition for removal should be presented to the state court and the opportunity given to that court to act. Presentation to the clerk of the court, or to the judge out of term time, is not sufficient. *Texas & P. R. Co.* v. *Bloom*, 85 *Tex.* 279, 20 *S. W. Rep.* 133. — REVIEWING Roberts *v.* Chicago, St. P., M. & O. R. Co., 45 Fed. Rep. 433.

53. Sufficiency of the bond. — The Removal Act of 1875, § 3, provides that a party removing a case from a state to a federal court shall give a bond with "good and sufficient surety." In a suit between a construction company and a railroad, a bond was given for removal with two sureties, one of which was an attorney in the case, which was forbidden by the state law. *Held*, without deciding whether the disability of the attorney would apply under the federal law, that two sureties were not required, and the bond was sufficient if the other signer was "good and sufficient." *Meyer* v. *Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.

Where a petition for removal is properly made at the first term at which the cause could be tried, accompanied by the bond required by law, and no objection is made as to the form of the bond or sufficiency of the sureties, the presumption is that it is such a bond as the act of congress requires, and the court should make an order for removal. *Terre Haute & I. R. Co.* v. *Abend*, 9 *Ill. App.* 304.

The Act of Congress of 1875, relating to the removal of causes, provides that the petitioner must offer in the state court "good and sufficient surety." *Held*, that this does not require the petitioner to sign the bond, if properly signed by "good and sufficient" sureties. *Nye* v. *Northern C. R. Co.*, 24 *Hun* (*N. Y.*) 556.

A state court does not err in refusing to remove a cause where no bond is filed other than an incomplete one having no penalty named therein. *Quarrier* v. *Baltimore & O. R. Co.*, 18 *Am. & Eng. R. Cas.* 535, 20 *W. Va.* 424.

54. Effect of filing petition and bond on jurisdiction of state court. —After removal the state court should proceed no further. *Home L. Ins. Co.* v. *Dunn*, 19 *Wall.* (*U. S.*) 214.—QUOTED IN Texas & P. R. Co. *v.* McAllister, 59 Tex. 349.

A state court may decide on the face of the papers whether a removal case has been made out. If its decision is adverse, the facts may be reviewed on appeal. *Stone* v. *South Carolina*, 117 *U. S.* 430, 6 *Sup. Ct. Rep.* 799.—FOLLOWED IN Burlington, C. R. & N. R. Co. *v.* Dunn, 122 U. S. 513.

If the petition is insufficient, the state court may properly disregard it, and refuse to remove the cause. Such petition must show that the plaintiff is a citizen of the state in which the suit is brought, and the defendant a citizen of another state, at the time the suit was commenced. *Indianapolis, B. & W. R. Co.* v. *Risley*, 50 *Ind.* 60. *Lawson* v. *Richmond & D. R. Co.*, 112 *N. Car.* 390, 17 *S. E. Rep.* 169. *White* v. *Chesapeake & O. R. Co.*, 20 *W. Va.* 792.

When a petition and bond are filed under the act of 1875, in a state court during vacation, the jurisdiction of that court ceases. It does not remain until the court can act upon them in term time; and it is not for the state court to decide whether a proper case is made. *Osgood* v. *Chicago, D. & V. R. Co.*, 6 *Biss.* (*U. S.*) 330.

It is well settled that after the filing of a petition and bond in due form, for the removal of a cause, the state court has no power to refuse the removal, and can do nothing to affect the right, and its rightful jurisdiction ceases *eo instanti*. *Terre Haute & I. R. Co.* v. *Abend*, 9 *Ill. App.* 304.

And a removal cannot be evaded by allowing an amendment reducing the amount in controversy below the amount necessary to give the federal court jurisdiction. *Louisville & N. R. Co.* v. *Roehling*, 11 *Ill. App.* 264.

Or by allowing a nonsuit. *Beery* v. *Chicago, R. I. & P. R. Co.*, 64 *Mo.* 533.—APPROVING Kanouse *v.* Martin, 15 How. (U. S.) 198; Gordon *v.* Longest, 16 Pet. (U. S.) 97. FOLLOWING Stanley *v.* Chicago, R. I. & P. R. Co., 62 Mo. 508; Herryford *v.* Ætna Ins. Co., 42 Mo. 148.—FOLLOWED IN Powell *v.* Chicago, R. I. & P. R. Co., 64 Mo. 544.

The mere filing in the state court of the petition for removal and bond is not of itself a removal of the cause. Until the United States court acquires jurisdiction, the same is retained by the state court, which may allow plaintiffs to amend by striking from the declaration the name of the

defendant alleged to be non-resident. *Rome & C. Constr. Co.* v. *Smith*, 84 *Ga.* 238, 10 *S. E. Rep.* 728.

Where the prerequisites for removal under the act of congress do not exist, the federal tribunal has no jurisdiction to remove or try a case, and where such court makes an order that the case be certified thereto, the state court may decline to permit the removal. *Lawson* v. *Richmond & D. R. Co.*, 112 *N. Car.* 390, 17 *S. E. Rep.* 169.

Where the petition of removal by a defendant is improperly overruled, such defendant is not bound, in order to preserve his right of removal, to disregard the overruling of his application, and proceed to perfect the transfer of the case. He may remain in the state court, and prevent, if possible, the prejudicial effect of its erroneous ruling, by all the means authorized by the laws of the state. *Erie R. Co.* v. *Stringer*, 32 *Ohio St.* 468. — FOLLOWING Baltimore & O. R. Co. *v.* Cary, 28 Ohio St. 208. QUOTING Hatch *v.* Chicago, R. I. & P. R. Co., 6 Blatchf. (U. S.) 105.

55. Proceedings in federal court after removal. — A suit was brought against a railroad company in Minnesota for a trespass in cutting logs from plaintiff's lands. Under the practice in that state the company set up as a defense both legal and equitable matters. *Held*, that the equitable matters could not be available after the case was removed to a federal court. *Northern Pac. R. Co.* v. *Paine*, 119 *U. S.* 561, 7 *Sup. Ct. Rep.* 323.

A defendant sued in a state court, by appearing and filing a petition and bond for a removal to a federal court, does not thereby waive the right to object to the sufficiency of the service of the summons; but such question may be raised after the case is filed in the federal court. *Forrest* v. *Union Pac. R. Co.*, 47 *Fed. Rep.* 1.

The case as made by the petition for removal and the pleadings at the time of the removal is the test of the right to remove; and no amendment can be made in the circuit court, setting up grounds for removal which was not presented to the state court on the motion to remove. *Fitzgerald* v. *Missouri Pac. R. Co.*, 50 *Am. & Eng. R. Cas.* 622, 45 *Fed. Rep.* 812.

Where a cause is one that is removable, the federal court has jurisdiction to try and determine it, although its nature is such that it could not originally have been brought in that court. *People ex rel.* v. *Colorado C. R. Co.*, 45 *Am. & Eng. R. Cas.* 599, 42 *Fed. Rep.* 638. — REFERRING to Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 Sup. Ct. Rep. 1113.

When the jurisdiction of the state court ceases, that of the federal court attaches for some purposes, on entering a copy of the record, so that the court may know the facts; but the jurisdiction of the federal court is not complete, so as to hear and determine the cause, although a transcript is filed, until on the day prescribed in the statute, or after, if the court accepts it. *In re Barnesville & M. R. Co.*, 2 *McCrary* (*U. S.*) 216, 4 *Fed. Rep.* 10. — FOLLOWED IN Kansas City & T. R. Co. *v.* Interstate Lumber Co., 36 Fed. Rep. 9.

Where a state court grants an injunction and appoints a receiver of a railroad on an *ex parte* application, the defendants may move to dissolve the injunction and discharge the receiver after they remove the suit to a federal court, at any time after the record is filed in that court, upon giving notice to the plaintiff. *Texas & St. L. R. Co.* v. *Rust*, 5 *McCrary* (*U. S.*) 348, 17 *Fed. Rep.* 275.

Suit was commenced in a state court against a foreign railroad corporation, the court having, by statute, jurisdiction only in case of a resident plaintiff. The defendant answered setting up that the plaintiff was a resident of England, and then removed the case into the U. S. court, and moved there for security for costs, on the ground of the non-residence of plaintiff. Counter affidavits being put in — *held*, that, as the issue of the residence of the plaintiff was the material one in the case, and as the U. S. court could have no jurisdiction if the state court would not have had, the issue must be left to be determined at the trial. *Simpkins* v. *Lake Shore & M. S. R. Co.*, 21 *Blatchf.* (*U. S.*) 554, 19 *Fed. Rep.* 802.

56. Motion to remand, generally. — An averment in a petition for removal by a corporation that it has a defense arising under the constitution and laws of the United States, will not be inquired into on a motion to remand the case to the state court. *Texas* v. *Texas & P. R. Co.*, 3 *Woods* (*U. S.*) 308.

Under U. S. Rev. St. § 640, a defendant corporation may remove a cause from a state to a federal court, where a state is

plaintiff. The eleventh amendment of the constitution of the United States only prohibits suits against a state, and does not apply where the state is plaintiff. *Texas* v. *Texas & P. R. Co.*, 3 *Woods* (*U. S.*) 308.

Where a motion is made to remand a case on the ground that no federal question is involved, the court will not anticipate the trial of the case, and proceed to construe the act of congress, and determine the rights of the parties thereunder. It cannot eliminate the federal question by a premature decision of the case, and then remand the suit on the theory that there is no longer a federal controversy in the case. *Lowry* v. *Chicago, B. & Q. R. Co.*, 46 *Fed. Rep.* 83.

On a motion to remand a case when it is alleged the record of the state court misstates the facts because of an error on the part of a ministerial officer of the state court in making up the record, parol testimony is competent to show the fact, though the same may contradict the record as made up by the clerk. *Stephens* v. *St. Louis & S. F. R. Co.*, 50 *Am. & Eng. R. Cas.* 618, 47 *Fed. Rep.* 530.

57. —— burden of proof. — Where a railroad company removes a suit against it to a federal court on the ground that it is a controversy between citizens of different states, and the plaintiff moves to remand the suit, alleging that both are citizens of the same state, the burden of proof is on the company to show that both are not citizens of the same state. *Copeland* v. *Memphis & C. R. Co.*, 3 *Woods* (*U. S.*) 651. — FOLLOWED IN Colglazier *v.* Louisville, N. A. & C. R. Co., 20 Am. & Eng. R. Cas. 611, 22 Fed. Rep. 568.

58. When a remand is proper.— The principle that a suit in a state court, which falls within the description of suits removable into the circuit court, may be removed, although it could not originally have been brought in the circuit court, is not affected by the act of March 3, 1875, § 5 (18 U. S. St. at L. 472), which provides for the dismissal or remanding of suits not really and substantially involving a dispute or controversy within the jurisdiction of the circuit court. *Warner* v. *Pennsylvania R. Co.*, 13 *Blatchf.* (*U. S.*) 231.

When it is settled that the jurisdiction of the circuit court in a removal cause is doubtful, all doubt as to what the court should do is dispelled, and the cause will be remanded. This rule is in harmony with the spirit and design of the act of congress repealing the act which allowed an appeal or writ of error from an order remanding a cause. *Fitzgerald* v. *Missouri Pac. R. Co.*, 50 *Am. & Eng. R. Cas.* 622, 45 *Fed. Rep.* 812.

A petition by a corporation for removal of a suit, which merely avers that the corporation is a citizen of a particular state, is not sufficient. A corporation is not a citizen of a state, within the meaning of the constitution. The averment should be that it is a corporation created by the laws of a particular state; and where the averment is that it is a citizen of a particular state, a motion to remand should be granted, although plaintiff has appeared in the federal court and demurred to the company's answer. *Frisbie* v. *Chesapeake & O. R. Co.*, 57 *Fed. Rep.* 1.

59. Effect of remanding. — Depositions taken in accordance with the laws of the state after a cause has been removed from the state to the federal court, and while it was pending in the federal court, pursuant to interrogatories filed before the cause was removed, are admissible in evidence on the trial in the state court. *Missouri Pac. R. Co.* v. *White*, 48 *Am. & Eng. R. Cas.* 206, 80 *Tex.* 202, 15 *S. W. Rep.* 808. —APPROVING Warren *v.* Younger, 18 Fed Rep. 859.

RENDITION.

Of judgment, see JUDGMENT, **1-8.**

RENEWAL.

Of negotiable paper, see BILLS, ETC., **7.**
— pass after expiration, see PASSES, **8.**

RENT.

Enforcement of payment of, see EQUITY, **18.**
Of leased lines, liability of receiver for, see RECEIVERS, **67.**
— right of way, claim for, when prior to mortgage, see MORTGAGES, **97.**
— submerged land, liability of lessee to lessor for, see LEASES, ETC., **69.**
Payment of claims for, by receiver, see RECEIVERS, **83.**
Priority of mortgage over claims for, see MORTGAGES, **114, 115.**
Right of mortgagees to, see LEASES, ETC., **97.**
Under leases generally, see LANDLORD AND TENANT, **6.**

When liability of lessee for, ceases, see LEASES, ETC., **86.**

RENTALS.

When exempt from taxes, see TAXATION, **180.**

RENTAL VALUE.

As an element of damages, see FLOODING LANDS, **95.**
— the measure of damages, see EMINENT DOMAIN, **658.**
Before and after construction of road, proof of, see STREETS AND HIGHWAYS, **266.**
Difference in, before and after building the road, see STREETS AND HIGHWAYS, **277.**
Evidence of loss of, see DAMAGES, **95.**
— — on assessment of land damages, see EMINENT DOMAIN, **608.**
Leases as evidence of, see ELEVATED RAILWAYS, **105.**
Limitation of time to sue for damages to, see ELEVATED RAILWAYS, **168.**
Measure of damages for depreciation of, see ELEVATED RAILWAYS, **148-156.**
Of contiguous property, evidence of, see ELEVATED RAILWAYS, **107.**
— property similarly situated, showing loss of, see STREETS AND HIGHWAYS, **267.**
Opinions of farmers as to, see WITNESSES, **161.**
— — witnesses as to, see WITNESSES, **114.**
Proof of diminution of, see ELEVATED RAILWAYS, **104.**
Reduction of, as an element of damages, see STREETS AND HIGHWAYS, **290.**
Who may sue for diminution of, see ELEVATED RAILWAYS, **93.**

REOPENING.

Of accounts, see ACCOUNTS, **3.**

REORGANIZATION.

After sale by receiver, see RECEIVERS, **116.**
New company takes burden of paying compensation for land taken, see EMINENT DOMAIN, **383.**
Power to issue bonds under agreement for, see BONDS, **5.**
Property in hands of new company, when subject to execution, see EXECUTION, **8.**
When exemption from taxes passes to reorganized road, see TAXATION, **157.**

1. Validity of schemes for. — (1) *General rules.*—The franchise to exist as a corporation pertains to the stockholders as such, and each one's interest therein accompanies the transfer of his stock. By statute in this state the purchasers of a railroad are enabled to constitute themselves a body corporate, and have all the rights and franchises in respect to it the company was vested with. *Meyer* v. *Johnston*, 53 *Ala.* 237, 15 *Am. Ry. Rep.* 467.

Mortgagees of a railroad, or purchasers in possession, have sufficient powers in the nature of a franchise to enable them to discharge the duties which the public have a right to demand, by keeping in repair and operating the road, and to demand and receive a suitable reward therefor, and for this purpose they may use their own proper names, or adopt any other name they may choose, and are not bound to do business in the name of the company, to whose rights they have succeeded. *Palmer* v. *Forbes*, 23 *Ill.* 301.

Me. Rev. St., 1857, ch. 46, authorizing the mortgagees of insolvent railroad corporations to form themselves into a "new and distinct" corporation, is to be construed in connection with ch. 46, § 17. *State* v. *Maine C. R. Co.*, 66 *Me.* 488, 19 *Am. Ry. Rep.* 323.

Under N. H. Act of 1881, ch. 232, entitled "An act in relation to the foreclosure of the Manchester & Keene railroad," the road was legally purchased by the Lowell and the Concord companies, and was legally operated by the Lowell company in 1884. *Boston, C. & M. R. Co.* v. *Boston & L. R. Co.*, 51 *Am. & Eng. R. Cas.* 106, 65 *N. H.* 393, 23 *Atl. Rep.* 529.

Where, on a foreclosure sale of railroad property, a committee of bondholders is appointed for the purpose of reorganizing, a suit is not maintainable to have a contract made by them declared null and void, where it is within the scope of their authority, in the absence of evidence of fraud; and facts which might amount to a violation of their trust relations to the bondholders are not sufficient. *Brooks* v. *Dick*, 4 *Silv. App.* 645, 135 *N. Y.* 652, 32 *N. E. Rep.* 230; *affirming* 17 *N. Y. Supp.* 259, 62 *Hun* 622, *mem.*, 43 *N. Y. S. R.* 37.

(2) *Illustrations.*—A reorganization plan which provides that the holders of unsecured indebtedness shall receive preferred income bonds of the company at par for the full amount of their claims, and that the stockholders shall receive new stock at a certain ratio, is not fraudulent as to the holders of the unsecured debts; neither is such reorganization void because it requires

olders of unsecured debts to contribute ratably to the necessary expenses incurred. *Hancock* v. *Toledo, P. & W. R. Co.*, 11 *Biss.* (*U. S.*) 148, 9 *Fed. Rep.* 738.—DISTINGUISHING Chicago, R. I. & P. R. Co. *v.* Howard, 7 Wall. (U. S.) 392.

On the foreclosure of a railroad mortgage the mortgage trustees purchased the property for the benefit of the bondholders. A new corporation was organized, its stock was issued to such bondholders for unpaid interest, and they received for their old bonds new bonds secured by a new mortgage. The stock passed into new hands, and its holders, acquiring control of the corporation, brought this suit in its name to set aside the new mortgage, as *ultra vires* in violation of the constitution of the *Held*, that the new mortgage was for property actually received, and the new bonds were the consideration of the conveyance of the property to the new corporation, and the vendee, the new corporation, could mortgage the property to secure the purchase money; that the corporation could not be allowed to retain the property and not pay the purchase price; and that the bondholders would be entitled to protection as having a vendor's lien. *Memphis & L. R. R. Co.* v. *Dow*, 22 *Blatchf.* (*U. S.*) 48.—QUOTING Philadelphia & R. R. Co. *v.* Stichter, 21 Am. Law Reg. (N. S.) 713; Platt *v.* Union Pac. R. Co., 99 U. S. 48.

A deed of trust on a railroad provided that the bondholders should consent to the articles of incorporation of a new company that should buy the property, on a reorganization, and this was not changed by a decree of sale. *Held*, that the deed of trust and the decree of sale must be construed together, and trustees who hold the property will not be required to convey it to any one of three companies until it appears that a majority of the bondholders have consented to their articles of incorporation. *Farmers' L. & T. Co.* v. *Central R. Co.*, 4 *Dill.* (*U. S.*) 546.

A company had issued several series of mortgages, some covering all of its property and others not. The company had a very large floating debt, and was in default for interest on all of the mortgages and for principal of a part, without any possibility of payment without a sale of its property. *Held*, that a consent decree foreclosing all the mortgages to enable the company to reorganize and extend its bonded indebtedness, and reduce the rate of interest, and to provide a means of carrying the floating indebtedness, would not be set aside at the application of some of the bondholders, because the principal of some of the mortgages was not yet due. *Carey* v. *Houston & T. C. R. Co.*, 45 *Fed. Rep.* 438.

In such case a proposed reorganization by which the bonded indebtedness is funded at a reduced interest, and which allows each stockholder to retain his stock on paying a *pro rata* share of the floating indebtedness, will not be enjoined at the suit of certain stockholders, as an alleged fraud on them, especially where they do not suggest any better way out of the company's financial embarrassment. *Carey* v. *Houston & T. C. R. Co.*, 45 *Fed. Rep.* 438.

At the time a plan of reorganization was agreed upon the railroad company was in the hands of a receiver, and decrees of foreclosure were rendered against the company. The stockholders were to surrender their certificates to a committee of reorganization, and the decrees of foreclosure were transferred to a trust company, the creditors surrendering their claims and accepting in lieu thereof debentures, and the receiver, under order of court, restored the property to the control of the company. *Held*, that the agreement for reorganization did not contravene any statute of the state, nor any principle of public policy. *Mobile & O. R. Co.* v. *Nicholas*, 57 *Am. & Eng. R. Cas.* 100, 98 *Ala.* 92, 12 *So. Rep.* 723.—QUOTING Hafer *v.* New York, L. E. & W. R. Co., 14 Ohio W. L. Bull. 68.

A plan for the reorganization of a railroad, by which the bondholders agree that the property shall be bought and held in trust for them, and new bonds issued to a greater amount than the old bonds, is not void, though there is nothing to show that the new bonds are to be used for corporation purposes. *Cushman* v. *Bonfield*, 36 *Ill. App.* 436; *affirmed in* 139 *Ill.* 219, 28 *N. E. Rep.* 937.—QUOTING Peoria & S. R. Co. *v.* Thompson, 103 Ill. 187.

And trustees who buy and hold such property for the bondholders cannot deny the interest of any of the bondholders so long as they hold title to the property. *Cushman* v. *Bonfield*, 36 *Ill. App.* 436; *affirmed in* 139 *Ill.* 219, 28 *N. E. Rep.* 937.

Plaintiff entered into a contract with several parties whereby he agreed, in consideration of $10,000, to assign and transfer the

rights and franchises of two projected railroad lines, of which he was president, and, upon the organization of a new company, to take four tenths of its capital stock, and to pay on the first assessment $20,000, the other parties to take balance of stock and pay $30,000. A new company was organized, including among its members plaintiff and three other parties to the agreement. Articles of incorporation were adopted, and preliminary business transacted. At this organization plaintiff made no mention of said contract, did not ask its adoption or ratification, or that it be made the basis of a contract between them. At a subsequent opening of subscription books, plaintiff subscribed for 200 shares, amounting to $20,000, to be paid for in cash. He paid $10,000, receiving certificates of stock for that amount, and brought suit for the balance subscribed, claiming to have paid therefor by a transfer of the franchises of his two companies. *Held*, that the contract was illegal and void, and even if binding it did not become a contract between plaintiff and the new company, and he was not thereby entitled to any credit on his stock account by virtue thereof. *Clarke* v. *Omaha & S. W. R. Co.*, 4 *Neb.* 458.

2. Reorganization by legislative act.—By Mass. Act of 1872, ch. 342, the charter of one company was repealed, and another company was incorporated, with power to take the tracks of the former company upon making compensation. The act of 1876, ch. 229, authorized certain railroad corporations to hold stock in the new company, and provided that nothing in the act contained should be construed as affecting the legal rights of the old company. *Held*, that this act could not be construed as a legislative recognition that the last-named company had at the time an existence or any legal rights. *Thornton* v. *Marginal Freight R. Co.*, 123 *Mass.* 32.

An act of the legislature which provides that, in a certain contingency, the stockholders of an existing corporation shall reorganize as a new corporation, which changes the amount of the capital stock, and provides for the stockholders in the existing corporation by reserving a certain amount of the stock for them in the corporation to be formed, creates a new corporation, and is not an amendment to the charter of the one already in existence. In such case it is immaterial that the new corporation is called by the same name as the old one. *Marshall* v. *Western N. C. R. Co.*, 20 *Am. & Eng. R. Cas.* 578, 92 *N. Car.* 322.

Quære whether the legislature has power to compel the stockholders in the old corporation to reorganize as a new company; but if they do so voluntarily, the new corporation is regularly and legally formed. In such case, the organization of a new corporation at once dissolves the old one. If there are creditors of the dissolved corporation under these circumstances, they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. *Marshall* v. *Western N. C. R. Co.*, 20 *Am. & Eng. R. Cas.* 578, 92 *N. Car.* 322.

Under the Pa. Act of April 8, 1861, providing for the reorganization of corporations whose property and franchises are sold at judicial sale, the organization of the corporation, and the selection of its officers, are to be done by the purchasers; but all subsequent acts are to be done by the corporation itself. *Com.* v. *Central Pass. R. Co.*, 52 *Pa. St.* 506.—DISTINGUISHED IN Metz *v.* Buffalo, C. & P. R. Co., 58 N. Y. 61.

An act provided for the reorganization of a railroad company, and, *inter alia*, directed the issuance of certificates of stock to the "purchasers." *Held*, that this conferred the right to issue the certificates to the purchasers, or to such persons as they might direct. *Com.* v. *Central Pass. R. Co.*, 52 *Pa. St.* 506.

An act for the reorganization of a corporation whose property had been sold, directed the purchasers in organizing the new company to "determine the amount of the capital stock." *Held*, not to mean that they should ascertain the actual cash value put in by the purchasers of the property; but that they should determine the amount of the capital stock of the new organization, and the par value of the shares. *Com.* v. *Central Pass. R. Co.*, 52 *Pa. St.* 506.

3. Sale by purchasers to existing corporation.—The provisions of N. Y. Railroad Act of 1854, as amended, authorizing the purchasers on foreclosure sale of the property and franchise of a railroad to organize a new corporation, do not prevent a sale or transfer by such a purchaser to a corporation already existing and capable of holding the property and exercising the franchises; the authority so given by said provisions was intended to meet a case

where there is no such existing corporation. It is not essential for the purchasing company to file a map of the line thus acquired where it is already constructed. *People* v. *Brooklyn, F. & C. I. R. Co.*, 9 *Am. & Eng. R. Cas.* 454, 89 *N. Y.* 75; *affirming* 24 *Hun* 529, *mem.*

A contract by which bondholders agree to buy in railroad property at a foreclosure sale, and to transfer it to a new company, of which one of the bondholders is a director, the road to be used in connection with the road of the purchasing company, is not such a contract as is provided for by N. Y. Act of 1873, ch. 710, which authorizes the purchaser of railroad property, sold under a mortgage or decree, to associate with him other persons and form a new corporation to maintain and operate the road. *Munson* v. *Syracuse, G. & C. R. Co.*, 29 *Am. & Eng. R. Cas.* 377, 103 *N. Y.* 58, 8 *N. E. Rep.* 355, 7 *N. Y. S R.* 863.—REVIEWING Aberdeen R. Co. *v.* Blakie, 2 Eq. R. 1281.

4. Rights and remedies of stockholders.*—(1) *In general.*—There is no priority between holders of reissued certificates of preferred stock in a railroad, and a new company organized by purchasers of the road at a second mortgage foreclosure sale, nor between said certificate holders and creditors of the old company, so that they can maintain a bill against either. *Sullivan* v. *Portland & K. R. Co.*, 94 *U. S.* 806, 16 *Am. Ry. Rep.* 181; *affirming* 4 *Cliff.* 212.

Where the legal rate of interest is six per cent., holders of certificates of stock by which the corporation agrees to pay ten per cent. cannot maintain a bill to set aside a foreclosure sale after a reorganization, and to recover an additional four per cent. after the legal rate has been paid. *Sullivan* v. *Portland & K. R. Co.*, 4 *Cliff.* (*U. S.*) 212; *affirmed in* 94 *U. S.* 806, 16 *Am. Ry. Rep.* 181.

A large number of certificates of stock was placed in the hands of agents to be transferred to and registered in their names, which was revocable at the will of the grantor. The petitioner claimed to stand in the place of original grantors. *Held*, that this only enabled him to revoke the power in respect to the identical certificates which the original grantor had put into the hands of the agents, or in respect to certificates representing the original ones. *Erie R. Co.* v. *Heath*, 9 *Blatchf.* (*U. S.*) 226.

Where each of such certificates bears a number, it is to be supposed that the particular certificates which each grantor placed in the hands of the agents can be identified; but whether this be so or not any person who can identify the certificates he deposited is entitled to call upon the agents for such certificates, and to claim that no one else shall call upon them for such certificates. *Erie R. Co.* v. *Heath*, 9 *Blatchf.* (*U. S.*) 226.

Trustees were appointed to buy in railroad property at a foreclosure for the benefit of the creditors and stockholders, with a view of reorganizing, with the agreement that such trustees were to issue certificates of stock in the new company to such creditors and stockholders, "to be and remain a first claim upon the property of the corporation after its indebtedness." *Held*, that this referred both to existing and future indebtedness, and that such stockholders had no prior lien over subsequent mortgage creditors. *King* v. *Ohio & M. R. Co.*, 9 *Biss.* (*U. S.*) 278.

Where, upon the eve of foreclosure under a consolidated trust deed, a plan for purchase and reorganization was drafted by a committee of the consolidated bondholders, providing that the old stock should be deposited, and that the new company should issue first mortgage bonds bearing six per cent. interest, to be used only to fund the past-due and maturing interest on the prior bonds, and for permanent construction and improvement; the par value of outstanding consolidated bonds to be represented by preferred seven per cent. stock, and the outstanding common stock to be represented by common stock; holders of common stock not to be entitled to shares or to vote until preferred stock had been paid seven successive annual dividends of seven per cent., and the property was paid in and a reincorporation effected on this basis, the new charter providing that the funds applicable to the payment of dividends on preferred stock was the net income after paying interest on prior bonds, expenses and equipments, etc., any surplus after paying seven per cent. to stand over until next dividend day; and at the first meeting of the new board a resolution was passed to the effect

* New company cannot sell out without the consent of dissenting shareholders. Rights of bondholders with notice, see 24 AM. & ENG. R. CAS. 199, *abstr.*

that under operating expenses only such improvements and additions should be included as were necessary to keep the property efficient, and that all beyond this should be provided for out of funds other than net earnings — the directors were bound by the provisions of the agreement and by their charter as interpreted by the resolution and the common stock, and the common stockholder was entitled to representation upon its being made to appear that the earnings and income which had been wrongfully converted to pay for improvements and extensions would, if applied to dividends, be sufficient to pay five successive dividends of seven per cent. each on the preferred stock. *Mackintosh* v. *Flint & P. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 340, 34 *Fed. Rep.* 582.—APPLYING St. John *v.* Erie R. Co., 22 Wall. (U. S.) 149; Ryan *v.* Leavenworth, A. & N. W. R. Co., 21 Kan. 365. DISTINGUISHING New York, L. E. & W. R. Co. *v.* Nickals, 119 U. S. 296, 7 Sup. Ct. Rep. 209. FOLLOWING Memphis & L. R. R. Co. *v.* Dow, 120 U. S. 287, 7 Sup. Ct. Rep. 482. QUOTING Sage *v.* Central R. Co., 99 U. S. 343.

Where, pursuant to an agreement for purchase and reorganization of a railroad company which was about to be foreclosed under a consolidated deed of trust, the company conveyed to the trustees of the separate mortgage of its land grant all its equities in trust to pay all liens on the lands and to turn in the balance to the trustees, and upon the sale of the property under such last trust, and its being paid in by the purchasing committee, these equities passed with it, and the trustees paid all except one of the liens for $300,000, partly secured on other property, for which charge for a period of five years they had on hand fourfold security—*held*, that as between preferred and common stock, the latter of which was, under the charter, to be debarred from participating until the former had been paid successive dividends of seven per cent. during those five years, the surplus after providing for the security of the $300,000 lien, as well as the premiums received by the company on first mortgage bonds issued and sold by it, was to be applied to dividends. *Mackintosh* v. *Flint & P. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 340, 34 *Fed. Rep.* 582.

In such case a steel-rail betterment as well as money spent on steamers owned by the company to make them more efficient, and money borrowed and expended in the purchase of new freight engines and coal cars, should not be charged to operating expenses; and in the event of no depreciation account being kept, the expense account should not be charged with an estimated depreciation, where the money so charged was not actually spent upon repairs. *Mackintosh* v. *Flint & P. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 340, 34 *Fed. Rep.* 582.

Where stock of an expiring corporation merged into the stock of a new one organized as its successor, acquiring its franchises and assuming its obligations, a provision inserted in the charter of the new company, forfeiting dividends not claimed within three years from the time when declared, is not binding upon the old stockholders except from the time when, expressly or by implication, they consent thereto by assuming the quality of stockholders in the new company. *Armant* v. *New Orleans & C. R. Co.*, 41 *La. Ann.* 1020, 7 *So. Rep.* 35.

(2) *In New York.* — Plaintiff, a stockholder in a railroad company, filed a complaint alleging that the property of the company had been sold under a foreclosure decree, and was bid in by a committee of bondholders; that a portion of the bondholders disputed the validity of the sale and litigation arose which resulted in an arrangement by which the stockholders withdrew all opposition and were accorded the right to take stock in a new company to be organized, but that the option to do so was to be exercised in thirty days; and that plaintiff had no knowledge of the agreement until after the expiration of the thirty days, when he tendered performance on his part and demanded new stock. *Held*, that a demurrer to the complaint was properly sustained. If the foreclosure sale was valid, all of plaintiff's legal rights were cut off; and if invalid, his right to attack it was not affected or impaired by the agreement, unless he elected to come in and ratify it, in which case he was bound to adopt it and could not vary its terms. *Thornton* v. *Wabash R. Co.*, 81 *N. Y.* 462.

N. Y. Act of 1853, ch. 502, § 2, which provides that a stockholder of a railroad company may, within six months after a sale of its road under foreclosure, on paying to the purchaser a proportion of the price paid equal to the proportion his share bears to the whole stock of the company, be entitled to have the same relative amount of stock

or interest in the company or property, was repealed by the act of 1854, amending the general railroad law of 1850, and by the act of 1874, ch. 430, entitled an act "to facilitate the reorganization of railroads sold under mortgages." *Pratt* v. *Munson*, 84 *N. Y.* 582.

Where the property and franchises of a railroad corporation are purchased on foreclosure sale in pursuance of a plan for the readjustment of the respective interests of the mortgage creditors and stockholders as authorized and provided for by the "act to facilitate the reorganization of railroads sold under mortgage," the foreclosure becomes absolute against the corporation, and all its rights and the proprietary interests of the stockholders are as absolutely barred and cut off as if the purchasers had purchased for themselves. The plan has reference only to the new corporation to be formed and to interests therein. *Vatable* v. *New York, L. E. & W. R. Co.*, 17 *Am. & Eng. R. Cas.* 268, 96 *N. Y.* 49; *reversing* 31 *Hun* 316, *mem.*, *which affirmed* 11 *Abb. N. Cas.* 133, 9 *Abb. N. Cas.* 271.—FOLLOWED IN Carpenter *v.* New York, L. E. & W. R. Co., 99 N. Y. 607.

While, therefore, the stockholder has the right under said act (section 3) to assent to the plan "at any time within six months" after the organization of the new company, and by complying with the terms and conditions becomes "entitled to his *pro rata* benefit therein," it is a condition precedent that he must signify his assent within the time specified; if he fails so to do, he forfeits the right, and against such a forfeiture the courts can give no relief. *Vatable* v. *New York, L. E. & W. R. Co.*, 17 *Am. & Eng. R. Cas.* 268, 96 *N. Y.* 49; *reversing* 31 *Hun* 316, *mem.*, *which affirmed* 11 *Abb. N. Cas.* 133, 9 *Abb. N. Cas.* 271.—FOLLOWED IN Carpenter *v.* New York, L. E. & W. R. Co., 99 N. Y. 607. REVIEWED IN Hoopes *v.* Corbin, 1 N. Y. S. R. 212.

Defendant, who had purchased property of a railway company on foreclosure, published an offer to exchange stock in a new company for stock in the old company, if the same should be deposited before a date named, with a transfer and power of attorney signed in blank thereon, with a certain trust company which would issue receipts therefor. Plaintiff, who had a certificate for stock in the old company presented it to the trust company, which declined to take it on the ground that it was not good. *Held*, that plaintiff having done nothing until after the expiration of the time mentioned in the offer could not maintain an action for breach of an expressed contract. *Schorestene* v. *Iselin*, 69 *Hun* (*N. Y.*) 250.

Where there is nothing unlawful about a plan for the reorganization of a railroad, a stockholder who acquires his stock from one who was present when the plan was made and voted for it, cannot insist on the plan as *ultra vires*, or ask for an injunction to restrain carrying it out. *Hollins* v. *St. Paul, M. & M. R. Co.*, 29 *N. Y. S. R.* 208, 9 *N. Y. Supp.* 909.

Certain stockholders filed a bill to vacate a foreclosure, and to set aside an agreement to reorganize a railroad company, on the ground that an assessment fixed by a trust company to be paid by the old stockholders, as a condition for obtaining stock in the new company, was excessive; but it appeared that the trust company had the power to fix the assessment, and there was no charge of bad faith or a lack of vigilance; but, on the other hand, the president of the trust company made an affidavit that the assessment was made only after a thorough investigation into the matters. *Held*, that the plaintiffs were not entitled to an injunction to restrain an issue of new stock. *Gernsheim* v. *Olcott*, 31 *N. Y. S. R.* 321, 10 *N. Y. Supp.* 438; *reversing* 7 *N. Y. Supp.* 872.

5.— payments on account of stock. —The property and franchises of a company were purchased on foreclosure sale by certain trustees in pursuance of a plan which, after providing for the organization of a new company and the transfer to it of the property purchased, prescribed the terms and conditions upon which the old stockholders could become stockholders in the new company. Among other things they were required to make certain payments upon their stock in the old company before they could exchange it for the new stock, which payments were required to be made "before the expiration of such time as may be lawfully limited by the parties." A time was fixed which was more than six months after the organization of the new company, and notice thereof was given by publication in many newspapers in this and other countries. In actions brought by stockholders in the old company, who failed to make payments as prescribed within the time so fixed, to be allowed to come in and

to become stockholders in the new company, and who claimed that they had received no notice of the time fixed—*held*, that the plaintiffs were chargeable with notice of the law securing them the right to assent within six months, and also with the general features of the scheme of readjustment of interests, as they were embodied in the articles filed for the organization of the new company; that the projectors of the plan were not bound to provide for any notice; that the plan contained no provision for notice, and none could be implied, it being left simply to the discretion of the trustees whether or not to give any notice; and, therefore, that plaintiffs had no right of action. *Vatable* v. *New York, L. E. & W. R. Co.*, 17 *Am. & Eng. R. Cas.* 268, 96 *N. Y.* 49; *reversing* 31 *Hun* 316, *mem.*, *which affirmed* 11 *Abb. N. Cas.* 133, 9 *Abb. N. Cas.* 271. — FOLLOWED IN Carpenter *v.* New York, L. E. & W. R. Co., 99 N. Y. 607.

It seems, that assuming that the plan required the trustees to give notice of the time fixed, no actual notice served upon all the stockholders could have been intended and none such was requisite; and that notice by publication, such as was given, was sufficient. *Vatable* v. *New York, L. E. & W. R. Co.*, 17 *Am. & Eng. R. Cas.* 268, 96 *N. Y.* 49; *reversing* 31 *Hun* 316, *mem.*, *which affirmed* 11 *Abb. N. Cas.* 133, 9 *Abb. N. Cas.* 271.—FOLLOWED IN Carpenter *v.* New York, L. E. & W. R. Co., 99 N. Y. 607.

A trust company was acting as agent in the reorganization of a railroad, and its officers made an assessment, in pursuance of the plan of reorganization on the stockholders of the old company, but the assessment was invalid because not authorized by the directors of the trust company. *Held*, that the power of the trust company to make a future assessment would not be affected by this unauthorized assessment. *Gernsheim* v. *Central Trust Co.*, 16 *N. Y. Supp.* 127, 61 *Hun* 625, *mem.*, 40 *N. Y. S. R.* 967.

A reorganization committee purchased railroad property at a foreclosure, under an agreement made by the bondholders, which empowered the committee to give the old stockholders privilege of exchanging their stock for stock in the new company, on the payment of certain assessments; but if such stockholders declined or failed to pay such assessments, the privilege of receiving new stock should be cut off, and it should be ratably distributed among others who had paid their assessments, or if they did not accept, that it might be allotted by the committee to other persons willing to make the payments. *Held*, that a failure to pay the assessments terminated the rights of the stockholders, and no action on the part of the committee was necessary to terminate such rights, and immediately the rights of others intervened, which the committee could not ignore. *Dow* v. *Iowa C. R. Co.*, 70 *Hun* 186, 53 *N. Y. S. R.* 898, 24 *N. Y. Supp.* 292; *affirmed in* 144 *N. Y.* 426, 39 *N. E. Rep.* 398.

Plaintiff, a complaining stockholder, alleged that the committee received assessments as late as the date when the plaintiff tendered his assessments upon the stock which he represented; but it appeared that notes for these assessments had been given at a prior time, which the committee had accepted. *Held*, that the question whether the committee had a right to accept the notes, or not, could not be considered, where plaintiff did not tender his assessments in time. Even if the committee did wrong in accepting the notes, a court would not compel it to do wrong again in accepting plaintiff's payments after the time. *Dow* v. *Iowa C. R. Co.*, 70 *Hun* 186, 53 *N. Y. S. R.* 898, 24 *N. Y. Supp.* 292; *affirmed in* 144 *N. Y.* 426, 39 *N. E. Rep.* 398.

6. —— cancellation of unpaid subscriptions.—Ind. Rev. St. of 1881, § 3945 *et seq.*, entitled "An act to authorize the sale of railroads, to enable purchasers of the same to form corporations, and to exercise corporate powers," provides that, in a case of a foreclosure sale of any railroad, the purchaser may form a corporation with power to operate the road. Section 3947 provides that such purchasing corporation shall possess all the powers, rights, etc., which were possessed by the vendor company, and shall have power, at any time after the formation of the corporation, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlement with any stockholder or creditor as may be deemed expedient, provided that all subscribers to the original stock shall be released from all unpaid subscriptions which shall not have been previously settled or arranged by agreement or compromise. *Held*, that it was intended to protect subscribers by canceling all obligations to pay unpaid subscriptions to such

stock in all cases where there shall not have been an adjustment by agreement or compromise. *Hamilton County Com'rs* v. *State*, 36 *Am. & Eng. R. Cas.* 210, 115 *Ind.* 64, 4 *N. E. Rep.* 589, 17 *N. E. Rep.* 855.

That act was not intended to subserve any mere temporary purposes, its terms being general, and applicable to all purposes arising subsequently to its passage. The proviso protects all subscribers to stock in railway companies, although at the time of its passage there was no law authorizing municipal corporations to vote aid and become stockholders in railway companies. *Hamilton County Com'rs* v. *State*, 36 *Am. & Eng. R. Cas.* 210, 115 *Ind.* 64, 4 *N. E. Rep.* 589, 17 *N. E. Rep.* 855.

7. Rights of bondholders—Deposit of bonds.—(1) *In general.*—A plan for reorganization of a railroad company, sold under a foreclosure, provided that certain bondholders might come in and share in the property, which otherwise would have been cut off. *Held*, that they thereby acquired rights which a court of equity would protect. *Riker* v. *Alsop*, 27 *Fed. Rep.* 251.

Upon the reorganization of a railroad corporation by mortgage bondholders after foreclosure, some of the bondholders can restrain the issue to another of more shares than he is entitled to, which have been voted to him, although there is no overissue of bonds under the mortgage. *Lincoln Nat. Bank* v. *Portland*, 43 *Am. & Eng. R. Cas.* 463, 82 *Me.* 99, 19 *Atl. Rep.* 102.

A railroad mortgage provided for the organization of a new company, if the mortgage was foreclosed, the new company to have the same amount of capital stock as the mortgage debt, to be composed of the bondholders, who were to receive stock in the new company in exchange for their bonds, at the rate of ten shares for each $1000 bond. Before a foreclosure another company guaranteed the interest on a portion of these bonds, and purchased some of them below par, but reissued them with the above guaranty; after which the company issuing the bonds agreed that interest thus guaranteed and paid should constitute a lien on the company's property. *Held*, that the holders of interest warrants or coupons were not entitled to stock under the above plan for reorganization. *Child* v. *New York & N. E. R. Co.*, 2 *Am. & Eng. R. Cas.* 329, 129 *Mass* 17

A committee to represent and protect bondholders in the sale of a railroad and in the reorganization of the company, addressed a circular to the bondholders calling upon them to deposit their bonds with a certain trust company and to pay certain assessments to meet expenses of the sale and reorganization. Plaintiff offered to deposit her bonds and assessment, but the trust company refused to receive them, and referred her to the committee, whose secretary took the bonds and assessment, and gave the committee's receipt therefor, which he delivered to the trust company and took a receipt in his own name. After the reorganization was effected the trust company refused to recognize the receipt or to return the bonds, or issue new ones in their place, claiming that the bonds were not deposited by her with the trust company. *Held*, that she was entitled to relief. *Hitchcock* v. *Midland R. Co.*, 1 *Am. & Eng. R. Cas.* 220, 33 *N. J. Eq.* 86; *affirmed in* 34 *N. J. Eq.* 278.

Certain persons projected the formation of a new railroad company, founded on a foreclosure sale of a company already existing, and published a scheme of reorganization and it directed the holders of first mortgage bonds, who wished to join in such reorganization, to deposit their bonds with a trust company, and appointed a permanent committee, having a president and secretary, with a place of business. A bondholder presented his bond to the trust company, but, on account of some irregularity, was referred to the committee. The president and secretary of such committee accepted the bond. *Held*, that such acceptance bound the new company, the committee having been held out to the public as its general agent in the business of organizing the new company. *Midland R. Co.* v. *Hitchcock*, 14 *Am. & Eng. R. Cas.* 598, 37 *N. J. Eq.* 549.

Where a railroad corporation reorganizes under Ohio Act of April 11, 1861, and, in the agreement therefor, it is stipulated that certain bonds of the original corporation shall be assumed by the new company, and the holder thereof entitled to vote at all meetings of stockholders, upon conditions specified, which he performs, the new company becomes liable to pay the bonds, and the holder thereof entitled to vote, without further action on the part of the new company. *State ex rel.* v. *McDaniel*, 22 *Ohio St.* 354.

An executory agreement to sell and de-

liver such bonds to the new corporation, subject to the ratification of its directors and stockholders, does not divest the holder of his title, nor deprive him of the privilege of voting, until such ratification. *State ex rel.* v. *McDaniel*, 22 *Ohio St.* 354.

(2) *In New York.*—Defendant and others had been a committee of the bondholders of a company to effect a reorganization; failing in this, they, acting for themselves and the owners of the bonds in their hands, entered into a contract with defendant by which they agreed to sell, and he to purchase, the bonds of the company at fifty cents on a dollar for the first mortgage landgrant bonds, one third cash, the balance "in satisfactory paper." It was further agreed that all holders of said bonds, who had registered them, should have the option of accepting the same price and terms. In an action upon the contract by plaintiff, who held some of the bonds but who was not one of the parties to the agreement—*held*, that defendant did not agree to purchase of each bondholder, nor to pay to each the purchase price, but to purchase of and to pay defendant and others, the parties named in the contract, and through them only could the option given to other bondholders be consummated; that the agreement of defendant was, in substance, to purchase of the other parties to the contract the bonds they then held as agents or otherwise, and all that they might thereafter obtain by the acceptance on the part of the holders of the option named; and that, therefore, plaintiff could not recover. *Johnson* v. *Morgan*, 68 *N. Y.* 494.

Where bondholders and other creditors of a company agree to purchase the road at a sale and organize a new company, and to surrender their bonds for bonds to be issued by the new company, a bondholder who has signed the agreement, but fails to surrender his bonds upon notice until after the road is purchased and the new company formed, cannot insist on receiving new bonds. *Carpenter* v. *Catlin*, 44 *Barb.* (*N. Y.*) 75, 29 *How. Pr.* 423.

The contract in such case does not require a personal demand upon stockholders to surrender their bonds. *Held*, that a written notice requesting a deposit of the bonds before a certain day is a sufficient demand. *Carpenter* v. *Catlin*, 44 *Barb.* (*N. Y.*) 75, 29 *How. Pr.* 423.

The plan for the reorganization of a railroad company provided for the surrender of outstanding bonds to a committee, and new ones to be issued in their stead, and further provided that if the plan of reorganization was changed then any bondholder might withdraw his bonds upon "payment of his share of expenses therein incurred in carrying out the agreement." *Held*, that in the event of a change in the plan of reorganization, a bondholder had a right to withdraw his bonds upon payment of expenses up to the time of giving notice of his intention to withdraw, and he was further entitled to an injunction to restrain the committee from further dealing with the bonds. *Kennedy* v. *Kennedy*, 70 *Hun* 257, 24 *N. Y. Supp.* 424.

8. Bondholder, when entitled to an account.—After the property of a railroad company had been sold, and a new company organized, a holder of bonds in the old company, which were not surrendered in the reorganization, filed a bill against both companies for an account. *Held*, that the rights of the old company were all extinguished by the foreclosure, and no further relief could be had against it, and it was not a necessary party; therefore a demurrer to the bill on its part is properly sustained. *Brooks* v. *Vermont C. R. Co.*, 17 *Am. & Eng. R. Cas.* 276, 22 *Fed. Rep.* 211.

In such case the new company filed a plea that the road was in the hands of a receiver appointed by a state court, who must account to that court, and not to the circuit court of the United States, in which plaintiff's bill was filed. *Held*, that the plea was not sufficient. The bill was filed to reach the income which the corporation may have received for the plaintiff, and not to touch the property itself, or in any way to interfere with the possession of the receiver. *Brooks* v. *Vermont C. R. Co.*, 17 *Am. & Eng. R. Cas.* 276, 22 *Fed. Rep.* 211.

9. Rights of non-assenting bondholders.*—(1) *In general.*—Where a railroad company fails and a mortgage has to be foreclosed, the legislature has full power to authorize the bondholders, by a vote of a majority, and with an equal opportunity to all to reorganize as a new corporation, with the rights of the old corporation, such authorized action being merely a mode of

* Reorganization agreement. Rights of minority bondholders, see 57 AM. & ENG. R. CAS. 171, *abstr.*

securing the performance of the paramount public trust. And a dissenting minority have no private rights that can be successfully asserted against such action. *Gates* v. *Boston & N. Y. A. L. R. Co.*, 24 *Am. & Eng. R. Cas.* 143, 53 *Conn.* 333, 5 *Atl. Rep.* 695.—QUOTING Canada Southern R. Co. *v.* Gebhard, 109 U. S. 534.

The assent of the statutory majority of a class to a scheme of arrangement under the Railway Companies Act, 1867, cannot be dispensed with under section 15, if any existing right of that class is prejudicially affected, it being for them and not for the court to consider whether the scheme gives them such benefits that their rights on the whole are not prejudicially affected. *In re Neath & B. R. Co.*, [1892] 1 *Ch.* 349.

Where a bondholder appoints an agent to represent him in a reorganization plan, and the agent has voted the bonds with full knowledge on the part of the bondholder, and he has accepted his share of the bonds of the new company, and has offered to buy and sell the same, and has brought suit on them, he thereby ratifies the act, and has no standing in a court of equity to have the proceedings annulled and the present organization dissolved, where there is no proof of fraud or imposition. *Matthews* v. *Murchison*, 9 *Am. & Eng. R. Cas.* 693, 15 *Fed. Rep.* 691.

(2) *In New York.* —A scheme of reorganization which contemplates the substitution of three mortgages for a first mortgage and some other obligations of the company, one of the mortgages being made a first lien on all the property of the company, is not binding upon a first mortgage bondholder who has never assented thereto, and the trustees under the first mortgage cannot divert to the new securities funds pledged by the first mortgage. *Hollister* v. *Stewart*, 38 *Am. & Eng. R. Cas.* 599, 111 *N. Y.* 644, 19 *N. E. Rep.* 782. — DISTINGUISHING Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527. REVIEWING Stevens *v.* Mid-Hants R. Co., L. R. 8 Ch. 1064.

Where a bondholder who refused to concur in a scheme of reorganization claims, in an action against the trustees for misapplication of funds, that the funds should be applied as if the whole of the assenting mortgage bonds had been extinguished, and that the whole funds should be applied to the few non-assenting bonds alone, a finding that the trustees, though acting erroneously, proceeded in good faith, is sufficiently supported, and judgment is properly rendered against the trustees only as such, and not personally. *Hollister* v. *Stewart*, 38 *Am. & Eng. R. Cas.* 599, 111 *N. Y.* 644, 19 *N. E. Rep.* 782.

Upon foreclosure of a mortgage of a Kentucky railroad corporation to secure its bonds which, to the amount of $994,000, were then outstanding, the property was bid in by defendants under an agreement that they should purchase as trustees for the benefit of the bondholders, who had deposited their bonds with a trust company, receiving receipts therefor. In case defendants should fail to sell they were to organize a new corporation, the stock therein to be issued to the holders of the receipts, "in proportion to the number of bonds deposited, * * * upon the surrender * * * of such receipts; that defendants "shall have full power and authority to make due provisions, in their discretion, in case of any defect of their express powers, and shall, nevertheless, proceed to carry out the true intent, meaning, and purpose of the agreement by conforming as near as may be to the provisions thereof." Also, that "they shall determine all questions that may arise concerning the construction and effect of any provisions" of the agreement, and that their determination shall be final and conclusive." Having failed to sell within the time designated defendants filed articles of incorporation, which fixed the capital stock of the new corporation at the same amount as the stock of the old company, i. e., $2,000,000; of this amount $994,000 was to be issued to the holders of the receipts in consideration of the conveyance to it of the property; the residue to be disposed of by its board of directors. By the laws of Kentucky the purchasers of a railroad at a foreclosure sale are authorized to become incorporated, the corporators to provide in their articles for the issue of paid-up capital stock not to exceed "the original cost of the construction of the railroad and equipment, and such sums as may be necessary to complete the same." Defendants bid in the property at $750,000, and fixed its cost or value at the amount of the bonds, and the new articles provided for the completion of the road. *Held*, in an action by a bondholder for an accounting that, in the absence of evidence of bad faith, defendants were not guilty of any violation

of the duty they owed the bondholders for which they could be held liable. *White* v. *Wood*, 51 *Am. & Eng. R. Cas.* 73, 129 *N. Y.* 527, 29 *N. E. Rep.* 835, 42 *N. Y. S. R.* 174; *reversing* 38 *N. Y. S. R.* 338, 13 *N. Y. Supp.* 631.

A portion of the relief asked for in the complaint and granted by the judgment of the court below was that defendants be restrained from conveying the property to the new corporation. It appeared that the conveyance was made by deed executed and delivered before the commencement of the action. *Held*, that this portion of the judgment was ineffectual for any purpose. *White* v. *Wood*, 51 *Am. & Eng. R. Cas.* 73, 129 *N. Y.* 527, 29 *N. E. Rep.* 835, 42 *N. Y. S. R.* 174; *reversing* 38 *N. Y. S. R.* 338, 13 *N. Y. Supp.* 631.

The judgment also restrained the issuing of the stock of the new company over and above the $994,000. Neither said company nor any of its directors was made a party. *Held*, that this portion of the judgment also was ineffectual. *White* v. *Wood*, 51 *Am. & Eng. R. Cas.* 73, 129 *N. Y.* 527, 29 *N. E. Rep.* 835, 42 *N. Y. S. R.* 174; *reversing* 38 *N. Y. S. R.* 338, 13 *N. Y. Supp.* 631.

After foreclosure suit had been commenced against a consolidated railroad, certain stockholders united under a plan to buy the road and to form a new company, each to share in a *pro rata* distribution of stock and bonds of the new company; and defendants were appointed a committee to carry out the scheme. Plaintiff, who was a bondholder, knew nothing of the proceedings for nine years after the agreement was entered into and about six years after a decree, when she promptly resorted to the necessary measures to secure any advantages accruing from the plan adopted. *Held*, that the fact of her ignorance would not, in itself, entitle her to relief. *Hoopes* v. *Corbin*, 1 *N. Y. S. R.* 212.—REVIEWING Vatable *v.* New York, L. E. & W. R. Co., 96 N. Y. 49.

A new company was to be organized for the benefit of bondholders uniting or subscribing, which all might do. Subsequently an agreement was entered into by which the committee might receive signatures from bondholders at any time after the sale, "upon such terms as to the committee might seem meet." Under this authority the committee provided that securities thereafter issued should be subject only to the delay necessary in procuring funds deposited in court by the committee for the redemption of bonds. *Held*, that plaintiff was in time for making her demand some five years afterwards, where it appeared that the new securities were not all exhausted. *Hoopes* v. *Corbin*, 1 *N. Y. S. R.* 212.

The statutes of the state sanction the reorganization of railroad corporations, and the protection of large railroad property, and the interests of the parties, may make such a proceeding proper; but in adopting a plan of reorganization there must be no discrimination against those who do not approve of the plan. *De Betz's Petition*, 9 *Abb. N. Cas.* (*N. Y.*) 246.

10. Rights of creditors — Setting aside foreclosure.—The property of a railroad corporation is vested in its trustees, to be preserved by them as a fund to secure the creditors of the corporation. Where the persons interested in one railroad corporation form a new one, which choose for its officers the officers of the old corporation, and the persons owning the stock of the old corporation receive in exchange therefor stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation. *San Francisco & N. P. R. Co.* v. *Bee*, 48 *Cal.* 398.—FOLLOWING Martin *v.* Zellerbach, 38 Cal. 300.

After a mortgage on a railroad had been foreclosed and the property bought in for the benefit of bondholders, most of whom united in a plan for reorganization, and after other creditors had obtained judgments subsequent to the mortgage, a decree by such judgment creditors setting aside the foreclosure and subjecting the property to payment of other judgments, only renders the foreclosure invalid as to such judgment creditors. Bondholders who voluntarily take stock in the new company cannot again set up a claim under the mortgage, nor can the mortgage trustee maintain a second bill to foreclose for the benefit of the bondholders. *Barnes* v. *Chicago, M. & St. P. R. Co.*, 8 *Biss.* (*U. S.*) 514.

A consent decree for the foreclosure and sale of a railroad, looking to a reorganization, will not be set aside on the application of certain stockholders, merely because the principal of one mortgage on the road is not yet due, where it appears that the sums due on other demands are so large as to

make a foreclosure inevitable, in the absence of proof of fraud, or of any offer on the part of the complaining stockholders to do equity by offering to pay the floating indebtedness of the company, and where they have not been diligent in attacking the decree complained of, or the new organization. *Carey* v. *Houston & T. C. R. Co.*, 52 *Fed. Rep.* 671.

Wisconsin Rev. St., 1858, ch. 125, § 24, changes the law in respect to pleading performance of conditions precedent, by providing that it shall not be necessary to state the facts showing such performance, but that it may be stated generally that the party has duly performed all the conditions on his part. So where a railroad company enters into an agreement for a reorganization, providing that the unsecured creditors may receive stock in the new company on certain conditions, a complaint by a creditor which alleges "that he performed all the things, and kept and observed all the conditions by him to be kept, observed, and performed, to entitle him to stock," is sufficient on demurrer. *Smith* v. *Chicago & N. W. R. Co.*, 19 *Wis.* 326.

11. Rights of prior mortgagees.—A fraudulent purchaser of railroad property, upon being subsequently deprived of possession, cannot recover the cost of repairs or improvements, nor the amount of encumbrances discharged by him while in possession. *Milwaukee & M. R. Co.* v. *Soutter*, 13 *Wall.* (*U. S.*) 517, 4 *Am. Ry. Rep.* 277.

A railroad which was subject to two mortgages was sold on execution, and bought in by certain bondholders secured by the second mortgage on the road. They organized under the state law into a new corporation, and continued to operate the road for their own benefit. Afterwards suit was commenced to foreclose the first mortgage, and to prevent a sale the new company paid off the mortgage debt. Still subsequently a sale under the second mortgage was set aside as fraudulent, whereupon the new corporation filed a bill against the mortgagees in the first mortgage to compel them to pay back what they had paid in discharge of the mortgage, or to be subrogated to their decree of foreclosure. *Held*, that, as they were wrongfully in possession of the property, the bill could not be maintained. *Milwaukee & M. R. Co.* v. *Soutter*, 13 *Wall.* (*U. S.*) 517, 4 *Am. Ry. Rep.* 277.

12. Legal status of new corporation.—Under Ala. Act of Dec. 17, 1873, as amended March 20, 1875, "to constitute the purchaser of any railroad heretofore sold under authority of any law of this state, a body corporate and politic," the new corporation succeeds to the franchises, faculties, and powers of the old corporation precisely surrendered or lost; though as to ownership of property and liabilities, it is a new corporation. *Mobile & M. R. Co.* v. *Steiner*, 61 *Ala.* 559.

Where a company is chartered without any restriction as to the power to fix charges on freights, but subsequently accepts aid from the state under the condition that a limitation on its power shall be imposed, such limitation becomes part of its charter, and a new corporation formed by those purchasing the property, under the Alabama statute, succeeds only to the rights of the original company and is bound by such limitation. *Mobile & M. R. Co.* v. *Steiner*, 61 *Ala.* 559.

Where a company is incorporated by the general assembly of the state, and sold under a decree of a United States court, and the purchasers have organized themselves into a new corporation under Ga. Act of 1876, and filed their certificate of incorporation in the office of the secretary of state, it is not a foreign corporation. *Griffin* v. *Augusta & K. R. Co.*, 72 *Ga.* 423.

Under acts of the general assembly of 1845 and 1848, a city council consented to the location and construction of a railroad, and the erection of buildings for railroad purposes, within the city, on condition that the company would fill certain tide-flowed lands within a specified time. The filling was not wholly done by the company, and was completed by the city after the time had expired. *Held*, that a second company, successor to the original company, had no claim to such land as was filled by the city. *New York & N. E. R. Co.* v. *Providence*, 16 *R. I.* 746, 19 *Atl. Rep.* 759.

Where a company holding a charter that was, in express terms, not liable to amendment was sold out under orders of the court, and the purchasers formed a new corporation under a general law permitting it in such cases, with all the rights, immunities, etc., possessed by the old corporation previous to the sale under its charter, and amendments thereto, and of other laws of the state, the new corporation became sub-

ject to all laws on the statute book applicable to railroads at the date of their organization. *Columbia & G. R. Co.* v. *Gibbes*, 24 *So. Car.* 60.—REVIEWED IN Charlotte, C. & A. R. Co. *v.* Gibbes, 31 Am. & Eng. R. Cas. 464, 27 So. Car. 385, 4 S. E. Rep. 49.

The duty imposed by a charter in the first instance passes to and rests upon the successors to the first company. *Dyer County* v. *Chesapeake, O. & S. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 676, 87 *Tenn.* 712, 11 *S. W. Rep.* 943.

While an execution sale of the franchise and property of a railway company conveys the franchise and property to the purchaser, still the corporate existence of the sold-out company remains. *Gulf, C. & S. F. R. Co.* v. *Newell*, 38 *Am. & Eng. R. Cas.* 503, 73 *Tex.* 334, 11 *S. W. Rep.* 342.

13. Liability for debts of old company.—(1) *In general.*—A new railway company organized by authority of statute, by persons who had purchased the property of another company at a foreclosure sale, although declared to be clothed with the same powers as the original company, is not the same, and is not liable for its debts. *Vilas* v. *Milwaukee & P. du C. R. Co.*, 17 *Wis.* 497.—FOLLOWED IN Gilman *v.* Sheboygan & F. du L. R. Co., 37 Wis. 317.—*Smith* v. *Chicago & N. W. R. Co.*, 18 *Wis.* 17.—FOLLOWED IN Gilman *v.* Sheboygan & F. du L. R. Co., 37 Wis. 317.—*Gilman* v. *Sheboygan & F. du L. R. Co.*, 37 *Wis.* 317.—DISTINGUISHING Pfeifer *v.* Sheboygan & F. du L. R. Co., 18 Wis. 155. FOLLOWING Vilas *v.* Milwaukee & P. du C. R. Co., 17 Wis. 498; Smith *v.* Chicago & N. W. R. Co., 18 Wis. 17; Wright *v.* Milwaukee & St. P. R. Co., 25 Wis. 46.—*Central R. Co.* v. *Bunn*, 11 *N. J. Eq.* 336. *Vose* v. *Cowdrey*, 49 *N. Y.* 336.—DISTINGUISHING Chicago, R. I. & P. R. Co. *v.* Howard, 7 Wall. (U. S.) 392.

Plaintiff entered into a contract with two railroad companies to build a joint passenger station for them, each of the companies to pay a specified sum and he to pay a part of the cost himself, though there was nothing to show that he was to have any interest in the building. One of the companies, which failed to pay as it had agreed to do, had a mortgage upon all of its property when the contract was entered into, which was foreclosed, and the bondholders became the purchasers and reorganized the company. *Held*, that the new company, although it used the station, was not liable to plaintiff. *Moyer* v. *Ft. Wayne, C. & L. R. Co.*, 51 *Am. & Eng. R. Cas.* 68, 132 *Ind.* 88, 31 *N. E. Rep.* 567. — DISTINGUISHING Lake Erie & W. R. Co. *v.* Griffin, 107 Ind. 464; Bloomfield R. Co. *v.* Grace, 112 Ind. 128.

An agreement between the bondholders that a certain sum should be retained for the payment of a specified claim and other small claims, as might be required, the claim of the plaintiff not being specially designated, created no obligation in his favor. *Moyer* v. *Ft. Wayne, C. & L. R. Co.*, 51 *Am. & Eng. R. Cas.* 68, 132 *Ind.* 88, 31 *N. E. Rep.* 567.

Even if an obligation was created in favor of plaintiff, he would have no right to recover upon it, as it does not appear that the sum was not properly used to pay the claim specified or other claims, having rightful precedence of plaintiff's claim. *Moyer* v. *Ft. Wayne, C. & L. R. Co.*, 51 *Am. & Eng. R. Cas.* 68, 132 *Ind.* 88, 31 *N. E. Rep.* 567.

A law provided that, if the property of an existing railroad should be sold under a mortgage, the purchasers might organize another company. The sale was made and the purchasers organized with the same name, except "railroad" was changed to "railway." *Held*, that there was no privity between the two companies, and that the latter was not liable for the debts of the former. *Stewart's Appeal*, 72 *Pa. St.* 291. —DISTINGUISHING Chicago, R. I. & P. R. Co. *v.* Howard, 7 Wall. (U. S.) 392.

Stockholders in the original company, by an arrangement subsequent to the purchase and before the organization of the new company, were allowed, under the act of assembly, to become stockholders of the new company, without payment of any money. *Held*, that this did not impose on the new company the debts of the old. *Stewart's Appeal*, 72 *Pa. St.* 291.

Creditors of an individual attached his securities held by the old company; judgment was had against the company as garnishee. *Held*, that the officers of the company having charge of the securities, not being parties to the attachment, were not liable to plaintiffs. Their possession and acts were those of the company, and their liability, if any, was to the company, and not to plaintiffs. *Stewart's Appeal*, 72 *Pa. St.* 291.

A railroad property and franchises were bought at judicial sale by H. and others,

who subsequently, under the provisions of Pa. Act of April 8, 1861, organized a company. *Held*, that the company was not liable for the operation of the road during the time between the purchase and the organization of the company, unless the possession of the company was affirmatively shown. The presumption was that H. and not the company was in possession of the road between the date of the sale and the time of filing the certificate of organization. *Pittsburgh, C. & St. L. R. Co.* v. *Fierst*, 9 *Am. & Eng. R. Cas.* 437, 96 *Pa. St.* 144.

(2) *Statutory or contract liability.*—A corporation organized, pursuant to an agreement, sanctioned by competent legislative authority, is bound by whatever is thereby imposed in favor of third parties. A provision in such agreement, that the company shall assume all liabilities relating to certain lines of railroad transferred to it by such agreement, includes debts contracted in the construction of such lines of road, and secured thereon by a trust mortgage; and the company is liable for their payment to the holders thereof. *Welsh* v. *First Div. St. P. & P. R. Co.*, 25 *Minn.* 314.—REFERRING TO First Div. St. P. & P. R. Co. *v.* Parcher, 14 Minn. 297.—FOLLOWED IN Patterson *v.* First Div. St. P. & P. R. Co., 25 Minn. 324, *n.*

Under Minn. Sp. Laws, 1881, ch. 414, upon the purchase by the Winona & St. Peter railroad company, of the property and franchises of the Plainview railroad company, it succeeded to the liabilities of the latter company. *Plainview* v. *Winona & St. P. R. Co.*, 30 *Am. & Eng. R. Cas.* 259, 36 *Minn.* 505, 32 *N. W. Rep.* 745.

Under Tex. Rev. St. art. 4260, which defines the powers of purchasers of railroad property under execution, and declares them to be true owners of the property, the purchaser at an execution sale of such property does not assume any liability for former indebtedness not secured by a lien; and is not liable under an agreement made by the company to erect and maintain a depot. *Gulf, C. & S. F. R. Co.* v. *Newell*, 38 *Am. & Eng. R. Cas.* 503, 73 *Tex.* 334, 11 *S. W. Rep.* 342.

Where the property and franchise of a railroad have been sold under a deed of trust, and the purchasers reorganize, to prove a new promise by the reorganized company to pay a debt owing by the company as originally organized, there must be shown some action of the directors of the former from which the promise can be clearly inferred. The mere certificate of their secretary that the amount was due, would be insufficient to bind the company, unless it appeared he had been empowered to adjust the claim. *American C. R. Co.* v. *Miles*, 52 *Ill.* 174.

An act of the legislature provided that the trustees in a railway deed of trust, and the *cestuis que trustent* and their associates, who should purchase at a sale under the deed of trust, should be incorporated by a name different from that of the old company, with power to purchase and own the franchise and property of the old company, and should be invested with all its corporate powers and privileges, but did not give the stockholders in the old company any rights in the new company, or require the latter company to pay the debts of the former. *Held*, that a new corporation was created and was not a reorganization of the old company, and that it took what it purchased subject to no liens or claims save such as were paramount to the deed of trust. *Morgan County* v. *Thomas*, 76 *Ill.* 120.

Where a new company is organized by the stockholders of an old company for the express purpose of acquiring all the rights, property, and franchises of the old company, and assuming all its obligations, and the old company having postponed its dissolution until after such transfer and assumpsit should have been made, the new company, for the purpose of the contract declared on in this case, was merely the old company reorganized under a new name. *Canal & C. R. Co.* v. *St. Charles St. R. Co.*, 44 *La. Ann.* 1069, 11 *So. Rep.* 702.

A railroad company may enter into a valid agreement with its mortgagees and bondholders, for a reorganization after sale, with permission to the stockholders and unsecured creditors of the old company to become stockholders in the new. *Smith* v. *Chicago & N. W. R. Co.*, 18 *Wis.* 17.

14. —— for torts of old company.—A railroad having been sold by order of court to pay the debts of the corporation, the purchasers are not responsible for injuries done by the railroad to adjoining lands before the sale, and, therefore, in an action against the new company for damages done by the railroad to such lands caused by a failure to maintain proper drainage, the circuit judge erred in charging the

jury that "you will take into consideration all you have heard as to the value of the land then and now," in estimating the damages. *Hammond* v. *Port Royal & A. R. Co.*, 11 *Am. & Eng. R. Cas.* 352, 15 *So. Car.* 10.

But whether the damages should be measured by the rent of the land, the value of crops or the deterioration in value of the land, one or all, was a matter for the jury to determine from the evidence. *Hammond* v. *Port Royal & A. R. Co.*, 11 *Am. & Eng. R. Cas.* 352, 15 *So. Car.* 10.

15. —— for expenses of reorganization.—The holders of the different mortgages on a railroad agreed with a trust company, that the latter was to obtain control of all the mortgages, reorganize the company and issue new stock therein, and also ascertain the floating indebtedness of the company and the cost of carrying out the plan, and fix the amount to be paid by each stockholder of the old company in order to become a stockholder in the new. *Held*, that the judgment of such trust company in ascertaining what were debts and liabilities of the old company would not be interfered with by the court when honestly and fairly exercised. *Gernsheim* v. *Central Trust Co.*, 16 *N. Y. Supp.* 127, 40 *N. Y. S. R.* 967, 61 *Hun* 625, *mem.*

Such agreement provided that "liabilities incurred in the reorganization" should be considered in ascertaining such indebtedness and liabilities. *Held*, that interest on new bonds issued to the holders of bonds of the old company in exchange, and for which the property of the old company was bonded, was properly included as "liabilities." *Gernsheim* v. *Central Trust Co.*, 16 *N. Y. Supp.* 127, 40 *N. Y. S. R.* 967, 61 *Hun* 625, *mem.*

In ascertaining such "liabilities," it was necessary for the trust company to make inquiries in different cities at a long distance from each other, and to examine numerous books, papers, and vouchers. *Held*, that a court would not interfere with the finding of the trust company, on the ground that no notice was given to the stockholders of the times and places where and when the trust company would meet to make such investigation. *Gernsheim* v. *Central Trust Co.*, 16 *N. Y. Supp.* 127, 40 *N. Y. S. R.* 967, 61 *Hun* 625, *mem.*

An agreement was made by the holders of chattel bonds of an insolvent railroad company, by their attorney, under which a new company was organized on the basis of a division of the stock in certain proportions among those interested in the old company, and it was agreed, among other things, that "the expenses of carrying out this agreement, printing new bonds, etc., are to be sustained by the new company." *Held*, that the words "printing bonds, etc.," did not restrict the agreement to expenses of that character, but covered all reasonable and necessary expenses in carrying out the arrangement. *Catawissa R. Co.* v. *Titus*, 49 *Pa. St.* 277.

On the division of a railway which extended from the northern to the southern line of the state, and which was divided at a certain river, the northern company retained the northern portion of the route, with all the subscriptions for the capital stock, and the original corporate name. *Held*: (1) That this was not to be deemed a new corporation but rather a continuation of the original one with a diminished franchise; and that having, after its organization, elected to take the benefit of plaintiff's services in effecting such division and organization, and obtaining subscriptions for stock, with a knowledge of those services, and that compensation was claimed for them, it was bound to pay what those services were reasonably worth. (2) That a provision in the charter making the corporation liable for preliminary services, and other specified services before the organization, but not including such services as plaintiff's did not affect plaintiff's right to recover upon the ground of a subsequent ratification. *Low* v. *Connecticut & P. R. R. Co.*, 46 *N. H.* 284.—DISTINGUISHING Hall *v.* Vermont & M. R. Co., 28 Vt. 401.

16. —— for value of land taken by old company.—Where a railroad mortgage is foreclosed, and a new company is organized under the laws of the state for the purpose of owning and operating the railway with all its franchises, rights, and property, the new company is not liable at law for the general debts of the old company, except such as it may assume. *Lake Erie & W. R. Co.* v. *Griffin*, 17 *Am. & Eng. R. Cas.* 235, 92 *Ind.* 487; *further appeal* 27 *Am. & Eng. R. Cas.* 394, 107 *Ind.* 464, 8 *N. E. Rep.* 451.

But where the old company has appropriated land for the purposes of its railroad, and a judgment has been rendered against

it for the value of the land, if the new company enters upon and occupies such land, it will be liable in equity for the payment of such judgment, upon the principle that it has adopted and ratified the original appropriation. *Lake Erie & W. R. Co.* v. *Griffin*, 17 *Am. & Eng. R. Cas.* 235, 92 *Ind.* 487; *further appeal* 27 *Am. & Eng. R. Cas.* 394, 107 *Ind.* 464, 8 *N. E. Rep.* 451.

And it cannot escape such liability by afterwards abandoning the land. *Lake Erie & W. R. Co.* v. *Griffin*, 27 *Am. & Eng. R. Cas.* 394, 107 *Ind.* 464, 8 *N. E. Rep.* 451; *former appeal* 17 *Am. & Eng. R. Cas.* 235, 92 *Ind.* 487.

17. —— for state taxes. — The N. Y. Act of May 11, 1874, as amended June 2, 1876, entitled "An act to facilitate the reorganization of railroads sold under mortgage, and to provide for the formation of new companies in such cases," creates no contract between persons purchasing a railroad at a foreclosure sale and wishing to reorganize, and the state; therefore, the N. Y. Act of April 16, 1886, requiring all corporations to pay a tax to the state of one eighth of one per cent. of their capital stock before a charter issues, does not violate the obligation of any contract, though the parties seeking to reorganize bought the railroad before the passage of the latter act. *People ex rel.* v. *Cook*, 57 *Am. & Eng. R. Cas.* 256, 148 *U. S.* 397, 13 *Sup. Ct. Rep.* 645; *affirming* 36 *Am. & Eng. R. Cas.* 256, 110 *N. Y.* 443, 18 *N. E. Rep.* 113.

The above statute of 1886, requiring, as a condition precedent to obtaining a charter, the payment of one per cent. upon the proposed amount of capital stock, applies to the organization of corporations by purchasers at a foreclosure sale of the property and franchises of a railroad corporation; and, although the statutes of the state provide that such purchasers shall have the right to incorporate, with all the powers, privileges, and franchises of the corporation whose property is acquired, the imposition of said tax does not violate the obligation of the contract within the inhibition of the federal constitution. *People ex rel.* v. *Cook*, 57 *Am. & Eng. R. Cas.* 256, 148 *U. S.* 397, 13 *Sup. Ct. Rep.* 645; *affirming* 36 *Am. & Eng. R. Cas.* 256, 110 *N. Y.* 443, 18 *N. E. Rep.* 113.

Even if the imposition of such a tax would violate a contract, in view of the right of reorganization conferred upon purchasers at such foreclosure sale, the state has the power to require the payment of said tax, under the authority granted by the constitution to repeal or amend any coporate charter or privilege. *People ex rel.* v. *Cook*, 57 *Am. & Eng. R. Cas.* 256, 148 *U. S.* 397, 13 *Sup. Ct. Rep.* 645; *affirming* 36 *Am. & Eng. R. Cas.* 256, 110 *N. Y.* 443, 18 *N. E. Rep.* 113.

The laws of 1886 relating to organization taxes apply to corporations formed by the reorganization of railroads sold under mortgage foreclosure. *People ex rel.* v. *Cook*, 36 *Am. & Eng. R. Cas.* 256, 110 *N. Y.* 443, 18 *N. E. Rep.* 113; *affirming* 47 *Hun* 467.

A line of railroad from Brainerd to Watab, formerly a part of the chartered line of the St. Paul & Pacific R. Co., was constructed by the Western R. Co. of Minnesota in 1877–78, under Sp. Laws 1877, ch. 201, by force of which the forfeited franchises, privileges, and immunities of the former corporation, appertaining to this line of road, were transferred to the latter company. *Held*, that the same obligation, as respects the percentage of earnings to be paid to the state in lieu of taxation, attended the franchises and immunities thus transferred, as the original company would have been subject to if it had constructed the road. Hence, pursuant to ch. 6, Sp. Laws 1865, this defendant, operating this section of road under lease from the Western R. Co., was liable to pay to the state, for the year 1885, *three* per cent. of the gross earnings therefrom. *State* v. *Northern Pac. R. Co.*, 29 *Am. & Eng. R. Cas.* 219, 36 *Minn.* 207, 30 *N. W. Rep.* 663.—APPROVING Chicago, M. & St. P. R. Co. *v.* Pfaender, 23 Minn. 217.

Where a Missouri railroad company, chartered with a provision exempting it from taxation for a period of years, unites with an Iowa road, and the consolidated road is subsequently sold under foreclosure proceedings, the new or reorganized company will take the property subject to the constitutional provision then existing which prohibits such property from being exempt from taxation. *Keokuk & W. R. Co.* v. *Missouri*, 152 *U. S.* 301, 14 *Sup. Ct. Rep.* 592. —FOLLOWED IN Keokuk & W. R. Co. *v.* Scotland County, 152 U. S. 317, 14 Sup. Ct. Rep. 608.

18. Setting aside the reorganization. — Where a committee of railroad mortgage bondholders appointed on fore-

closure sale of the mortgaged property, for the purpose of effecting a reorganization, enter into a contract within the scope of the authority given to them, an action to have the contract adjudged null and void is not sustainable, in the absence of any claim of fraud on the part of those contracting with the committee, or participation on their part in some fraud of the committee; it is not sufficient to aver conduct on the part of the latter which might, as between them and the bondholders, amount to a violation of their trust duties. *Brooks* v. *Dick*, 135 *N. Y.* 652, 32 *N. E. Rep.* 230, 48 *N. Y. S. R.* 555; *affirming* 43 *N. Y. S. R.* 37, 17 *N. Y. Supp.* 259.

A trust deed was executed in 1870 by a street-railway company to secure its bonds. In 1873, becoming insolvent, the company suspended. W., the holder of 1874 of the 2000 shares and of $49,000 of the $50,000 of bonds, being elected president, expended much money and greatly improved the situation. Trustees having vacated, W. had others substituted by the court. W. then became the purchaser. He failing, there was a second sale. In the meantime no objections were made. In 1886, the property having become valuable, G., owning three shares, brought suit for himself and the other stockholders to set aside the reorganization and sale on the ground of some alleged informality in the notice on which the order of substitution was made. *Held*, that by laches complainant lost, if he had any, right to relief. *Godwin* v. *Whitehead*, 88 *Va.* 600, 14 *S. E. Rep.* 344.

19. English "schemes of arrangement." — The assent of the preference shareholders to a scheme of arrangement between a railway company and its creditors must, under the Railway Companies Act, 1867, be given in writing, although the special act of the company gave preference shares the like right of voting at meetings as ordinary shares, and the scheme was assented to by all the preference and ordinary shareholders present at an extraordinary general meeting. *In re Cambrian R. Co.*, 19 *W. R.* 871, 24 *L. T.* 417.

A scheme of arrangement under the above act, providing for the borrowing of large sums, and that the entire authorized loan capital should be applied in completing and stocking the line, and then to all lawful purposes, and not containing any special provision for the payment of or arrangement with creditors, will not be confirmed by the court. *In re Letterkenny R. Co.*, 4 *Ir. R. Eq.* 538.

A petition for the confirmation of the scheme of arrangement between a company and its creditors will be dismissed where some of the outside creditors oppose the scheme, and it appears to the court that their opposition is reasonable and based on due regard to their own interests. *In re Somerset & D. R. Co.*, 21 *L. T.* 656, 18 *W. R.* 332.

A scheme of arrangement under the Railway Companies Act, 1867, which gives to the holders of debenture stock the right to vote like shareholders, will not be sanctioned by the court. *In re Stafford & U. R. Co.*, 41 *L. J. Ch.* 777, 20 *W. R.* 921.

A scheme for the reconstruction of a railway company in a ruined condition, which is assented to by an overwhelming majority of the debenture holders, will be held by the court to be binding on the minority. *In re Tunis R. Co.*, 22 *W. R.* 639, 30 *L. T.* 512; *affirmed in* 31 *L. T.* 264.

The court will confirm a scheme of arrangement, under the above act, which provides that, upon the allotment of debenture stock to the creditors, their debts and claims shall be deemed satisfied, to which almost all the outside creditors give their assent, and the petition to confirm, which none of them oppose, upon the company giving security to make no allotment of the stock to any non-assenting outside creditors. *In re West Cork R. Co.*, 7 *Ir. R. Eq.* 96.

A scheme of arrangement of the creditors with the company will not bind parties not assenting who have recovered a judgment against the company, and converted it into a statutory mortgage under 13 & 14 Vict. c. 29. *Stephens* v. *Cork & K. J. R. Co.*, 6 *Ir. R. Eq.* 604.

And an outside creditor is not affected by a scheme of arrangement between a company and its creditors. *Stevens* v. *Mid-Hants R. Co.*, 42 *L. J. Ch.* 694, *L. R.* 8 *Ch.* 1064, 21 *W. R.* 858.

And debenture holders and unpaid vendors of land do not, by accepting debenture stock under a scheme of arrangement, lose any priority which they previously had over an elegit creditor, who is not bound. *Stevens* v. *Mid-Hants R. Co.*, 42 *L. J. Ch.* 694, *L. R.* 8 *Ch.* 1064, 21 *W. R.* 858.

After the enrolment of a scheme of arrangement, the court has no jurisdiction

under the Railway Companies Act, 1867, §§ 7, 9, without a bill being filed to restrain an action against the company; nor does a judgment creditor require leave of court to issue execution. *In re Potteries, S. & N. W. R. Co.*, 39 *L. J. Ch.* 273, 22 *L. T.* 53, *L. R.* 5 *Ch.* 67.

A debenture holder is bound by a scheme of arrangement under the above act when assented to by three fourths in value of the debenture holders, although he has obtained judgment and issued execution against the company before the filing of the scheme. *Potteries, S. & N. W. R. Co.* v. *Minor*, 40 *L. J. Ch.* 685, *L. R.* 6 *Ch.* 621, 19 *W. R.* 883, 25 *L. T.* 522.

The power given by the Joint Stock Companies Arrangement Act, 1870, § 2, to sanction a scheme of arrangement between a company in liquidation and its creditors, extends to debenture holders and other secured creditors, and enables the court to sanction a scheme, although it deprives debenture holders of their security wholly or in part. *In re Alabama, N. O., T. & P. J. R. Co.*, [1891] 1 *Ch.* 213.—APPROVING In re Empire Min. Co., 44 Ch. D. 402.

In exercising the power of sanctioning a scheme of arrangement conferred on it by the above act, the court will not only ascertain that all the statutory conditions have been complied with, but will also consider whether the class of creditors summoned to the meeting was fairly represented by those who attended, and whether the statutory majority who approved of the scheme were acting *bona fide*, or were seeking to promote interests adverse to those of the class whom they professed to represent, and generally whether the arrangement is such as a man of business would reasonably approve. *In re Alabama, N. O., T. & P. J. R. Co.*, [1891] 1 *Ch.* 213.

REPAIRERS.

Risks assumed by, see EMPLOYÉS, INJURIES TO, **285–292.**

REPAIRS.

After accident, admissibility of evidence of, see EVIDENCE, **86.**
— — **evidence of,** see EMPLOYÉS, INJURIES TO, **571.**
At farm crossings, liability for failure to make, see FARM CROSSINGS, **14.**
Claims for supplies used in making, when prior to mortgage, see MORTGAGES, **99.**
Duty and liability of street railway as to, see STREET RAILWAYS, **154–169.**
— **of lessee to make,** see LEASES, ETC., **70.**
— — **receiver to make,** see RECEIVERS, **59.**
— **to keep cattle-guards in repair,** see CATTLE-GUARDS, **17.**
Evidence of subsequent, in action for injury at crossing, see CROSSINGS, INJURIES, ETC., AT, **347.**
Of bridges, expenses of, see BRIDGES, ETC., **35.**
— **cars, power to bind company by contracts for,** see STATION AGENTS, **6.**
— **farm crossings, duty to make,** see FARM CROSSINGS, **11.**
— **fences, company's duty as to,** see ANIMALS, INJURIES TO, **140–151.**
— — **duty to make,** see FENCES, **85–91.**
— **highway crossings,** see CROSSING OF STREETS AND HIGHWAYS, **29–40.**
— **machinery, failure of employé to make, when contributory negligence,** see EMPLOYÉS, INJURIES TO, **350.**
— **property taken, evidence of cost of,** see EMINENT DOMAIN, **619.**
— **railway intersections,** see CROSSING OF RAILROADS, **76.**
— **road and machinery, failure of vice-principal to make, effect of,** see FELLOW-SERVANTS, **93–95.**
— **roadbed or track, duty to make, as towards passengers,** see CARRIAGE OF PASSENGERS, **161–179.**
— **steam roads in cities,** see STREETS AND HIGHWAYS, **341–359.**
— **track, machinery, etc., duty of company as to,** see EMPLOYÉS, INJURIES TO, **143–154.**
— **tramways,** see TRAMWAYS, **3.**
— **wharves, liability of owner as to,** see WHARVES AND PIERS, **4.**
Payment of claims for, by receiver, see RECEIVERS, **85.**
Promise by employer to make, effect of, see EMPLOYÉS, INJURIES TO, **250–259.**

REPAVING.

Duty of street-railway companies as to, see STREET RAILWAYS, **133–153.**

REPEAL.

Of charter provision exempting from taxation, see TAXATION, **141, 142.**
— **charters,** see CHARTERS, **26–47.**
— **condemnation laws,** see EMINENT DOMAIN, **55.**
— **franchise to lay tracks in street,** see STREET RAILWAYS, **26–28.**

Of limitation laws, see LIMITATIONS OF ACTIONS, **15.**
— **ordinances,** see MUNICIPAL CORPORATIONS, **16.**
— **provision requiring assent of city to use of steam power in streets,** see STREETS AND HIGHWAYS, **65.**
— **statutes,** see STATUTES, **65-69.**
— — **before subscription is completed,** see MUNICIPAL AND LOCAL AID, **64.**
— — **by implication,** see MUNICIPAL AND LOCAL AID, **61.**
— — **making stockholders liable to creditors, effect of,** see STOCKHOLDERS, **41.**
— **statutory grant of right of way, effect of,** see PUBLIC LANDS, **45.**
— **stock laws,** see ANIMALS, INJURIES TO, **27, 28.**
— **tax laws, effect of,** see TAXATION, **61, 288.**

REPLEVIN.

Effect of, on carrier's lien for charges, see CARRIAGE OF MERCHANDISE, **388.**
Of goods carried, right to charges after, see CHARGES, **78.**
— **property seized for taxes,** see TAXATION, **335.**

1. When the action lies.—A consignee of goods cannot maintain replevin against a carrier who has instructions to deliver them to the consignee only upon payment by him in cash of an accompanying itemized bill. *Lane* v. *Chadwick*, 32 *Am. & Eng. R. Cas.* 548, 146 *Mass.* 68, 5 *N. Eng. Rep.* 562, 15 *N. E. Rep.* 121.

If a carrier obtains possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value. *Fitch* v. *Newberry*, 1 *Dougl.* (*Mich.*) 1.

Replevin will not lie for the mere detention by a common carrier, of goods that came lawfully into his possession. *Woodward* v. *Grand Trunk R. Co.*, 46 *N. H.* 524.

Where a creditor of a consignee of goods attaches them in the hands of the carrier, and at the same time pays the carrier's charges, the latter cannot maintain replevin for the goods, if the attachment is valid on its face, on the ground that it is liable to the consignee. Where the attachment is valid on its face, it is a protection to the carrier. *Livingston* v. *Miller*, 48 *Hun* 232, 16 *N. Y. S. R.* 71.—FOLLOWING Bliven *v.* Hudson River R. Co., 36 N. Y. 403.

The owner of property may institute replevin for the same when it is in the possession of another, even though the latter may have wrongfully mixed it with other property of a like character, such as pork and lard mixed with other pork and lard. *Great Western R. Co.* v. *Hodgson*, 44 *U. C. Q. B.* 187.

2. —— and against whom. — The owner of hay agreed that another party might purchase it at a fixed price per ton, to be paid for when each car was loaded (it being intended for shipment), but that it should continue in the possession and control of the seller until paid for, and in the event of a failure to pay when each car was loaded, it was to be shipped in the seller's name. In violation of this contract, a carload was shipped in the purchaser's name. *Held*, that the owner might maintain replevin against the carrier, and the fact that the carrier had no notice of the arrangement between the seller and purchaser, would not affect the case. *Stone* v. *Wabash, St. L. & P. R. Co.*, 9 *Ill. App.* 48.

The fact that a common carrier has been garnished by a creditor to whom property is consigned is no defense of an action of replevin, by the vendor, who has given notice to the carrier and demanded the goods. *Chicago, B. & Q. R. Co.* v. *Painter*, 15 *Neb.* 394, 19 *N. W. Rep.* 488.

Replevin cannot be maintained against a freight agent for refusing to deliver goods to the consignee until the carrier's charges thereon are paid, where he does not claim any control or possession of the goods, except as agent of the carrier. *McDougall* v. *Travis*, 24 *Hun* (*N. Y.*) 590.

One who receives goods of another who has no transferable interest therein, having notice of the plaintiff's claim, can take no title which he can set up in an action of replevin therefor. *Great Western R. Co.* v. *Hodgson*, 44 *U. C. Q. B.* 187.

3. Demand before suit—Security. —Where a connecting road is lawfully in possession of cars which belong to another road, the road owning the cars must show, in order to maintain replevin for the cars, that a demand was made before suit was commenced, which was not complied with. *Toledo, St. L. & K. C. R. Co.* v. *American Refrigerator Transit Co.*, 41 *Ill. App.* 625.

In replevin the sheriff is not bound to take any step in the execution of the writ until he is made secure by sureties and safe

pledges, etc. The bond is a condition precedent. The service of the writ on defendants as a summons is void, and they are not bound to appear and plead. *Taylor* v. *Adams Exp. Co.*, 9 *Phila.* (*Pa.*) 272.

In replevin against one person goods cannot be taken out of the peaceable possession of another without notice or demand. *Great Western R. Co.* v. *McEwan*, 28 *U. C. Q. B.* 528.—QUOTING Mennie *v.* Blake, 6 El. & Bl. 850.

4. Pleading.—In replevin to recover the possession of a mule injured by a railroad company against which the owner had obtained judgment as for a total loss, a plea by the company that the original action was for the conversion of the mule is bad, if it does not allege a satisfaction of the judgment recovered for the conversion. *Dow* v. *King*, 40 *Am. & Eng. R. Cas.* 233, 52 *Ark.* 282, 12 *S. W. Rep.* 577.

Where an action to recover a chattel is based solely upon a wrongful detention, a general denial puts in issue, as well, plaintiff's property in the chattel as the wrongful detention, and defendant under such a plea may show title in a stranger although he does not connect himself with such title. *Griffin* v. *Long Island R. Co.*, 101 *N. Y.* 348, 4 *N. E. Rep.* 740, 1 *N. Y. S. R.* 56, 9 *Civ. Pro.* 84; *reversing* 34 *Hun* 632, *mem.*

Where a receiver brings suit against another company for wrongfully detaining cars, and there is no allegation that the taking was wrongful, a general denial puts in issue the plaintiff's title, and it is competent for the defendant to show an outstanding title in a third person. *Griffin* v. *Long Island R. Co.*, 101 *N. Y.* 348, 4 *N. E. Rep.* 740, 9 *Civ. Pro.* 84, 1 *N. Y. S. R.* 56; *reversing* 34 *Hun*, 632, *mem.*

Pleading a writ of replevin by a sheriff as a justification for taking goods, to an action of trespass, see *Great Western R. Co.* v. *McEwan*, 28 *U. C. Q. B.* 528.

5. Evidence — Burden of proof.—Where, in an action of replevin, the defendant, a railroad, pleads property in a third party, and the plaintiff replies property in himself, and issue is thereupon joined, the *onus* is upon the plaintiff to prove to the satisfaction of the jury, that the property is his, by a title superior to the claim relied on in the defendant's plea. *McKinstie* v. *Baltimore & O. R. Co.*, 28 *Md.* 161.

A shipper applied to a station agent at the place of destination of the freights, but the agent refused to deliver them without an order from the consignee, and the payment of charges. This order was procured and the charges paid, when the agent offered to surrender the goods, but immediately the sheriff served him with summons in a replevin suit, and seized the property. The agent filed an answer denying plaintiff's ownership, gave bond, and obtained a return of the property. *Held:* (1) that plaintiff had no cause of action when the suit was commenced; (2) that the agent was not estopped by giving the return bond from showing that he offered to surrender the property, and thereby defeat the action, although plaintiff showed himself to be the real owner. *Church* v. *Frost*, 3 *T. & C.* (*N. Y.*) 318.

6. Damages for detention. — Judgment for a return of property to the defendant, with damages for the taking, is ordered, in an action of replevin, under Mass. Gen. St. ch. 143, § 13, only where it appears upon a nonsuit, or upon a trial or otherwise, that the defendant is entitled to a return of the goods. *Ware River R. Co.* v. *Vibbard*, 114 *Mass.* 458.

A defendant who prevents the plaintiff from obtaining actual possession of replevined property is not entitled to damages for its detention; and if there has been no actual change of possession an order of return is not necessary. *So held*, where a lot of railroad iron which had been imported was replevied, and was held in bond in a United States custom-house, and the plaintiff never obtained actual possession under the writ, by reason of the defendant refusing to deliver the warehouse receipt. *Ware River R. Co.* v. *Vibbard*, 114 *Mass.* 458.

Where the defendant wrongfully retained certain railway bonds and the judgment ordered him to restore them, the condemnation against him in default of giving over the bonds should be to pay the actual value thereof at the time he got them, as established in evidence, and not the par or face value. *Senecal* v. *Hatton*, 1 *Montr. L. R.* 112.

REPLICATION.

In action against carrier of cattle, see CARRIAGE OF LIVE STOCK, **141.**
— — **for loss of baggage,** see BAGGAGE, **112.**
— — **on corporate bonds,** see BONDS, **58.**

In action on stock subscription, see SUBSCRIPTIONS TO STOCK, 99.
Sufficiency of, in stock-killing cases, see ANIMALS, INJURIES TO, 379.
When proper, form, sufficiency, etc., see PLEADING, 73-79.

REPLY.

Evidence in, see TRIAL, 50.
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Inspection of, see DISCOVERY, ETC., 4.
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— — review of, see EMINENT DOMAIN, 485.
— commissioners, objections to, how taken, see EMINENT DOMAIN, 916.
— — to assess damages, duty of court to render judgment on, see EMINENT DOMAIN, 842.
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— company's employés as evidence, see ANIMALS, INJURIES TO, 439; EMPLOYÉS, INJURIES TO, 588.
— — officers as evidence, see EVIDENCE, 243.
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— officers, admissibility of, in evidence, see CARRIAGE OF PASSENGERS, 568.
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— lease, how affected by part performance, see LEASES, ETC., 81.
— railway-aid subscriptions, see MUNICIPAL AND LOCAL AID, 202.
— release, restoration of consideration on, see RELEASE, 16.
— rules for government of employés, see EMPLOYÉS, INJURIES TO, 430.
— — of company by conductor, see CONDUCTOR, 5.
— sales, stopping goods in transitu is not, see CARRIAGE OF MERCHANDISE, 502.

RESERVATION.

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In behalf of grantor of deed of trust, see DEEDS OF TRUST, 10.
— charters, see CHARTERS, 74.
— conveyances for depot purposes, see UNION DEPOT COMPANIES, 6.
— deeds, see DEEDS, 39-48.
— — acquirement of easements by, see EASEMENTS, 7.
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I. CUSTOMS DUTIES.

1. In general.—A private act of parliament imposed a duty of two shillings per chaldron upon all coal "imported and landed at the town of H., or otherwise brought or delivered within the limits of the town." The act gave a remedy against the shipowner by distraining the ship and tackle, as well as the coals, in default of payment. At the time that the act was passed no coals were brought into H. except by sea. *Held*, that coals brought into the town by railway were liable to the duty, and that the company was primarily liable to pay the duty. *Great Eastern R. Co.* v. *Harwich*, 41 *L. T.* 533, 3 *Ry. & C. T. Cas.* xiii.

2. Powers, duties, and liabilities of collector.—The Act of Congress of June 10, 1880, § 10, provides that where a custom-house officer shall be notified of a carrier's lien on imported goods for freight, he shall give reasonable notice to the parties claiming the lien before delivering the goods. *Held*, in a suit by a railroad against a collector to recover freights alleged to have been collected but not paid over, that the collector was not liable for failing to give the statutory notice. *Cleveland, C., C. & I. R. Co.* v. *McClung*, 28 *Am. & Eng. R. Cas.* 70, 119 *U. S.* 454, 7 *Sup. Ct. Rep.* 262; *affirming* 15 *Fed. Rep.* 905.

The law does not make it the duty of custom-house officers to collect freights on imported goods. Under a custom that had long prevailed at a certain office, a deputy collector collected freights due a railroad. The collector had not been in office long, and neither knew of the custom, nor gave any authority to make this collection. *Held*, that the collector was not liable for the amount collected. *Cleveland, C., C. & I. R. Co.* v. *McClung*, 28 *Am. & Eng. R. Cas.* 70, 119 *U. S.* 454, 7 *Sup. Ct. Rep.* 262; *affirming* 15 *Fed. Rep.* 905.

An order of the treasury department directing a collector of customs to deposit in the treasury all moneys received by him is equally obligatory upon his successor. *Ellsworth* v. *United States*, 14 *Ct. of Cl.* 382.

3. Compensation — Receipts for storage.—Where the owner of a bonded warehouse pays to the collector of a non-enumerated port the full salary of the inspectors on duty in the warehouse and he properly accounts for the money, it should be allowed to him as "receipts for storage" in the settlement of his accounts and in determining the amount of his compensation. *Ellsworth* v. *United States*, 14 *Ct. of Cl.* 382.

All moneys received by collectors from the owners of bonded warehouses for half storage of goods shipped by railroad and while in bond, or for the attendance of an

inspector, shall be accounted for as "receipts for storage" and allowed to the collectors of the non-enumerated ports in determining the amount of their compensation. *Ellsworth* v. *United States*, 14 *Ct. of Cl.* 382.—FOLLOWING United States *v.* Macdonald, 5 Wall. (U. S.) 659; Carter *v.* United States, 6 Ct. of Cl. 31.

A collector of customs is entitled to retain not to exceed $2000 per annum for storage of imports. *United States* v. *Macdonald*, 5 *Wall.* (*U. S.*) 659.—FOLLOWED IN Ellsworth *v.* United States, 14 Ct. of Cl. 382.

II. INTERNAL REVENUE.

4. Tax on indebtedness of railway companies. — A railway company executed a mortgage to secure certain city bonds issued in aid of the road, and agreed to pay a certain rate of interest to the city thereon. Subsequently congress imposed a tax of three per cent. upon money due by railroads, and required them to pay such tax to the government out of the amount due. The company gave the city notice, and paid the tax under protest. *Held*, that the city's failure to proceed to test the legality of the tax would prevent its recovering the amount from the company. *Baltimore* v. *Baltimore & O. R. Co.*, 10 *Wall.* (*U. S.*) 543.

The interest on bonds issued by a city in aid of a railroad, and secured by a mortgage on the road, is not subject to federal taxation. *United States* v. *Baltimore & O. R. Co.*, 17 *Wall.* (*U. S.*) 322. — APPROVING Northern C. R. Co. *v.* Jackson, 7 Wall. 262. —REVIEWED IN United States *v.* Erie R. Co., 9 Ben. (U. S.) 67.

Act of Congress of Feb. 8, 1875, § 19, providing that corporations, except national banks, should pay a tax of ten per cent. on the amount of their notes used for circulation and paid out by them, does not apply to certificates of indebtedness issued by a railroad company to its employés for wages, though they are made payable to bearer, and transferred by the employés before maturity. *Philadelphia & R. R. Co.* v. *Pollock*, 19 *Fed. Rep.* 401.

5. —— on interest due on railway bonds. — The duty of five per cent. imposed by the Act of Congress of 1864, § 122, upon railroad bonds upon which interest is payable, is a tax upon the income of the bondholder, and not upon the interest coupons in the hands of the company, though the act authorizes the company to deduct the amount of the tax from the interest and pay it directly to the government. *Haight* v. *Pittsburg, Ft. W. & C. R. Co.*, 6 *Wall.* (*U. S.*) 15.

A railroad company paid to the holders of its bonds the entire amount of semi-annual interest accruing thereon from Jan. 1 to July 1, 1870. *Held*, that the United States rightfully assessed against the company a tax of five per cent. upon the amount so paid, under the Internal Revenue Act of June 30, 1864, § 122, as amended July 13, 1866, and Jan. 14, 1870, which latter amendment continued the law until Aug. 1, 1870. *Lake Shore & M. S. R. Co.* v. *Rose*, 95 *U. S.* 78.

The tax on interest paid by corporations under the above section, as amended by the act of 1866, is an excise tax on the business of these corporations, to be paid by them out of their earnings, income, and profits. *Michigan C. R. Co.* v. *Slack*, 100 *U. S* 595.

In order to secure payment of this tax, it was laid by congress on the subjects to which these earnings were applied in the usual course of business of such corporations, namely, dividends, interest on funded debt, construction, or some reserve fund held by the company. *Michigan C. R. Co.* v. *Slack*, 100 *U. S.* 595.—EXPLAINED IN Western Union R. Co. *v.* United States, 101 U. S. 543. QUOTED N United States *v.* Louisville & N. R. Co., 33 Fed. Rep. 829.

Such a tax is not invalidated by the provision that the amount of it may be withheld from the dividend or interest going to the stockholder or bondholder, though the latter be a citizen or subject of a foreign government, with no residence in this country. *Michigan C. R. Co.* v. *Slack*, 100 *U. S.* 595.—FOLLOWED IN United States *v.* Erie R. Co., 13 Am. & Eng. R. Cas. 319, 106 U. S. 327, 1 Sup. Ct. Rep. 223.

The Act of Congress of 1870 (16 St. at L. 260), § 15, imposed a tax for 1871, "of two and one half per cent. on interest paid on bonds or other evidences of debt issued and payable in one or more years after date," and on "all dividends of earnings, income, or gains, * * * and on all undivided profits," of any railroad. *Held*, that a company was not liable to the tax on interest until the interest was payable; therefore it was not taxable on interest due and paid on bonds Feb. 1, 1872. *Western Union R. Co.*

v. *United States*, 101 *U. S.* 543.—EXPLAINING Michigan C. R. Co. *v.* Slack, 100 U. S. 595, Barnes *v.* Philadelphia & R. R. Co., 17 Wall. 309.—FOLLOWED IN United States *v.* Louisville & N. R. Co., 33 Fed. Rep. 829.

Under the Act of Congress of July 13, 1866, a judgment for a five per cent. tax on interest paid in coin by a railroad to its non-resident bondholders, may be a general judgment for the amount due, if rendered at a time when coin and currency are equal in value, though the statute provides, if it is paid in currency, that it shall be of an amount equal in value to coin. *United States* v. *Erie R. Co.*, 107 *U. S.* 1, 2 *Sup. Ct. Rep.* 83.

The Act of Congress of July 14, 1870, imposing a tax on the interest on railroad bonds, was limited to the year 1871, and applies only to interest actually paid, and not to interest merely payable. *United States* v. *Louisville & N. R. Co.*, 33 *Fed. Rep.* 829.—FOLLOWING United States *v.* Erie R. Co., 106 U. S. 330, 1 Sup. Ct. Rep. 223; Memphis & C. R. Co. *v.* United States, 108 U. S. 234, 2 Sup. Ct. Rep. 482. QUOTING Michigan C. R. Co. *v.* Slack, 100 U. S. 598; Western Union R. Co. *v.* United States, 101 U. S. 550.

The internal revenue tax on coupon bonds is payable by the holder, and not by the obligor. *Haight* v. *Pittsburgh, Ft. W. & C. R. Co.*, 3 *Pittsb.* (*Pa.*) 105.

6. —— on dividends. — Under the Internal Revenue Act of 1864, as amended, railroads are liable to pay a five per cent. tax on a dividend and on a semi-annual instalment of interest on its bonds, declared after Jan. 1, 1870, but which accrued during the six months next prior thereto. *Barnes* v. *Philadelphia & R. R. Co.*, 17 *Wall.* (*U. S.*) 294.

Under the Internal Revenue Act of July 13, 1866, § 122, railroads are liable to pay a five per cent. tax on dividends declared prior to, and payable after Jan. 1, 1870; and also on dividends and semi-annual instalments of interest declared and payable after Jan. 1, 1870, but which accrued prior thereto. *Barnes* v. *Philadelphia & R. R. Co.*, 17 *Wall.* (*U. S.*) 294. — APPLIED AND FOLLOWED IN Metropolitan R. Co. *v.* Slack, 1 Holmes (U. S.) 375. EXPLAINED IN Western Union R. Co. *v.* United States, 101 U. S. 543.

Certificates by a railroad company to its stockholders to the effect that such stockholders are entitled to eighty per cent. of the stock held by them with dividends thereon are dividends of scrip within the meaning of the Internal Revenue Act of July 13, 1866, taxing dividends in scrip or money. *Bailey* v. *New York C. & H. R. R. Co.*, 22 *Wall.* (*U. S.*) 604, 11 *Am. Ry. Rep.* 121.—FOLLOWED IN Bailey *v.* New York C. & H. R. R. Co., 13 Am. & Eng. R. Cas. 333, 106 U. S. 109, 1 Sup. Ct. Rep. 62.

The act of June 30, 1864 (13 St. at L. 283), as amended by act of July 13, 1866 (14 St. at L. 138), providing that income taxes "shall be levied on the 1st day of May, and be due and payable on or before the 30th day of June, in each year, until and including the year 1870, and no longer," does not apply to an internal revenue tax on the dividends and earnings of a railway corporation, for the first six months of the year 1870, which is not an income tax but an excise. *Metropolitan R. Co.* v. *Slack*, 1 *Holmes* (*U. S.*) 375.—APPLYING Philadelphia & R. R. Co. *v.* Kenney, 18 Int. Rev. Rec. 92. FOLLOWING Barnes *v.* Philadelphia & R. R. Co., 17 Wall. (U. S.) 294.

Under the act of 1864, a dividend declared payable after Dec. 31, 1869, although for earnings of the year 1869, is not liable to the income tax; and a United States revenue-tax collector cannot justify in an action of trespass for levying on the property of a company for such tax. *Philadelphia & R. R. Co.* v. *Barnes*, 7 *Phila.* (*Pa.*) 543.

Under Act of Congress of July 14, 1870, § 15 (16 St. at L. 260), providing for a tax "for and during the year 1871," on interest paid by corporations "and on the amount of dividends of earnings hereafter declared by them," the dividends and earnings of a railway corporation for the last six months of the year 1870 are not taxable. *Metropolitan R. Co.* v. *Slack*, 1 *Holmes* (*U. S.*) 375.—APPLYING Barnes *v.* Philadelphia & R. R. Co., 17 Wall. (U. S.) 294.

7. —— on earnings and gross receipts—Undivided profits.*—The expression "profits used in construction," in section 122 of the Internal Revenue Act of June 30, 1864, imposing a tax not only on dividends of railroad and other companies, but also on profits used for construction, does not embrace earnings expended in repairs for keeping the property up to its

* See also TAXATION, 106.

normal condition, but has reference to new constructions adding to the permanent value of the capital; and, when these are made to take the place of prior structures, it includes only the increased value of the new over the old, when in good repair. *Grant* v. *Hartford & N. H. R. Co.*, 93 *U. S.* 225.

Under Act of Congress of June 30, 1864, ch. 173, § 122, as amended by act of July 13, 1866, ch. 184, the earnings of a railroad, used to pay interest or dividends, are taxable whether actual profits or not; but earnings used for construction or carried to the account of a fund, are not so taxed unless they represent the profits of the company in its business as a whole. *Little Miami, C. & X. R. Co.* v. *United States*, 13 *Am. & Eng. R. Cas.* 330, 108 *U. S.* 277, 2 *Sup. Ct. Rep.* 627.

A railroad in a Confederate state was taken possession of during the civil war by the military authorities of the United States, but the company moved the rolling stock within the Confederate lines, and there hired it out to other companies, and from the rentals received, and which were paid in Confederate money, dividends were declared. *Held*, that the company was liable for an income tax on such dividends, imposed by the act of 1862; but after the close of the war the company was not liable for such tax upon surplus earnings applied in restoring the road, bonds being distributed to the stockholders in lieu of money. *Memphis & C. R. Co.* v. *United States* 108 *U. S.* 228, 2 *Sup. Ct. Rep.* 482.—FOLLOWED IN United States *v.* Louisville & N. R. Co., 33 Fed. Rep. 829.

Under the Act of Congress of July 1, 1862 (12 St. 492–3), and the acts in addition to it, plaintiff in error received from defendant in error subsidy bonds, which were made by statute a lien upon its road. *Held*, that, in a suit to collect an internal revenue tax on the undivided net earnings of the road, carried to a fund or to construction account, plaintiff was not entitled to have the interest upon these bonds deducted from its net earnings before settling the amount to be subject to the tax, but that the amount of that interest, if earned and carried to a fund or charged to construction, was taxable. *Sioux City & P. R. Co.* v. *United States*, 17 *Am. & Eng. R. Cas.* 480, 110 *U. S.* 205, 3 *Sup. Ct. Rep.* 565.

Under the act of July 13, 1866, § 9 *bis*, a company engaged in the express business, and also in transporting passengers by stage coach, which makes returns of its gross receipts, under section 109 of the act of June 30, 1864, and is subject to pay duty thereon, under sections 103 and 104 of the last-named act, is required to declare, in such returns, whether such gross receipts are stated according to their values in legal tender currency, or according to their values in coined money, and is liable to pay such duty according to the values in coined money when reduced to their equivalent in legal tender currency. *Wells* v. *Shook*, 8 *Blatchf.* (*U. S.*) 254.

The terms "income or articles or objects charged with an internal tax," in said section of the act of 1866, are comprehensive and include "gross receipts" of express companies and "gross receipts" of stage proprietors. *Wells* v. *Shook*, 8 *Blatchf.* (*U. S.*) 254.

The depreciation of assets during a certain period cannot be deducted from profits earned during the same period, in determining the taxable profits of a railroad corporation under the Internal Revenue Act of June 30, 1864. *United States* v. *Little Miami, C. & X. R. Co.*, 1 *Fed. Rep.* 700.

Where two railroad companies consolidate, and one agrees to pay the debts of the other, such payment is not within the meaning of the internal revenue laws, which impose a tax upon corporate incomes. *United States* v. *Louisville & N. R. Co.*, 33 *Fed. Rep.* 829.—FOLLOWING Marquette, H. & O. R. Co. *v.* United States, 123 U. S. 722, 8 Sup. Ct. Rep. 319.

Act of Congress of 1870 provides that there shall be levied and collected during the year 1871 a tax of two and a half per cent. on the amount of all dividends of earnings, income, or gains hereafter declared by any railroad company, and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other fund. *Held*, that undivided profits of a company, carried to an account known as unexpended earnings, and used for construction purposes, were liable to the tax imposed by the above statute. *United States* v. *Marquette, H. & O. R. Co.*, 17 *Fed. Rep.* 719.

The above statute was intended to reduce the tax on profits from five per cent. under the act of 1866, to two and one half per cent., but was not intended to remove from such reduced tax any part of the profits.

United States v. *Marquette, H. & O. R. Co.*, 17 *Fed. Rep.* 719.

8. —— on receipts for carrying the mails.—The Act of Congress of 1864, § 103, as amended July 13, 1866, provided that "every * * * corporation owning * * * any railroad * * * engaged or employed in transporting the mails of the United States upon contracts made prior to Aug. 1, 1866, shall be subject to, and pay a tax of two and one half per cent. of the gross receipts" from such service. *Held*, that a company carrying the mails without any express contract was liable to pay the tax, where the term of service began prior to Aug. 1, 1866. *Western Union R. Co.* v. *United States*, 101 *U. S.* 543.—DISTINGUISHED IN Eastern R. Co. *v.* United States, 20 Ct. of Cl. 23.

9. Penalties for violation of internal revenue laws.—Under the Internal Revenue Act of June 30, 1864, § 122, as amended July 13, 1866, the only penalty for which a railroad is liable is that of $1000 provided for by that section. *Erskine* v. *Milwaukee & St. P. R. Co.*, 94 *U. S.* 619, 16 *Am. Ry. Rep.* 154.

The act of July 14, 1870, did not add to the penalties imposed by the above section while it was in force. *Elliott* v. *East Pa. R. Co.*, 99 *U. S.* 573.

Only one penalty is recoverable for all failures to make the returns required by the act of June 30, 1864, as amended by the act of July 14, 1870, prior to the commencement of the action to recover the penalty. *United States* v. *Brooklyn City & N. R. Co.*, 14 *Fed. Rep.* 284.—APPLYING United States *v.* New York G. & I. Co., 8 Ben. (U. S.) 269.

The penalty of one hundred per cent. on reassessment of an internal revenue tax, under the Act of Congress of March 2, 1867 (13 St. at L. 480), for false and fraudulent omission of taxable property from the return to the assessor, cannot be lawfully collected, if the reassessment includes a sum not legally taxed. *Michigan C. R. Co.* v. *Slack*, 1 *Holmes* (*U. S.*) 231. See *Michigan C. R. Co.* v. *Slack*, 100 *U. S.* 595.

Under the act of March 2, 1867, it is a prerequisite to the lawful collection of the penalty of one hundred per cent. in addition to the internal revenue tax, as reassessed, according to that act, for false and fraudulent omission from the return of taxable property, that the assessor should determine that the omission was false and fraudulent, and adjudge the penalty to have been incurred. A penalty added by the assessor only, on the order of his superior officer, and not as the result of his own finding upon the facts, is not legally added, and cannot lawfully be collected. *Michigan C. R. Co.* v. *Slack*, 1 *Holmes* (*U. S.*) 231.

10. Remedy for illegal taxation—Set-off.—Where a railroad company has paid an internal revenue tax, and sues to recover it back as illegally exacted, the annual report of the road is proper evidence to show that interest certificates were merged in the capital stock, and that dividends were paid on them as on the regular stock. *Bailey* v. *New York C. & H. R. R. Co.*, 22 *Wall.* (*U. S.*) 604, 11 *Am. Ry. Rep.* 121.

Internal revenue taxes illegally exacted, if paid under protest, may be recovered back in an action of assumpsit, but an injunction will not lie to enjoin their collection. *Barnes* v. *Philadelphia & R. R. Co.*, 17 *Wall.* (*U. S.*) 294.

In 1863 a company accumulated a fund of $100,000 in U. S. bonds as net earnings. In 1867, by consolidation with another road, it ceased to exist. By the articles of consolidation this fund was transferred to plaintiff, as a trustee, for the use of the stockholders in the first-named company. An assessor of internal revenue assessed on this fund in the hands of the trustee, $5000 of taxes as being gains, profits, and income accrued to the beneficiaries in the year in which the trustee received the fund. To make this tax, the collector, the defendant, threatened to distrain the trustee's property. To avoid such distress, the latter, under protest, paid the $5000. *Held*, that said $100,000 was not liable to the tax of $5000; and that the tax so paid might be recovered. *Reynolds* v. *Williams*, 4 *Biss.* (*U. S.*) 108.

In a suit at law or in equity by the United States, the defendant cannot plead a set-off, legal or equitable, growing out of independent claims against the United States, although such claims are just, and have been presented to and rejected by the proper auditing officers. *United States* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 66.

11. Stamps.—County bonds and coupons issued in 1870 and 1871 in payment of subscriptions to railroad companies were not required to be stamped by the United States internal revenue laws in force at the time of their issue, being exempt from taxation as official instruments issued by the

officers of any state, county, town, or other municipal corporation. *Ralls County* v. *Douglass*, 7 *Am. & Eng. R. Cas.* 212, 105 *U. S.* 728.

In a proceeding under Indiana Act of March 4, 1863, to enforce a judgment of a justice of the peace against a railroad company for killing stock, it is not necessary that the certificate to the transcript of the justice shall have a revenue stamp on it. *Toledo, L. & B. R. Co.* v. *Nordyke*, 27 *Ind.* 95. -FOLLOWING Prather *v.* Pritchard, 26 Ind. 65.

12. Lien for taxes and how enforced — Delay. — Under U. S. Rev. St. § 733, providing that "taxes accruing under any law providing internal revenue may be sued for and recovered, either in the district where the liability for such tax occurs or in the district where the delinquent resides," a suit will not lie to recover such tax in a district other than that in which the tax accrues or that in which the delinquent resides, although he may be found and served with process therein. *United States* v. *New York, N. H. & H. R. Co.*, 10 *Ben.* (*U. S.*) 144.

Under Act of Congress of July 13, 1866, imposing certain taxes, and providing that the amount of such tax shall be a lien on all the property and rights of property belonging to the person, a demand of the taxes is necessary to create a lien; and the demand must state the amount of the tax and demand payment thereof. *United States* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 71.

The United States may maintain an action at law, or a bill in equity, according to the nature of the relief sought, to enforce a lien for taxes due from a railroad company, under the internal revenue law. *United States* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 66.—QUOTED IN United States *v.* Pacific R. Co., 1 McCrary (U. S.) 1.

Under U. S. Rev. St. § 3186, the lien of the government for delinquent taxes attaches only to property of the taxpayer, owned at the time when payment of such taxes is demanded; and the statute should be construed favorably to innocent purchasers. *United States* v. *Pacific R. Co.*, 1 *McCrary* (*U. S.*) 1, 1 *Fed. Rep.* 97.—QUOTING United States *v.* Pacific R. Co., 4 Dill. 71.

It is necessary, in order to establish and enforce a lien for taxes under the act of 1864, as amended in 1866, that all their prerequisites be strictly complied with. *United States* v. *Pacific R. Co.*, 1 *McCrary* (*U. S.*) 1, 1 *Fed. Rep.* 97.

And it is necessary that an assessment return or list of the taxes delinquent should be had before, and in addition to, the demand which is the foundation of the lien. *United States* v. *Pacific R. Co.*, 1 *McCrary* (*U. S.*) 1, 1 *Fed. Rep.* 97.

Under the Acts of Congress of 1866 and 1870, it was the duty of a railroad company to return to the proper internal revenue officer the amount of "income, profits, and taxes." *Held*, that when no return has been made, a failure on the part of the government to demand such tax, or to institute proceedings to recover the same until 1881, cannot constitute a bar to an action to recover such tax, when it does not appear that the delay has prejudiced the company. *United States* v. *Marquette, H. & O. R. Co.*, 17 *Fed. Rep.* 719.

13. Assessment.—Under the Act of Congress of June 30, 1864, as amended June 13, 1866, the recovery of a tax against a railroad does not depend on a previous assessment, nor, if made, is it conclusive on either party. *United States* v. *Philadelphia & R. R. Co.*, 123 *U. S.* 113, 8 *Sup. Ct. Rep.* 77.

Under the Act of Congress of 1866, as amended in 1870, the amount expended by a railroad company for a piece of new line, for the purpose of shortening its tracks, properly belongs to expenditures for improvements, and where paid from the earnings, should be deducted from the amount subject to taxation. *United States* v. *Marquette, H. & O. R. Co.*, 17 *Fed. Rep.* 719.

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I. GENERAL NATURE AND HOW ACQUIRED.

1. What is a right of way.* — The right of way for a railroad is an easement — an interest in the freehold; and it can only exist in grant or by prescription. *East Ala. R. Co.* v. *Tennessee & C. R. R. Co.*, 29 *Am. & Eng. R. Cas.* 363, 78 *Ala.* 274.

The term "right of way" can only be understood as embracing the land used as a way for the road, and not such additional ground as may be used for the convenience of the railroad, but is not a part of its way.

* Right of way of a railroad considered as an easement, see note, 1 L. R. A. 214. Same defined, note, 4 *Id.* 275.

Chicago, B. & Q. R. Co. v. *Paddock*, 75 *Ill.* 616.

What shall constitute a right of way for a railroad is not defined by law, but, like any other easement, it is a subject of contract, and when the contract, as to the width of the right of way, is general or ambiguous, the intention of the parties may be shown by parol evidence of their contemporaneous acts and declarations. *Indianapolis & V. R. Co.* v. *Reynolds*, 116 *Ind.* 356, 19 *N. E. Rep.* 141.

2. The company's title, and how acquired, generally.* — Ill. Act of Feb. 8, 1861, "to perfect the title of the purchasers of the Pittsburg, Fort Wayne and Chicago railroad, and to enable them to form a corporation," § 2, has no reference to the mode of acquiring the right of way, and does not have any retroactive operation to validate titles to right of way. *Pittsburg, Ft. W. & C. R. Co.* v. *Reich*, 101 *Ill.* 157.

A title to a right of way can only be acquired (1) by condemnation and compensation in the manner provided by law; (2) by formal deed of conveyance from the owner; (3) by the performance of some act or payment of some consideration by virtue of an executory agreement enforceable in a court of equity between the owner and the corporation; (4) by completing a road over lands, and thereby exposing the corporation to liability for compensation, when such right and liability are provided by statute. *Beattie* v. *Carolina C. R. Co.*, 46 *Am. & Eng. R. Cas.* 524, 108 *N. Car.* 425, 12 *S. E. Rep.* 913.

When the charter provides that, in the absence of any contract, the corporation acquires title to 100 feet on each side of the track, and that if no claim for damages is brought in two years from the completion of that part of the road it is barred, the corporation has a valid title to the right of way as its track is completed. *Purifoy* v. *Richmond & D. R. Co.*, 46 *Am. & Eng. R. Cas.* 232, 108 *N. Car.* 100, 12 *S. E. Rep.* 741.

The payment of a judgment establishing a right of way in a railway company bars the right of the former owner of the land to an action based on the proper use by the company of the right of way, and operates as a dedication of the right of way, with all its incidents, to the uses to which the company has applied it. *Gulf, C. & S. F. R. Co.* v. *Donahoo*, 59 *Tex.* 128.

In 1868 plaintiff's predecessor in title went on lots and found the road there, and acquiesced in it, and verbally promised to give the company the right of way. The road had then existed for eight years. *Held*, that the company had acquired title by limitation, this suit to recover the lots having been brought in 1882. *Shepard* v. *Galveston, H. & H. R. Co.*, 2 *Tex. Civ. App.* 535, 22 *S. W. Rep.* 267.

The possession and occupation under the verbal gift was such adverse possession and use thereof as would put in operation the statute of limitations. *Shepard* v. *Galveston, H. & H. R. Co.*, 2 *Tex. Civ. App.* 535, 22 *S. W. Rep.* 267.

3. — how extinguished or lost. — The mere non-user of a right of way will not extinguish the easement, in the absence of adverse possession by the servient owner, or of such acts on the part of the company as evince a clear intention to abandon the right of way. *Roanoke Investment Co.* v. *Kansas City & S. E. R. Co.*, 108 *Mo.* 50, 17 *S. W. Rep.* 1000.

The title of a railroad to a right of way once acquired cannot be lost by occupancy as to any part of it by the lapse of time. *Purifoy* v. *Richmond & D. R. Co.*, 46 *Am. & Eng. R. Cas.* 232, 108 *N. Car.* 100, 12 *S. E. Rep.* 741.

A charter under Pa. Railroad Act of 1849 gives a company the right only to occupy the land on which its road may be located, and it is merely an easement, and is not the subject of lien or sale under execution. *Western Pa. R. Co.* v. *Johnston*, 59 *Pa. St.* 290.—QUOTED IN Beacon *v.* Pittsburgh, Y. & A. R. Co., 1 Pa. Dist. 618; Hasson *v.* Oil Creek & A. R. R. Co., 8 Phila. (Pa.) 556.

4. Acquisition by deed. — Where a party conveys to a company a right of way in consideration that it will erect a round house and machine shops at a certain point, and build the road to a designated place, the deed conveying the right of way will not be canceled after the road has been built, because the company has failed to perform its part of the contract. *Buckner* v. *Pacific & G. E. R. Co.*, 53 *Ark.* 16, 13 *S. W. Rep.* 332.

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* Interest acquired by company in right of way where there has been neither conveyance nor condemnation, see 46 AM. & ENG. R. CAS. 493, *abstr.*

Right of way by prescription over land acquired by a railroad company from a state, see 46 AM. & ENG. R. CAS. 542, *abstr.*

A deed of land for a right of way, which has but one witness to it, is not void for all purposes, if it is void for any, and may be admitted in evidence to show that the company is not a trespasser in running its railroad over the land. *Downs* v. *Yonge*, 17 *Ga.* 295.

Where a landowner conveys a right of way with a provision that the company shall convey the water of a spring from one side of the track to the other by means of a pipe, and the exact location of the spring is changed by the construction of the road, but the company conveys the water from a new point where it flows out, this is a sufficient compliance with the condition of the deed to cut off a claim for damages. *Chamberlain* v. *Baltimore & O. R. Co.*, 29 *Am. & Eng. R. Cas.* 533, 66 *Md.* 518, 8 *Atl. Rep.* 267.

Where a deed granting a right of way to a railroad company provides for a forfeiture in case the land ceases to be used as a railroad, defeasance becomes operative and the conveyance has no further force or effect when the right of way ceases to be used and operated as a railroad and is used only for the storing of cars. *Hickox* v. *Chicago & C. S. R. Co.*, 94 *Mich.* 237, 53 *N. W. Rep.* 1105. *Hickox* v. *Chicago & C. S. R. Co.*, 43 *Am. & Eng. R. Cas.* 613, 78 *Mich.* 615, 44 *N. W. Rep.* 143.

A deed to a railroad company organized under the laws of Missouri does not become inoperative, by virtue of section 823 of the Revised Statutes of that state, because the road is not built the entire length of the charter route within the ten years prescribed by the statute. *Morrill* v. *Wabash, St. L. & P. R. Co.*, 36 *Am. & Eng. R. Cas.* 425, 96 *Mo.* 174, 9 *S. W. Rep.* 657.

An instrument not under seal is not effectual as a deed to convey a right of way. *Beattie* v. *Carolina C. R. Co.*, 46 *Am. & Eng. R. Cas.* 524, 108 *N. Car.* 425, 12 *S. E. Rep.* 913.

5. —— by grant.—Where the owner of land grants a right of way for a switch from a railroad to the land of one of the grantees, to be used by the grantees and others for railroad and switch purposes, and the owners of such right of way purchase eighty acres of land from another, over a part of which the switch is constructed, so as to reach the coal land of one of the grantees, the grantor contributing nothing to the expense of grading and bridging the track for the switch, the right of way becomes appurtenant to the coal land of the grantee, to which the switch is constructed. *Koelle* v. *Knecht*, 99 *Ill.* 396.

A landowner granted to a railway company a right of way across his farm, and retained the title to the land on each side of the right of way, and he afterwards, under an unrecorded contract with the company, used two openings under the road as passage-ways to and from the several parts of his farm, and built his fences so as to leave such ways open for use. *Held*, that his user of such ways and fencing with a view to their use was notice to a subsequent purchaser of the railroad of the possessor's rights. *Rock Island & P. R. Co.* v. *Dimick*, 144 *Ill.* 628, 32 *N. E. Rep.* 291.—FOLLOWING Swan *v.* Burlington, C. R. & N. R. Co., 72 Iowa 650.

Where the charter of a company empowers it to settle with any owner his claim of damages for the occupation of land, a grant to the company, by one of several tenants in common, of a right of way as to his interest over the common estate, although it passes no fee and confers no right as against the other tenants, is nevertheless valid and operates, as to the tenant executing it, as a release of his damages. *Draper* v. *Williams*, 2 *Mich.* 536.

Under a grant to a railroad company of a right of way over the grantor's land, in consideration of a free pass to the grantor to travel over the road, the consideration is a part of the purchase money, and the company remains personally liable for its fulfilment; but a purchaser of the road at a foreclosure sale is not liable in damages for a failure to grant the pass, though the land may remain subject to a lien to secure the performance of the contract. Complaint, in an action to rescind a grant of right of way by plaintiff to defendant, on the ground that its execution was procured by fraudulent representations of defendant's agent—*held*, good. *Albitz* v. *Minneapolis & P. R. Co.*, 40 *Minn.* 476, 42 *N. W. Rep.* 394. *Helton* v. *St. Louis, K. & N. W. R. Co.*, 25 *Mo. App.* 322.

A grant of a right of way "not exceeding 100 feet in width" within which limit the officers of the company were to "use so much of the land as they may deem necessary," is not an absolute grant of 100 feet, but, until located, is a floating right exercisable over any portion of the land within

the limit of the width specified. The occupancy by the company of a narrower strip than 100 feet, and its acquiescence for years in the occupation of the land bordering on such narrower strip by other grantees, estop them to eject the occupants for the purpose of widening its actual right of way. *Vicksburg & M. R. Co.* v. *Barrett*, 43 *Am. & Eng. R. Cas* 595, 67 *Miss.* 579, 7 *So. Rep.* 549.

A party who enters land without right is not entitled to improvements put thereon as against mortgagees. So where a railroad company constructs a track over premises which are mortgaged, under a grant of a right of way from the mortgagors, it is not entitled to have the track reserved from a mortgage sale of the land. *Price* v. *Weehawken Ferry Co.*, 31 *N. J. Eq.* 31.—DISTINGUISHING North Hudson County R. Co. *v.* Booraem, 28 N. J. Eq. 450.—EXPLAINED IN Jacksonville, T. & K. W. R. Co. *v.* Adams, 28 Fla. 621.

6. —— by release.—When a beneficiary under a conveyance of land in trust to secure the payment of debts owing by the grantor permits a railroad company, of which she and her husband are both stockholders, to acquire by fee, and with their knowledge, a right of way over the lands, the husband being a director of such company, and as such director negotiating with the grantor for the purchase of such right of way, the purchase price of which was paid to such beneficiary to be a credit upon her debt secured by such trust deed, the beneficiary is charged with knowledge that the company believed it was acquiring the absolute title to the right of way, and by accepting the purchase price she releases her interest as beneficiary in the trust as to such way. *Mary Lee C. & R. Co.* v. *Winn*, 97 *Ala.* 495, 12 *So. Rep.* 607.

Under an agreement relinquishing to a railroad company a right of way 100 feet wide, over a tract of land situated in two sections of a township, the railroad to be located "on the section line," the company will not forfeit its right to the land because its track is not laid immediately on and along the section line, provided it is constructed within the limits of the 100 feet, and this strip embraces that line. *Munkers* v. *Kansas City, St. J. & C. B. R. Co.*, 60 *Mo.* 334, 9 *Am. Ry. Rep.* 234.—REVIEWED IN Vermilya *v.* Chicago, M. & St. P. R. Co., 66 Iowa 606.

7. Contracts to procure or convey, generally.* — An agreement in writing, executed by a landowner, to give a right of way upon certain conditions, the agreement being placed in the hands of a third party not an agent of the company, who returned it after the company had failed of compliance, did not entitle the company to the right of way without compensation therefor. *Hibbs* v. *Chicago & S. W. R. Co.*, 39 *Iowa* 340, 9 *Am. Ry. Rep.* 180.

Parties who have obligated themselves by contract to procure a right of way for a railroad at their own expense, and who, for that purpose, have caused expropriation proceedings to be instituted by counsel employed by themselves, though necessarily in the name of the company, are bound to make good to the company the amount of a judgment rendered against it in such proceedings for the value of the land and incident damages, as provided by La. Rev. St. § 1481. *St. Louis S. W. R. Co.* v. *Jacobs*, 44 *La. Ann.* 922, 11 *So. Rep.* 571.

Where the railroad bed has been constructed before trial of the expropriation proceeding, if it appears that part of the damages allowed result from faulty construction, defendants will not be bound therefor; but when the pleadings exhibit no such issue, and the opinion and judgment refer to none such, it will be presumed that the damages allowed were only those incident to the expropriation. *St. Louis S. W. R. Co.* v. *Jacobs*, 44 *La. Ann.* 922, 11 *So. Rep.* 571.

A contract giving to the lessees of plaintiffs' quarries a right to lay a railroad track or switch across plaintiffs' land to reach the quarries in order to transport their products to market—*held*, not to authorize the laying across plaintiffs' land of a railroad track, part of a long line of an ordinary commercial railroad for general business, not going to the quarries, but passing at a distance. *Shoemaker* v. *Cedar Rapids, I. F. & N. W. R. Co.*, 45 *Minn.* 366, 48 *N. W. Rep.* 191.

A railway company, entitled by contract to a deed for a definite strip of ground for a right of way, completed its track along said strip, near its center; and was in actual possession and use of said track. *Held*, that such

* Contracts for right of way, see note, 29 AM. & ENG. R. CAS. 548.

Agreements for pass over road in consideration of grant of right of way. Pond changing hands, see 51 AM. & ENG. R. CAS. 391, *abstr.*

possession included so much ground (not adversely held by another), upon either side of said track, as was reasonably necessary for the convenient use and maintenance of the railway, in the customary mode, and was constructive notice, to a subsequent purchaser, of the actual equitable title of the railway. *Day* v. *New York, P. & O. R. Co.*, 20 *Am. & Eng. R. Cas.* 359, 41 *Ohio St.* 392.

8. Their validity.—Certain individuals entered into a contract under seal to furnish a railroad company, at their own expense, a right of way and certain other lands for purposes of the road, on condition that the company would maintain its principal place of business at a certain place, and should not build a side track to a certain town. *Held*, that the provision relating to the side track was void as against public policy, and, as the contract was not separable, the whole of it was void. *Pueblo & A. V. R. Co.* v. *Taylor*, 6 *Am. & Eng. R. Cas.* 474, 6 *Colo.* 1, 45 *Am. Rep.* 512.

And a contract made with officers of a railroad company, acting in their individual capacity, to induce them to establish a road at a given point for the purpose of promoting the private advantage of the contracting parties, is against public policy, as tending to sacrifice the interest of stockholders and of the public, and will not be enforced in equity. *Bestor* v. *Wathen*, 60 *Ill.* 138. *Linder* v. *Carpenter*, 62 *Ill.* 309.

Twenty persons entered into a contract directly with a railroad company, whereby they agreed to furnish a right of way through the county if the company would locate its road on a certain line. *Held*, that the contract was not void as against public policy. *Pixley* v. *Gould*, 13 *Ill. App.* 565.

And where such a contract is made, and one of the contracting parties occupies a fiduciary relationship to the company, such as director, or stockholder, and it is entered into for the purpose of promoting his own private advantage, it will not be enforced. *Fuller* v. *Dame*, 18 *Pick.* (*Mass.*) 472. *Holladay* v. *Patterson*, 5 *Oreg.* 177.

9. Right of action for breach.—An agreement of a railroad company, in consideration of a right of way through one's lands, so to build its roadbed as to protect the lands from overflow, imposes upon it, as an artificial person, a personal obligation, for a breach of which it, or a company afterwards consolidated with it, will be liable to an action at law for damages. *Sappington* v. *Little Rock, M. R. & T. R. Co.*, 11 *Am. & Eng. R. Cas.* 330, 37 *Ark.* 23.

Several persons signed a writing in which they, among other things, proposed to secure the right of way for the extension of a railroad, free of expense to the corporation, and to obtain the legislation needful to carry out the proposed plan. The corporation accepted the proposal, having at the time no authority to extend its railroad, but subsequently obtained authority. Such persons afterwards agreed in writing that it might go forward and secure the right of way without prejudice to the rights of either party; and thereupon it purchased the right of way. *Held*, in an action by the corporation against the signers for their failure to secure the right of way, that the contract was lawful, and that the burden of showing that defendants were unable to secure the right of way was upon them. *New Haven & N. Co.* v. *Hayden*, 107 *Mass.* 525.—QUOTING Scottish N. E. R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 382; Mayor, etc., of Norwich *v.* Norfolk R. Co., 4 El. & Bl. 397.

Where a company has agreed, in consideration of a grant of right of way, to erect and maintain a water tank upon the land of the proprietor, to be supplied with water from an elevated spring thereon, which should be used by the company and for which the owner should be paid the compensation usually payable for such a privilege, a lien exists upon the right of way granted for the payment of such sum, and an action will lie against the receiver of the company, under Tex. Gen. Laws, 1887, p. 121, § 15, that "all judgments, claims, or causes of action when determined, existing against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of the receiver * * * and the same shall be a lien upon such earnings." *Howe* v. *Harding*, 42 *Am. & Eng. R. Cas.* 1, 76 *Tex.* 17, 13 *S. W. Rep.* 41. —REVIEWED IN Brown *v.* Warner, 78 Tex. 543.

The company or the receiver repudiating the contract for the payment for the monthly water service will be liable for the purchase money for the right of way, as well as for compensation for work and material furnished to convey the water to the tank. *Howe* v. *Harding*, 42 *Am. & Eng. R. Cas.* 1, 76 *Tex.* 17, 13 *S. W. Rep.* 41.

Plaintiff entered into a contract agreeing to convey a strip of land to a railroad company in fee simple, provided the company should not interfere with a certain mill owned by plaintiff, or lay the track nearer than seven rods from the mill. *Held*, that the company, by accepting the contract and the grant under it, was bound by its terms, and was liable in damages for interfering with the mill structure, or for building within the prescribed distance. *Hutchinson* v. *Chicago & N. W. R. Co.*, 37 *Wis.* 582.

In such case the fact that plaintiff covenanted to grant a right of way over a larger tract of land than he owned might make him liable in damages, but could not defeat an action by him for a breach of the contract on the part of the company. *Hutchinson* v. *Chicago & N. W. R. Co.*, 41 *Wis.* 541; *former appeal* 37 *Wis.* 582.

10. Specific performance.—R., who had agreed to grant a right of way over his land, after the construction of the road, brought ejectment for the land so taken, and also sued in trespass for damages, and afterwards dismissed these actions upon the agreement of the company operating the road to make a cattle pass, the cost of which was to go in reduction of the owner's damages; and the pass was constructed accordingly. *Held*, on bill for specific performance by the company, and to enjoin the prosecution of an action of ejectment for the possession of the land, that it would be inequitable to allow R. to recover the possession of the right of way, after inducing the company to incur this expense solely for his benefit, and after his election to take damages instead of the possession of the land. *Ross* v. *Chicago, B. & Q. R. Co.*, 77 *Ill.* 127.

Defendant having entered into an agreement to sell plaintiffs, a railroad corporation, "the land they might take on the northerly side of the M. turnpike, adjoining T.'s land, at twenty cents per square foot, for each and every foot so taken by said company," and plaintiffs having brought a bill in equity for specific performance—*held*, that the agreement was not for a sale of the land generally, or of such part of it as plaintiffs might elect, or of such as they should accept the offer of; but for the sale of such a part of the land described as plaintiffs might take in the exercise of the authority conferred on them by law to take land for their road. *Boston & M. R. Co.* v. *Babcock*, 3 *Cush.* (*Mass.*) 228.

II. RELATIVE RIGHTS OF THE COMPANY AND ADJOINING OWNERS.

11. Rights of the company, generally.—Where a hedge planted by the owner on his land is suffered to grow over the right of way of a railway so as to obstruct it, the company will have the right to trim such hedge, doing no unnecessary damage; and such act will not constitute a purchase of the hedge. *Toledo, W. & W. R. Co.* v. *Green*, 67 *Ill.* 199.

The conveyance of a strip of land to a railway company will not give the grantee the right to make any use of it which would injuriously affect the remaining land of the grantor. The law annexes the condition that the owner of land shall so use it as not to produce injury to another. *Wylie* v. *Elwood*, 134 *Ill.* 281, 25 *N. E. Rep.* 570.

A railroad company, after having obtained the right of way for its road, is entitled to the exclusive possession of such way, and stands to adjoining proprietors (where no statute has changed the relation) in the common relation existing between proprietors of lands bordering on each other. *Williams* v. *New Albany & S. R. Co.*, 5 *Ind.* 111.

The right of a railway company, after having constructed its roadbed, to make such changes in it as experience may designate as proper, is, of necessity, a continuous one. *Moss* v. *St. Louis, I. M. & S. R. Co.*, 85 *Mo.* 86.

The character of a railroad company's right to its track, and whether stock on the road are trespassing, depend upon the deed or other instrument under which the right of way was acquired. *Joyner* v. *South Carolina R. Co.*, 29 *Am. & Eng. R. Cas.* 258, 26 *So. Car.* 49, 1 *S. E. Rep.* 52.

12. What title or interest remains in the landowner.—The grant of a right of way being the grant only of an easement, the owner of the fee remains the owner of springs, streams, and minerals. Subject to the use of the right of way, he may make all lawful use of the land. *Smith* v. *Holloway*, 46 *Am. & Eng. R. Cas.* 495, 124 *Ind.* 329, 24 *N. E. Rep.* 886.

13. Building additional tracks.—A railroad company having power to take land for a double track, built a single-track line through plaintiff's lands, and took a release, which contained no description, and put upon the plaintiff the duty to build and maintain the fences. He built the fences

immediately, and maintained them for a long term of years. *Held:* (1) that a presumption arises that the right of way is limited to the strip of land so fenced, and unless this presumption is rebutted, the railroad cannot encroach beyond the fences for the purpose of building an additional track without making compensation to plaintiff; (2) that mere proof that soon after the road was built the president reported to the stockholders that the right of way for a double track had been secured for the whole line will not rebut this presumption. *Westchester & P. R. Co.* v. *Goddard*, (*Pa.*) 33 *Am. & Eng. R. Cas.* 195, 13 *Atl. Rep.* 214.

14. Construction of cattle pass.— A contract with a company, embodied in a deed for a right of way, provided for the construction of a cattle pass by the company, but fixed no time therefor. *Held*, that the company had a reasonable time after the completion of the road. *Livingston* v. *Iowa Midland R. Co.*, 35 *Iowa* 555, 5 *Am. Ry. Rep.* 166.

15. Crossing line with gas mains.— The act of assembly incorporating natural gas companies confers upon any railroad company whose line the gas company desires to cross the right to direct in what manner it shall be done, provided such direction be reasonable. If the plans and requirements submitted are not unreasonable, the court should require them to be adopted. *Ridgway L. & H. Co.* v. *Pennsylvania R. Co.*, 18 *Phila.* (*Pa.*) 601.

16. Cutting ice.— By acquiring an easement in the lands of another, for a right of way, a railroad company takes no right to ice which may form within the limits of the right of way. Such ice is the property of the owner of the land. *Julien* v. *Woodsmall*, 82 *Ind.* 568.

17. Digging wells.—A railroad company, to which is deeded "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway," has the legal right to dig a well upon such right of way, and to use the water supplied by percolation for railway purposes, although such use may materially diminish the supply of water in a spring upon the grantor's land. *Hougan* v. *Milwaukee & St. P. R. Co.*, 35 *Iowa* 558, 2 *Am. Ry. Rep.* 43.

18. Erecting buildings.— Land acquired by a railroad company for a right of way may be used by it in any manner which contributes to the efficient operation of its road, and which does not interfere with the property rights of adjacent landowners. In this case the use of a right of way for the erection of a freight depot was held not to be a misuser. *Elyton Land Co.* v. *South & N. Ala. R. Co.*, 51 *Am. & Eng. R. Cas.* 371, 95 *Ala.* 631, 10 *So. Rep.* 270.

A railway company has the right to erect on its right of way any building necessary for its use and convenience in carrying on its business, and it has a right to remove it when its interest so requires. *Gudger* v. *Richmond & D. R. Co.*, 43 *Am. & Eng. R. Cas.* 606, 106 *N. Car.* 481, 11 *S. E. Rep.* 515. —FOLLOWING Western N. C. R. Co. *v.* Deal, 90 N. Car. 110.

A statute prohibiting a railway company from erecting buildings upon its right of way, except at certain places and for certain purposes, is for the protection of the landowner, and has no application to cases in which the company owns an estate in fee. *Calcasieu Lumber Co.* v. *Harris*, 43 *Am. & Eng. R. Cas.* 570, 77 *Tex.* 18, 13 *S. W. Rep.* 453.

19. Lateral support.— Plaintiff conveyed a piece of land, not a part of the company's right of way, "for material," to have and to hold "for the uses and purposes of said railroad, and for no other or different purposes." In removing the materials the company excavated to a considerable depth, so as to cause plaintiff's adjoining land to cave in. *Held*, that he was not entitled to lateral support, and was not entitled to recover damages caused by his land caving in. *Ludlow* v. *Hudson River R. Co.*, 4 *Hun* (*N. Y.*) 239, 6 *T. & C.* 420.

20. Removing sand, soil, or hay.*— Plaintiff conveyed, by a quit-claim deed, a right of way over certain land, "for all purposes connected with the construction, use, and occupation of said railway." *Held*, that this did not authorize the company to take sand therefrom for the construction of a round house, without compensation. *Vermilya* v. *Chicago, M. & St. P. R. Co.*, 23 *Am. & Eng. R. Cas.* 108, 66 *Iowa* 606, 24 *N. W. Rep.* 234.—RECONCILING Chapin *v.* Sullivan R. Co., 39 N. H. 564. REVIEWING Boston Gas Light Co. *v.* Old Colony & N. R. Co., 14 Allen (Mass.) 444; Taylor *v.* New

* Right of company to remove soil from right of way for purposes other than constructing railroad, see 43 AM. & ENG. R. CAS. 576, *abstr.*

York & L. B. R. Co., 38 N. J. L. 28; New York & C. R. Co. *v.* Gunnison, 1 Hun 496; Hasson *v.* Oil Creek & A. R. R. Co., 8 Phila. (Pa.) 556; Munkers *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 334; Smith *v.* Chicago, A. & St. L. R. Co., 67 Ill. 191; Hurd *v.* Rutland & B. R. Co., 25 Vt. 116; Connecticut & P. R. R. Co. *v.* Holton, 32 Vt. 43; Troy & B. R. Co. *v.* Potter, 42 Vt. 265; Burnett *v.* Nashville & C. R. Co., 4 Sneed (Tenn.) 528; Chicago & M. R. Co. *v.* Patchin, 16 Ill. 198; Munger *v.* Tonawanda R. Co., 4 N. Y. 349.—REVIEWED IN Blakely *v.* Chicago, K. & N. R. Co., 34 Neb. 284.

But in such case the landowner may take sand from the right of way, so long as he does not interfere with the use of the land for railroad purposes; therefore the company cannot set up as a counterclaim that plaintiff has taken sand himself. *Vermilya* v. *Chicago, M. & St. P. R. Co.*, 23 *Am. & Eng. R. Cas.* 108, 66 *Iowa* 606, 24 *N. W. Rep.* 234.—DISTINGUISHED IN Fernow *v.* Chicago, M. & St. P. R. Co., 36 Am. & Eng. R. Cas. 420, 75 Iowa 526, 39 N. W. Rep. 869.

A railroad corporation cannot, as against the owner of the soil, give away hay upon land within its location. *Bailey* v. *Sweeney*, 30 *Am. & Eng. R. Cas.* 328, 64 *N. H.* 296, 4 *N. Eng. Rep.* 287, 9 *Atl. Rep.* 543.

III. RIGHTS AND DUTY OF COMPANY AS TOWARDS THE PUBLIC.

21. In general.*—The right of way of the Illinois Central R. Co. is held by that company only for railroad purposes and uses, and it cannot lawfully apply such right of way to any other use or purpose than such as is necessary for the maintenance and operation of its railroad. *Illinois C. R. Co.* v. *Chicago*, 51 *Am. & Eng. R. Cas.* 528, 141 *Ill.* 509, 30 *N. E. Rep.* 1036.

The company owes duties and obligations to the state from whom it accepted its charter. It is bound to maintain and operate its road, and to execute the different obligations for which it was created. *Illinois C. R. Co.* v. *Chicago*, 51 *Am. & Eng. R. Cas.* 528, 141 *Ill.* 509, 30 *N. E. Rep.* 1036.

22. Exclusive rights of the company.—Lands condemned as a right of way stand in a different category from that of ordinary easements. Over them is acquired, not the right of use to be enjoyed in common with the public, or with other persons. The right and use are exclusive, and no one else has any right of way thereon. *Tennessee & C. R. Co.* v. *East Ala. R. Co.*, 75 *Ala.* 516, 51 *Am. Rep.* 475.—QUOTING Connecticut & P. R. R. Co. *v.* Holton, 32 Vt. 43.

A railroad company has the exclusive use of its right of way, and the owner of land upon which it is situated cannot recover for trespass thereon by third persons, nor can he use such right of way himself. *St. Onge* v. *Day*, 11 *Colo.* 368, 18 *Pac. Rep.* 278.

A railroad company has a right to the possession of the land taken for the purpose of its road, which includes the right to exclude all persons and beasts therefrom at any and all times. *Walsh* v. *Virginia & T. R. Co.*, 8 *Nev.* 110.

23. Storage of cars on right of way.—A railroad company cannot convert its right of way into storeroom for its cars, and call it a "yard," and thus prevent a street from crossing its right of way. *Com'rs of Parks, etc.*, v. *Detroit, G. H. & M. R. Co.*, 51 *Am. & Eng. R. Cas.* 525, 93 *Mich.* 58, 52 *N. W. Rep.* 1083.—REVIEWING AND FOLLOWING Com'rs of Parks, etc., *v.* Michigan C. R. Co., 90 Mich. 385.

24. Removal of trees in danger of falling. — In case of probable danger of obstruction of its track by falling timber, it is the duty of a company, if the timber be standing upon its own right of way, to remove it at once, and if it be upon the adjoining land, then the company should take steps to have it done. The company is not, however, required to remove, or have removed, everything which may possibly become an obstruction. It is only required to use reasonable care in this respect, and if injury results, notwithstanding this care, the company is not chargeable with wilful neglect. *Filbin* v. *Chesapeake & O. R. Co.*, 91 *Ky.* 444, 16 *S. W. Rep.* 92.

Where a partially decayed tree, standing fifty-five feet from a railroad track, leaned in the opposite direction to such an extent that it was not reasonable to suppose that it would ever fall across the track, and it was only due to the force of a storm that it did fall in that direction, the company is not chargeable with wilful neglect in failing to remove the tree before it fell, although it had notice that the tree was decayed. *Fil-*

* Dominion of company over station grounds and right of way, including power to remove persons therefrom, see note, 8 L. R. A. 753.

bin v. *Chesapeake & O. R. Co.*, 91 *Ky.* 444, 16 *S. W. Rep.* 92.

IV. JOINT USER BY TWO OR MORE ROADS.

25. Construction of contracts for. —Two railroads contracted with park commissioners for a right of way over the park, with the condition that other companies might use the same right of way. *Held*, that a subsequent company purchasing from one of said contracting companies was a purchaser, with notice of the condition imposed, and was bound by it, whether it was a covenant running with the land or not. *Joy* v. *St. Louis*, 45 *Am. & Eng. R. Cas.* 655, 138 *U. S.* 1, 11 *Sup. Ct. Rep.* 243.

Two railroads contracted with park commissioners for a right of way through the park for themselves and other roads that might want to use it. On the same day one company conveyed to the other an interest in a right of way that it had formerly obtained in the park and other lands in the city near by. *Held*, on application of a subsequent road for a right of way, that the two contracts should be construed together as one, and liberally in favor of the public. *Joy* v. *St. Louis*, 45 *Am. & Eng. R. Cas.* 655, 138 *U. S.* 1, 11 *Sup. Ct. Rep.* 243.

26. Specific performance of such contracts.— Certain railroads obtained a right of way into the city of St. Louis on condition that other companies be permitted to use the same. *Held*, on a bill filed in the U. S. circuit court, that the court had jurisdiction to decree specific performance by enjoining one of the contracting companies from preventing another company from using the right of way, there being no adequate remedy at law. The fact that the other companies who were to use the right of way were not named in the agreement is of no consequence. *Joy* v. *St. Louis*, 45 *Am. & Eng. R. Cas.* 655, 138 *U. S.* 1, 11 *Sup. Ct. Rep.* 243.—DISTINGUISHING Texas & P. R. Co. *v.* Marshall, 136 U. S. 393.—FOLLOWED IN Union Pac. R. Co. *v.* Chicago, R. I. & P. R. Co., 51 Fed. Rep. 309, 2 C. C. A. 174. QUOTED IN Toledo, A. A. & N. M. R. Co. *v.* Pennsylvania Co., 53 Am. & Eng. R. Cas. 293, 54 Fed. Rep. 746; Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562.

The commissioners of a park belonging to the city of St. Louis contracted with two railroads, by which the latter obtained a right of way through the park, conditioned that they let other roads enter the city over their right of way. In a suit for specific performance of this condition—*held*, that the city was not a mere nominal party, but a party in interest. *Joy* v. *St. Louis*, 45 *Am. & Eng. R. Cas.* 655, 138 *U. S.* 1, 11 *Sup. Ct. Rep.* 243.

RIPARIAN RIGHTS.

Admissibility of evidence as to taking water from stream, see EVIDENCE, **71.**

Injury to, as an element of land damages, see EMINENT DOMAIN, **711.**

In watercourses, see also WATERS AND WATERCOURSES, **9-29.**

Rights of riparian owner of land condemned, see EMINENT DOMAIN, **143.**

What constitutes a taking of, see EMINENT DOMAIN, **168.**

1. In general—Title of state. — A state may aid in improving rivers, but not so as to interfere with the government control of improvements or navigation. *Sands* v. *Manistree River Imp. Co.*, 123 *U. S.* 288, 8 *Sup. Ct. Rep.* 113.—FOLLOWED IN Rhea *v.* Newport News & M. V. R. Co., 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.

A state has the power to change the current of a navigable river, or to close some of its navigable channels, when the good of the state demands it; but if private property is injured thereby, just compensation must be made. *People* v. *St. Louis*, 10 *Ill.* 351.—DISTINGUISHED IN Chicago & P. R. Co. *v.* Stein, 75 Ill. 41.

One who owns a block of land in a city, and also a narrow strip between the block and a navigable river, continues to be a riparian owner of the strip after it has become dedicated as a public street; and after he has conveyed the block described as bordering on the street, he continues the riparian owner of at least half the street next to the river to low-water mark, and is entitled to compensation from a railroad company that seeks to condemn a right of way at any place between the centre of the street and the centre of the river. *Brisbine* v. *St. Paul & S. C. R. Co.*, 23 *Minn.* 114, 17 *Am. Ry. Rep.* 65.—FOLLOWED IN Carli *v.* Stillwater St. R. & T. Co., 28 Minn. 373.

The state is the absolute owner of the land in all navigable waters within its territorial limits, and such land can be granted to any one, either public or private, without

making compensation to the owner of the shore. *Stevens* v. *Paterson & N. R. Co.*, 34 *N. J. L.* 532.—DISAPPROVED IN Rumsey *v.* New York & N. E. R. Co., 133 N. Y. 79. FOLLOWED IN Pennsylvania R. Co. *v.* New York & L. B. R. Co., 23 N. J. Eq. 157. QUOTED IN Easton & A. R. Co. *v.* Central R. Co., 52 N. J. L. 267.

A statute giving to a railroad company the right to construct its road along a navigable stream, and to acquire the rights of the shore owners, does not confer upon such company the right to take the lands of the state lying below high-water mark. *Stevens* v. *Paterson & N. R. Co.*, 34 *N. J. L.* 532.

A riparian proprietor upon a navigable lake takes the land only to the water's edge; but he has the exclusive right of access to and from the water, and of building piers and wharves in aid of navigation, so long as they do not interfere with navigation; and this right is property, and cannot be taken without compensation. *Delaplaine* v. *Chicago & N. W. R. Co.*, 42 *Wis.* 214, 15 *Am. Ry. Rep.* 28.

Riparian rights proper rest upon title to the bank or shore, and not upon title to the soil under the water, being the same whether he owns the soil under the water or not. And distinguished from the right arising in case of gradual accretion, the general right of appropriating and occupying the soil under the water, when such right may exist, is not properly a riparian right, resting not upon the title to the bank only, but more directly to the title to the soil under the water. *Diedrich* v. *Northwestern Union R. Co.*, 42 *Wis.* 248, 15 *Am. Ry. Rep.* 9.—FOLLOWING Chapman *v.* Oshkosh & M. R. R. Co., 33 Wis. 629; Delaplaine *v.* Chicago & N. W. R. Co., 42 Wis. 214.

2. Right to natural flow of the stream.—Each proprietor of land through which water flows may use as much of it as is necessary for natural and domestic purposes, even if it be entirely consumed in the use, but he is limited as regards other purposes to a reasonable and proportionate use, which must not be such as to exclude others from a benefit to which they are equally entitled with himself. *Anderson* v. *Cincinnati Southern R. Co.*, 14 *Am. & Eng. R. Cas.* 275, 86 *Ky.* 44, 5 *S. W. Rep.* 49, 9 *Am. St. Rep.* 263.

Every owner of land on the banks of a stream has a usufruct in the water, though he cannot diminish or divert the stream, except that all water necessary for the use of men and animals may be withdrawn from it by natural or artificial means; but water cannot be taken from it for irrigation or such secondary purposes. *Anderson* v. *Cincinnati Southern R. Co.*, 14 *Am. & Eng. R. Cas.* 275, 86 *Ky.* 44, 5 *S. W. Rep.* 49, 9 *Am. St. Rep.* 263.

3. Title to bed of navigable stream.*—The owner of lots on each side of a navigable river is also the owner of the underlying soil of the river, and may make any use of the river bed that suits his purpose, so that it does not materially or unlawfully interfere with the public easement to the use of the water in the stream. *McCartney* v. *Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

A riparian owner upon a navigable river, like the Mississippi, owns the fee to ordinary high water; but the term "high-water mark" is regarded as co-ordinate with the limit of the river bed, and the river bed only includes land which the water covers long enough to destroy vegetation, and the banks are limited to the ordinary water line, as distinguished from the water line at the time of freshets. *Houghton* v. *Chicago, D. & M. R. Co.*, 47 *Iowa* 370.

The owner of land bordering upon a navigable river owns only to high-water mark; and an act of congress declaring the river non-navigable does not extend his fee to the center of the stream, nor entitle him to maintain an action to recover possession of the land lying below high-water mark from a railway company which began to occupy the same with its roadbed while the river was yet, in contemplation of law, navigable. *Wood* v. *Chicago, R. I. & P. R. Co.*, 11 *Am. & Eng. R. Cas.* 499, 60 *Iowa* 456, 15 *N. W. Rep.* 284.

For the purpose of determining the title to the bed or bottom of rivers and streams in a state they may be divided into three classes: (1) Those where the tide flows, together with the tideless rivers of the first magnitude, such as the Niagara, St. Lawrence, Mohawk, Genesee, and Alleghany. (2) Those of lesser magnitude, which are in fact navigable for a portion of the year, the real character of which is usually ascertained by proof. (3) Those which have no

* Rights of owners of land bordering on navigable rivers, see note, 5 AM. & ENG. R. CAS. 92.

navigable capacity whatever. *Buffalo Pipe Line Co.* v. *New York, L. E. & W. R. Co.*, 10 *Abb. N. Cas.* (*N. Y.*) 107.

Under the above classification, riparian owners have no title to the bed of rivers of the first class, and no exclusive privileges therein, but the title remains in the state for common use. In the second class, the riparian owner takes title to the bed of the stream to the centre, and the opposite owner comes up to the same line. Streams of the third class are wholly private. *Buffalo Pipe Line Co.* v. *New York, L. E. & W. R. Co.*, 10 *Abb. N. Cas.* (*N. Y.*) 107.

A railroad company owning the bed of a river of the second class, as above defined, holds subject to the right of the public to navigate the stream, but not subject to the right of others who devote it to private traffic. So a pipe-line company becomes a trespasser if it enters upon such land and attempts to lay its line in the bed of the stream. *Buffalo Pipe Line Co.* v. *New York, L. E. & W. R. Co.*, 10 *Abb. N. Cas.* (*N. Y.*) 107.

The statutes of the state do not prevent railroad corporations from holding the fee simple to lands necessary for corporate purposes; which include lands under water. *Buffalo Pipe Line Co.* v. *New York, L. E. & W. R. Co.*, 10 *Abb. N. Cas.* (*N. Y.*) 107.

Rocks and shoals lying along the margins of navigable rivers, above tide water, belong to riparian owners. Riparian rights extend laterally from the shore, and not up or down the stream. *Moore* v. *Willamette T. & L. Co.*, 7 *Oreg.* 355.

While a shore owner has riparian rights to land under navigable waters, he holds the right subject to public navigation, which includes the right to improve, regulate, and control the stream in the interests of navigation. *Delaplaine* v. *Chicago & N. W. R. Co.*, 42 *Wis.* 214, 15 *Am. Ry. Rep.* 28.—FOLLOWING Jones *v.* Pettibone, 2 Wis. 308. REAFFIRMING Walker *v.* Shepardson, 2 Wis. 384, 4 Wis. 486; Mariner *v.* Schulte, 13 Wis. 693; Arnold *v.* Elmore, 16 Wis. 510; Harrington *v.* Edwards, 17 Wis. 586; Yates *v.* Judd, 18 Wis. 119.—FOLLOWED IN Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248.

The right of riparian owners extends to low-water mark; beyond, the commonwealth is owner; and the port wardens are the agents of the state and dispense the bounty of the state in allowing extension of wharves beyond low-water mark. *Philadelphia & R. R. Co.* v. *Morris*, 7 *Phila.* (*Pa.*) 286.

4. Title to flats and land under water.* — Proceedings were commenced against a railroad company to prevent the filling of certain flats or swamp lands, under Mass. Act of 1866, ch. 149, which created a board of harbor commissioners, and intrusted them with the power of preventing unauthorized encroachments upon the navigable waters of harbors. The company defended on the ground that its work was begun before the passage of the statute. The evidence showed that the extent of the flats to be filled had never been defined by any legislative act, or by any line of wall or piles, except by a short portion of wall, for a short distance in front of the flats, which turned and ran for a short distance toward the upland and there stopped. *Held*, not sufficient to exempt the company from the operation of the act. *Attorney-General* v. *Boston & L. R. Co.*, 118 *Mass.* 345.

In such case, the company also defended under the authority of Mass. Act of 1845, ch. 224; but that statute merely defined the boundary line of defendant's flats, and conferred no new title, right, or authority upon the defendant. *Held*, that it was not a good defense. *Attorney-General* v. *Boston & L. R. Co.*, 118 *Mass.* 345.

Neither the N. Y. Act of 1846, ch. 216, incorporating a company for the purpose of constructing a railroad along the east side of the Hudson river, nor the amendatory act of 1848, ch. 30, gave the corporation any title to lands belonging to the state, whether above or under the waters of the river; nor did the adopting a course or filing a map as prescribed give any such title. Said acts, at most, gave only an implied license to the company to build along the course selected, and the title to lands of the state as well as to those of individuals was to be subsequently acquired. *New York C. & H. R. R. Co.* v. *Aldridge*, 135 *N. Y.* 83, 32 *N. E. Rep.* 50, 48 *N. Y. S. R.* 373; *affirming* 42 *N. Y. S. R.* 18, 16 *N. Y. Supp.* 674.

The provision of said amendatory act, (§ 5) giving to the directors of the company power to adopt a new and altered location for its road as a substitute for the original

* Rights of landowners in navigable waters fronting lands, and in the lands under water, see very full note, 19 AM. ST. REP. 226.

location, applies only to what is in reality an alteration and substitution; not to that which is a mere addition to the original location. *New York C. & H. R. R. Co.* v. *Aldridge*, 135 *N. Y.* 83, 32 *N. E. Rep.* 50, 48 *N. Y. S. R.* 373; *affirming* 42 *N. Y. S. R.* 18, 16 *N. Y. Supp.* 674.

5. Conflicting rights to shore front.*—The fact that the owner of land bounded by a navigable river has conveyed to a railroad company for the use of its road a strip of the land along the water front, over which its route runs, does not deprive him of the character of riparian owner, within the meaning of the statute in reference to grants of lands under water, nor does it give to the company that character; although the title granted to the company is a fee, it holds and can only use the land for the purposes of its road. *New York C. & H. R. R. Co.* v. *Aldridge*, 135 *N. Y.* 83, 32 *N. E. Rep.* 50, 48 *N. Y. S. R.* 373; *affirming* 42 *N. Y. S. R.* 18, 16 *N. Y. Supp.* 674.—FOLLOWING Rumsey *v.* New York & N. E. R. Co., 114 N. Y. 423.

The H. R. R. Co., pursuant to N. Y. Act of 1846, duly designated the line of its road, as it passed through the town of Fishkill, and filed the proper certificate thereof in the office of the county clerk; it obtained from owners of lands fronting on the river conveyances of a strip of land along the river over which the route ran, the eastern boundary of which was above high-water mark, thus taking in the river front. The deeds contained reservations of the grantors' rights to all land lying below high-water mark, except such portions as were included in the route as laid out and located. The grantors subsequently conveyed their remaining lands, "excepting and reserving" the line of the railroad as then in use and occupation by the company. In 1867 the grantees made application to the commissioners of the land office for a grant of land under the river adjacent to the upland, which was opposed by the company; while the application was pending the company, assuming to act under the amendment of 1848, changed the westerly line of the road, as originally laid out over said lands, by carrying said line further west, in no other respect changing the original location. In 1869 the commissioners granted the said application and issued a patent to the applicants "subject to all rights and privileges in and to said premises," which said company had acquired under its charter. In 1873 said commissioners issued a patent to plaintiff, it having succeeded to the rights of the H. R. R. Co. in the strip of land under water included in the new westerly line. In an action of ejectment to recover said strip — *held*, that plaintiff acquired no title thereto either by the alleged alterations, or by said patent; that even if the patents so issued to the defendants were void because they were not the upland proprietors, this could not be urged in this action, as plaintiff could only succeed by showing title in itself. *New York C. & H. R. R. Co.* v. *Aldridge*, 135 *N. Y.* 83, 32 *N. E. Rep.* 50, 48 *N. Y. S. R.* 373; *affirming* 42 *N. Y. S. R.* 18, 16 *N. Y. Supp.* 674.—FOLLOWED IN Saunders *v.* New York C. & H. R. R. Co., 135 N. Y. 613.

The patents so issued to defendants were valid; neither the provision in said patents making the grants subject to the rights and privileges acquired by plaintiff, nor the provision of N. Y. Rev. St. in reference to grants of land under water (1 Rev. St. 208, § 67) as amended in 1850, ch. 283, prohibiting the commissioners from making any grant interfering with the rights of said H. R. R. Co., affected their right to a patent, or the validity of those granted to them; and conceding that the company had power to alter its course in the manner it assumed to do, this alteration did not affect the rights of the commissioners to make a grant to an upland proprietor of land included in the alteration. *New York C. & H. R. R. Co.* v. *Aldridge*, 135 *N. Y.* 83, 32 *N. E. Rep.* 50, 48 *N. Y. S. R.* 373; *affirming* 42 *N. Y. S. R.* 18, 16 *N. Y. Supp.* 674.

The person entitled to the exclusive right to possess and use land abutting on a navigable lake or river is also, though he does not own the fee, entitled to enjoy the riparian rights incident to the land. And so, where a railroad company procured to be condemned for its use land abutting on the bay of St. Louis, it acquired the riparian rights belonging to i., although the petition for condemnation made no express mention of such rights. *Hanford* v. *St. Paul & D. R. Co.*, 39 *Am. & Eng. R. Cas.* 25, 43 *Minn.* 104, 42 *N. W. Rep.* 596; *reargued and reaffirmed in* 44 *Am. & Eng. R. Cas.* 205.

* Right in bank of navigable rivers. Action for the obstruction of a public highway, see note, 23 AM. & ENG. R. CAS. 82.

6. Right to extend shore front.*—In Connecticut, the owners of land bounded on a harbor own only to high-water mark, and whatever rights such owners have of reclaiming the shore are mere franchises. When, however, such reclamations are made, the reclaimed portions in general become integral parts of the owners' adjoining land. By means of such reclamations, the line of high-water mark is changed and carried into the harbor, and the owners' lands have gained the reclaimed shore by accretion; the principles governing the case being the same as those which prevail where the sea recedes gradually by accession of soil to the land. *Lockwood* v. *New York & N. H. R. Co.*, 37 *Conn.* 387.

An owner of lots abutting on the Mississippi river possesses the riparian right of constructing thereon suitable landings and wharves for the convenience of commerce and navigation, and, to extend such construction out into the river to the point of navigability *Rippe* v. *Chicago, D. & M. R. Co.*, 23 *Minn.* 18, 17 *Am. Ry. Rep.* 19.

The owner of land bounded by a navigable stream has the right, by virtue of the ownership of the bank, to enjoy free communication between his abutting premises and the navigable channel of the river, and may fill out into the river, beyond low-water mark, to navigable water, so as to make the shore available for the uses connected with navigation, and to this extent is entitled to the exclusive occupancy of the bed of the stream, subordinate and subject only to the rights of the public with respect to navigation, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority; and such riparian rights are property, and cannot lawfully be taken for public use without just compensation. *Carli* v. *Stillwater St. R. & T. Co.*, 3 *Am. & Eng. R. Cas.* 226, 28 *Minn.* 373, 41 *Am. Rep.* 290, 10 *N. W. Rep.* 205.—FOLLOWING Brisbine *v.* St. Paul & S. C. R. Co., 23 Minn. 114.—DISTINGUISHED IN Newell *v.* Minneapolis, L. & M. R. Co., 24 Am. & Eng. R. Cas. 298, 35 Minn. 112.—*Union Depot, St. R. & T. Co.* v. *Brunswick*, 14 *Am. & Eng. R. Cas.* 233, 31 *Minn.* 297, 47 *Am. Rep.* 789, 17 *N. W. Rep.* 626.

By the local custom of this state, the shore-owner can reclaim the land between high- and low-water marks, but such privilege is a mere license, which the legislature may revoke at any time before execution. *Stevens* v. *Paterson & N. R. Co.*, 34 *N. J. L.* 532.

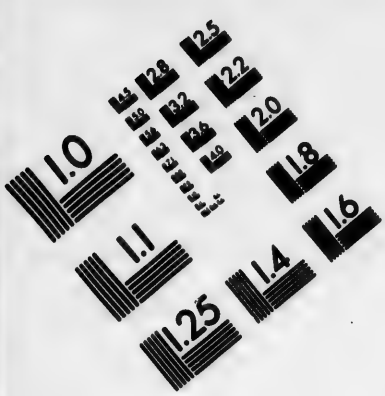
By force of the statute of New Jersey, a riparian owner, when he extends his shore front, must, if the high-water line is substantially a straight line, so extend his side lines as to make them rectangular with such high-water line, but when the high-water line is not straight, the extension of the shore front must be divided proportionally among the riparian owners. *Delaware, L. & W. R. Co.* v. *Hannon*, 37 *N. J. L.* 276.—QUOTING Walker *v.* Boston & M. R. Co., 3 Cush. (Mass.) 22.

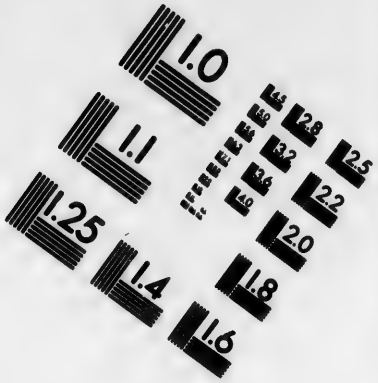
The inchoate right which the owner of the upland has to acquire an exclusive title to lands under water by wharfing out or otherwise improving the same gives him no property in the land before it is reclaimed; he has a mere license, revocable by the legislature at any time before it shall be executed. *State* (*New York, L. E. & W. R. Co., Pros.*) v. *Yard*, 11 *Am. & Eng. R. Cas.* 529, 43 *N. J. L.* 632; *affirming* 43 *N. J. L.* 121.

A riparian owner has a right to construct wharves or piers in aid of navigation, and to protect his land against natural causes which are wearing it away or encroaching upon the banks; but beyond these he has no right to extend his possession, or intrude beyond the natural shore line, except upon a public grant. Any other intrusion or extension beyond the natural shore, whether made by the riparian owner or a stranger, is a pourpresture, and vests no title in the one who makes it. *Diedrich* v. *Northwestern Union R. Co.*, 42 *Wis.* 248, 15 *Am. Ry. Rep.* 9.

7. Grants of land under water—"Adjacent owners."—A railroad company that has acquired title to land under water some distance from the shore for the purpose of constructing its roadbed, and has built thereon an embankment supporting its tracks, but leaving a bay between the embankment and the original shore line, into which the tide ebbs and flows, is not "a proprietor of adjacent lands," within the meaning of 1 N. Y. Rev. St. 208, § 67, prohibiting grants of lands under waters of navigable streams "to any person other

* Right of riparian owner to use submerged lands to a depth of practical navigation, see note, 36 AM. ST. REP. 336.





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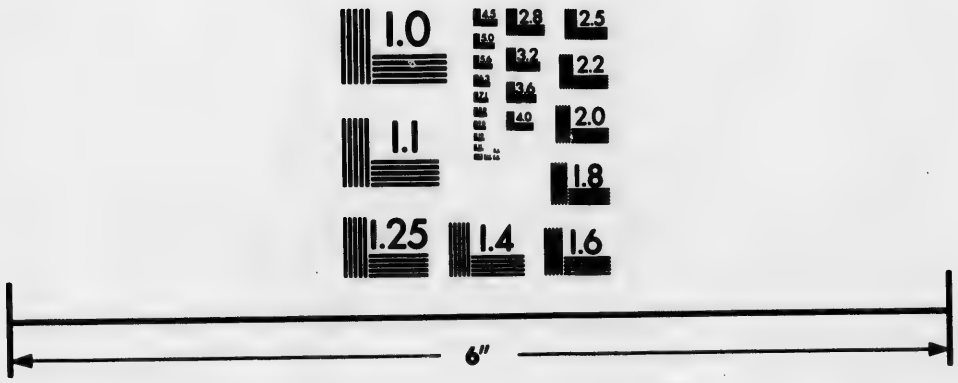

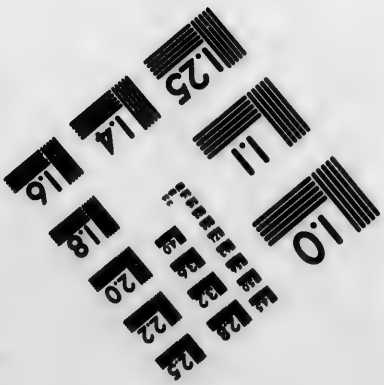

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than the proprietor of the adjacent lands." *Rumsey* v. *New York & N. E. R. Co.*, 39 *Am. & Eng. R. Cas.* 34, 114 *N. Y.* 423, 21 *N. E. Rep.* 1066, 23 *N. Y. S. R.* 928.—FOLLOWED IN New York C. & H. R. R. Co. *v.* Aldridge, 135 N. Y. 83; Rumsey *v.* New York & N. E. R. Co., 3 Silv. App. 203. REVIEWED IN New York C. & H. R. R. Co. *v.* Aldridge, 42 N. Y. S. R. 18.

Under the above statute the proprietor of "adjacent lands" is the proprietor of the adjacent uplands. *Rumsey* v. *New York & N. E. R. Co.*, 39 *Am. & Eng. R. Cas.* 34, 114 *N. Y.* 423, 21 *N. E. Rep.* 1066, 23 *N. Y. S. R.* 928. —DISTINGUISHING Gouge v. Hudson River R. Co., 6 N. Y. 522; Langdon v. Mayor, etc., of N. Y., 93 N. Y. 129.

A riparian owner on the Hudson river conveyed to a railroad company the right of way in land under a small body of water or bay which projected from the main line of the river, reserving to himself the right to the other land below high water, except the strip conveyed. *Held*, that such reservation was valid, though the grantor had not obtained a patent from the state at the time the deed was made. *Saunders* v. *New York C. & H. R. R. Co.*, 30 *Abb. N. Cas.* 88, 23 *N. Y. Supp.* 927; *affirmed in* 24 *N. Y. Supp.* 659, 54 *N. Y. S. R.* 364, 71 *Hun* 153; *modified and affirmed in* 144 *N. Y.* 75, 38 *N. E. Rep.* 992.

8. Right to erect dams and breakwaters.—As a right of necessity, when water, navigable or otherwise, is by natural causes wearing away and intruding upon its banks, the riparian owner, whether he owns to the middle of the stream or not, may, as against the public, intrude into the water as far as may be necessary for the construction of works essential to the protection of his lands against the action of water; but he does this at his peril of obstructing the public use, if the water is navigable, and at his peril, if the obstruction is not necessary. *Diedrich* v. *Northwestern Union R. Co.*, 42 *Wis.* 248, 15 *Am. Ry. Rep.* 9.

9. Remedies for obstructing navigation.*—The state has the right of a proprietor over navigable streams entirely within its borders, and may obstruct, or (unless where restricted by the constitution of the United States) may close up such streams at pleasure. *Bailey* v. *Philadelphia, W. & B. R. Co.*, 4 *Harr.* (*Del.*) 389.

Individuals, as part of the general public, have a right to navigate waters; but an individual cannot acquire a private right to do so, for his use cannot, in law, be adverse. So an individual who owns a private dock cannot maintain a proceeding against a railroad company to have damages assessed for constructing a railroad on piles over navigable waters, so as to prevent the bringing of boats from beyond the railroad to the dock. *Thayer* v. *New Bedford R. Co.*, 125 *Mass.* 253.

A landowner whose sole interest in a navigable stream is the right to its use as a public highway in common with the public cannot maintain a private suit for its obstruction. *Potter* v. *Indiana & L. M. R. Co.*, 95 *Mich.* 389, 54 *N. W. Rep.* 956.

Where land upon a navigable stream is only useful in connection with a shipping and freighting business, and it is problematical whether it will ever be in demand for that purpose, damages claimed by the owner for the obstruction of the stream are purely speculative. *Potter* v. *Indiana & L. M. R. Co.*, 95 *Mich.* 389, 54 *N. W. Rep.* 956.

Where a railroad company is sued for damages for obstructing a navigable stream by a bridge, and there is proof of the obstruction, and that plaintiff has sustained damages thereby, plaintiff's case is established, and it then rests upon the company to show that it had authority to erect the bridge, and that it was properly built and managed. (Pratt, J., dissenting.) *Doxsey* v. *Long Island R. Co.*, 35 *Hun* (*N. Y.*) 362.

The provision of N. Y. General Railroad Act of 1890, ch. 565, authorizing a railroad corporation to construct its road across or along any stream or watercourse and removing the exception in the similar provision of the act of 1850, ch. 140, of the right to obstruct any navigable stream or lake, has no effect upon a patent for lands under the waters of a navigable stream issued by the state prior to the passage of said act of 1850, and so, does not divest the patentee of any rights acquired under his patent. *Rumsey* v. *New York & N. E. R. Co.*, 130 *N. Y.* 88, 28 *N. E. Rep.* 763, 40 *N. Y. S. R.* 583; *affirming* 28 *N. Y. S. R.* 984; *former appeal* 114 *N. Y.* 423.

The right of navigation being a pre-existing public right, one who claims authority

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* Right in bank of navigable river. Action for the obstruction of a public highway, see note, 23 AM. & ENG. R. CAS. 82.

to obstruct it, under a legislative grant, must show such authority to be clear, either from the explicit terms of the grant, or by necessary implication. *Thompson* v. *Paterson &* H. R. R. Co., 9 *N. J. Eq.* 526.

The burden of proving lawful an obstruction of a navigable stream is upon the party causing the obstruction. *Cantrell* v. *Knoxville, C. G. &* L. R. Co., 90 *Tenn.* 638, 18 *S. W. Rep.* 271.

The ownership of the bed of a navigable river is immaterial in an action by a person not claiming any interest in the soil, but merely a public right of way over such river, against a railway company for obstructing navigation; and it is not necessary for the railway company in such action to allege or prove that it has taken steps to have the ownership of the soil vested in it under the statutes. *Abraham* v. *Great Northern R. Co.*, 16 *Q. B.* 586, 15 *Jur.* 855, 20 *L. J. Q. B.* 322.

Where a railway company, sued for obstructing navigation of a river, justifies under the Lands Clauses Act, 1845, it need not allege in its plea that it has done as little damage as could be, in accordance with section 16 of the act, which requires that companies in the exercise of their powers "shall do as little damage as can be." *Abraham* v. *Great Northern R. Co.*, 16 *Q. B.* 586, 15 *Jur.* 855, 20 *L. J. Q. B.* 322.

Where a railway act provides that nothing therein shall authorize the company "to obstruct the navigation of a river, or any part thereof, or to divert any of the waters therein, or which now supply the river," this clause applies only to the time of the construction of the railway and does not take away the company's rights as riparian proprietor. *Attorney-General* v. *Great Eastern R. Co.*, 18 *W. R.* 1187, 23 *L. T.* 344.

10. —— for obstructing shore front. —(1) *In general.*—Though the title of one owning lands bordering on a navigable stream stops at the water, yet as riparian owner he has a right to construct suitable landings and wharves for the convenience of navigation, and may enjoin a railroad company from constructing tracks so as to interfere with this right. *St. Paul &* P. R. Co. v. *Schurmeir*, 7 *Wall.* (*U. S.*) 272.—QUOTED IN Story *v.* New York El. R. Co., 90 N. Y. 122, 11 Abb. N. Cas. 236.

Section 2 of the Iowa act entitled "An act in relation to riparian owners on the Mississippi and Missouri Rivers," approved March 18, 1874, is not in conflict with any statute of the United States. Where, therefore, the owner of lands on the Mississippi had made an embankment in front of them, and at its outer end, beyond low-water mark, erected, without the direction or consent of the secretary of war, a stone pier or crib, this court affirms the judgment of the supreme court of that state, declaring that under that section a railway company cannot construct its road over the embankment between high- and low-water mark, unless the damages to such owner shall first be ascertained and paid. *Davenport &* N. W. R. Co. v. *Renwick*, 5 *Am. &* Eng. R. Cas. 90, 102 *U. S.* 180.

The owners of lands bordering upon the Mississippi river whose riparian rights are appropriated by a railroad company are entitled to compensation for the destruction of, or injury to, their right of access to the navigable part of the river, and for the loss of the right to make and maintain a wharf or pier for their own use and for the use of the public, and of the privilege of keeping a public ferry. *Organ* v. *Memphis &* L. R. R. Co., 39 *Am. &* Eng. R. Cas. 75, 51 *Ark.* 235, 11 *S. W. Rep.* 96.

The owner of lands lying along the Mississippi river has no private right in the waters thereof, or in the shore between high- and low-water mark, and he cannot recover damages for being deprived of access to the stream by reason of the construction of a railroad along its banks between such marks. (Beck, J., dissenting.) *Tomlin* v. *Dubuque, B. &* M. R. Co., 32 *Iowa* 106, 10 *Am. Ry. Rep.* 70.—FOLLOWING Gould *v.* Hudson River R. Co., 6 N. Y. 543.—DISAPPROVED IN Chapman *v.* Oshkosh & M. R. R. Co., 33 Wis. 629.

To entitle a riparian owner to damages for the appropriation by a railroad company of land upon the banks of the Mississippi or Missouri rivers, under Iowa Laws of 1874, ch. 35, it is not necessary that he should have erected a crib or pier in front of his property. *Renwick* v. *Davenport &* N. W. R. Co., 49 *Iowa* 664.

It is competent for the state to provide, as in the statute cited, that a railway company should not appropriate land for its own use, between low- and high-water mark, without compensation to the riparian owner. *Renwick* v. *Davenport &* N. W. R. Co., 49 *Iowa* 664.

A riparian owner on a navigable river is

entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property. *Pion* v. *North Shore R. Co.*, 14 *Can. Sup. Ct.* 677; *reversing* 12 *Quebec L. R.* 205.

A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *acces et sortie*, and such obstruction without parliamentary authority is an actionable wrong. *Bigaouette* v. *North Shore R. Co.*, 17 *Can. Sup. Ct.* 363.—FOLLOWING North Shore R. Co. *v.* Pion, L. R. 14 App. Cas. 612.

(2) *In New York.*—N. Y. General Railroad Act of 1850, ch. 140, § 28, subd. 5, providing that every stream of water, watercourse, etc., intersected or touched by a railroad, shall be restored by the corporation "to its former state, or to such state as not unnecessarily to have impaired its usefulness," was designed to protect public rights, not private interests, and applies only to such streams and watercourses as were, before the construction of the road, capable of and accustomed to be generally navigated, and, so far as it applies to a navigable river, has reference simply to commerce thereon and the general right of navigation. *Kerr* v. *West Shore R. Co.*, 127 *N. Y.* 269, 27 *N. E. Rep.* 833, 37 *N. Y. S. R.* 913; *affirming* 53 *Hun* 634, 25 *N. Y. S. R.* 1036, 6 *N. Y. Supp.* 958.

It does not entitle each owner of upland fronting upon a bay in a river intersected by a railroad, which bay was not navigable in the ordinary meaning of the term, to have a drawbridge constructed in the road so as to permit the passage of vessels to his property. *Kerr* v. *West Shore R. Co.*, 127 *N. Y.* 269, 27 *N. E. Rep.* 833, 37 *N. Y. S. R.* 913; *affirming* 53 *Hun* 634, 25 *N. Y. S. R.* 1036, 6 *N. Y. Supp.* 958.

Plaintiff was the owner of a farm bounded by the Hudson river, and the state had made to him a grant of lands under water, extending along the whole front of his farm. A railroad corporation, to whose title the defendant is the successor, constructed its road along the river partly upon plaintiff's upland, partly upon the land so granted by the state, and partly upon land under water in front of plaintiff's property. The lands of plaintiff so occupied by said road were condemned by the company, and the sum awarded was paid by it. The commissioners of the land office executed to the company a grant of the land under water upon which the road was constructed. Prior to the construction of the road there were two small docks upon plaintiff's land, at which vessels landed, access to which was had by a private way across plaintiff's land from a highway. These docks were within the strip of land acquired by the company. There was also a dock on a small bay near the mouth of the creek, where sand was shipped upon scows and sail vessels. The railroad crossed this bay outside of the land under water granted to plaintiff. Opposite the mouth of the creek the road crossed on a bridge, the bottom of which was four feet above high water. *Held*, that an action was not maintainable to compel defendant to restore said way leading to the docks, or to construct a drawbridge so as to give vessels access to the dock in the bay; that under the condemnation proceedings the railroad company acquired whatever title plaintiff had either in the upland or the land under water; that by the grant from the commissioners of the land office said company acquired both such reserved rights as the state had in the land theretofore granted to plaintiff and the title of the state to the land occupied by the road in front of plaintiff's premises, not included in his grant; and so, that defendant owed no duty to plaintiff save such as was owed to every riparian owner whose access to the channel of the river is cut off by its road; and that as such owner he was not entitled to the relief sought. *Kerr* v. *West Shore R. Co.*, 127 *N. Y.* 269, 27 *N. E. Rep.* 833, 37 *N. Y. S. R.* 913; *affirming* 53 *Hun* 634, 25 *N. Y. S. R.* 1036, 6 *N. Y. Supp.* 958.

The owner of land bounded upon a navigable river has property rights therein, i. e., the right of access to the navigable part of the stream and the right to construct a landing or wharf, and where a railroad company, although acting under legislative authority, has constructed its road across the water front of such owner, and thus has deprived him of access to the navigable part of the stream, unless he has granted the right, or it has been obtained by eminent domain, he is entitled to recover his damages. *Rumsey* v. *New York & N. E. R. Co.*, 52 *Am. & Eng. R. Cas.* 20, 133 *N. Y.* 79, 30 *N. E. Rep.* 654, 44 *N. Y. S. R.* 248;

reversing 60 *Hun* 585, 39 *N. Y. S. R.* 894, 15 *N. Y. Supp.* 509.—DISAPPROVING Stevens *v.* Paterson & N. R. Co., 34 N. J. L. 532; Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Ex. 221. QUOTING Yates *v.* Milwaukee, 10 Wall. (U. S.) 497.

The proper measure of damages in such case is the diminished rental or usable value of the property for the purpose it was used for before the building of defendant's road; not what it would have been if the land had been put to some other use or other structures had been placed upon it. *Rumsey* v. *New York & N. E. R. Co.*, 52 *Am. & Eng. R. Cas.* 20, 133 *N. Y.* 79, 30 *N. E. Rep.* 654, 44 *N. Y. S. R.* 248; *reversing* 60 *Hun* 585, 39 *N. Y. S. R.* 894, 15 *N. Y. Supp.* 509.

In an action by plaintiffs, who were the owners of certain uplands on the Hudson river, to recover damages sustained by the construction by defendant in 1880 of a railroad across their water front, which cut off their access to the water, it appeared that the lands under water in front of plaintiffs' premises were not granted to them until in March, 1885. *Held*, that plaintiffs' right to recover was not confined to the period since such grant, but that they were entitled to damages for interference with their prior property rights in the stream as riparian owners. *Rumsey* v. *New York & N. E. R. Co.*, 52 *Am. & Eng. R. Cas.* 20, 133 *N. Y.* 79, 30 *N. E. Rep.* 654, 44 *N. Y. S. R.* 248; *reversing* 60 *Hun* 585, 39 *N. Y. S. R.* 894, 15 *N. Y. Supp.* 509.—OVERRULING Gould *v.* Hudson River R. Co., 6 N. Y. 522.

11. Conveyances of riparian rights.*—The right of a riparian proprietor upon navigable waters to improve, reclaim, and occupy the submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom, and be transferred to, and enjoyed by, persons having no interest in the original riparian estate. *Hanford* v. *St. Paul & D. R. Co.*, 44 *Am. & Eng. R. Cas.* 205, 43 *Minn.* 104, 42 *N. W. Rep.* 596, 44 *N. W. Rep.* 1144.—OVERRULING Lake Superior Land Co. *v.* Emerson, 38 Minn. 406.

An adjacent landowner granted a right of way across a small bay which was navigable, and afterwards the water was filled between the track and the mainland, part by the company and part by the riparian owner, and the company laid other tracks on the filled portion. *Held*, that the riparian owner still was entitled to the land so reclaimed, notwithstanding the state had made a grant to the company of the land originally under water. *Saunders* v. *New York C. & H. R. R. Co.*, 23 *N. Y. Supp.* 927, 30 *Abb. N. Cas.* 88, *affirmed in* 24 *N. Y. Supp.* 659, 54 *N. Y. S. R.* 364, 71 *Hun* 153; *modified and affirmed in* 144 *N. Y.* 75, 38 *N. E. Rep.* 992.—QUOTING Illinois C. R. Co. *v.* Illinois, 146 U. S. 387, 13 Sup. Ct. Rep. 110.

A landowner, while the owner of certain lots which lay partly above and partly below ordinary high tide in a navigable river, conveyed to a company the right to build a wharf on land in front of the lots, but extending several hundred feet out into the river, upon condition that a wharf should be erected thereon. Subsequently the lots were conveyed to plaintiff. After the wharf was erected it was conveyed to defendant railway company, and burned down, and plaintiff sued to restrain its reconstruction. *Held*, that the conveyance by the original owner of the lots of the privilege of erecting the wharf in front of the lots conferred a complete right to build such structure, under Oreg. Misc. Laws, ch. 63, and plaintiff, the subsequent grantee of the lot, took it subject to the right conveyed to erect the wharf, and was estopped from objecting to such wharf. *McCann* v. *Oregon R. & N. Co.*, 13 *Oreg.* 455, 11 *Pac. Rep.* 236.

A conveyance by a claimant under the donation law, by deed without covenants, of a riparian right incident to the land covered by his claim, and prior to the completion of his term of residence and cultivation, passes no title. *McCann* v. *Oregon R. & N. Co.*, 13 *Oreg.* 455, 11 *Pac. Rep.* 236.

The proprietor of land bordering upon a navigable river dedicated a portion of it to a town for public highways, and the same was delineated upon a map as extending to high-water mark, as it existed at the time of the grant. *Held*, that no part of the land or water adjoining, and lying below high-water mark, as it then existed, passed to the town or was subject to any easement by any such dedication or grant, since all such land lying below high-water mark belongs to the state and could only be dedicated or subjected to an easement by the state or the grantees. *Hoboken* v. *Pennsylvania R. Co.*, 16 *Fed. Rep.* 816.

* Condemnation of riparian rights; effect of, see note, 39 AM. & ENG. R. CAS. 28.

12. Accretion.* — Where a railroad company has lawfully built its embankment in the bed of a river, below high-water mark, and the high-water mark is changed to the further side of the embankment, the riparian owner cannot claim title out to the last high-water mark, on the ground of change of boundary by accretion. *Chicago, B. & Q. R. Co.* v. *Porter*, 36 *Am. & Eng. R. Cas.* 405, 72 *Iowa* 426, 34 *N. W. Rep.* 286.

The owner of a lot bounded on one side by a street which is located along the Mississippi river is not entitled as a riparian proprietor to accretions formed on the opposite side of the street. *Ellinger* v. *Missouri Pac. R. Co.*, 112 *Mo.* 525, 20 *S. W. Rep.* 800.

One holding land under a deed which conveyed "to the bank of Lake Ontario, thence along said bank" is entitled to lands formed by alluvial deposits extending the line of the bank lakeward, which completely cover the original bank, as against a railroad owning the shore. *Throop* v. *Cobourg & P. R. Co.*, 5 *U. C. C. P.* 509.

A parcel of land conveyed being described as so many chains, more or less, running to Lake Ontario and thence along the lake shore, etc., and a beach or strip of land having been formed by accretion between what was then the line and the edge of the lake as at present, which was claimed by a railroad—*held*, that the owner of the land was entitled to such strip of land to the water's edge, and was not limited to the boundary of the lake as it was when the above deed was made. *Buck* v. *Cobourg & P. R. Co.*, 5 *U. C. C. P.* 552.

13. The Chicago lake front case.† —The general government made a grant to the state of Illinois of land to aid in the construction of a railroad, and a grant of a right of way 200 feet wide over the public domain; and the state chartered defendant company as the beneficiary of the grant, and, among other things, authorized it to build into the city of Chicago upon conditions imposed by the city council. By an ordinance adopted June 24, 1852, the company was authorized to build its road along the shore of Lake Michigan near the margin of the lake to a certain designated point in the city. *Held*, that building and appropriating 200 feet along such shore was not an intrusion upon the public domain of the state, so as to require the removal of the tracks, or any restraint in their use, where the company had conformed to the provisions of the ordinance for the protection of the shore, and of individuals and property. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

It is settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide water, within the limits of the several states, belong to the states within which they are found, with the right to use or dispose of a portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject to the paramount right of congress to control their navigation. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

The above doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

But the company never acquired, by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated, viz., the construction and operation of a railroad thereon, with one or more tracks and works in connection with the road or in aid thereof. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

Nor did the company acquire, by the construction of its road and other works, any right, as a riparian owner, to reclaim still further lands from the waters of the lake for its use, or for the construction of piers, docks, and wharves in the furtherance of its business. The extent to which it could reclaim the land under water was

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* Accretion, rule as to, see note, 36 AM. & ENG. R. CAS. 409.

† Right of riparian owner to use submerged lands to a depth of practical navigation, see note, 36 AM. ST. REP. 336. See also notes, 19 *L.* 226; 5 AM. & ENG. R. CAS. 92.

limited by the city ordinance, which was simply for the construction of a railroad on a track not to exceed a specified width, and of works connected therewith. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

The construction of a pier, or the extension of any land into navigable waters, for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

A riparian proprietor is entitled, among other rights, to access to the navigable part of the water on which his land fronts, and for that purpose to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the public. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

Defendant company became the owner of certain lots of land fronting on said lake, and finding the lake in front of these lands shallow, filled it in, and upon the reclaimed land constructed slips, wharves, and piers, which it claims to own and to have the right to use in its business. *Held*, that it has a right to own and use such slips, wharves, and piers, unless the trial court shall hereafter find, on further proof, that they are so constructed as to extend beyond the point of practical navigation in the lake; and if so, to that extent they must be abated. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

And where the city, by ordinances, has granted the company additional space as a means of approaching its station, it has a right to continue the use. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

Illinois Act of April 16, 1869, granting to such company all the right and title of the state in and to the submerged lands constituting the bed of Lake Michigan, for the distance of one mile in the Chicago harbor, cannot be invoked so as to extend riparian rights which the company possessed from its ownership of lands on the lake. It was not competent for the legislature thus to deprive the state of its ownership of the submerged lands in the harbor, and of the consequent control of its waters. Therefore the repealing act of April 15, 1873, was valid and effective to restore to the state its original title. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.—REVIEWED IN Lake Roland El. R. Co. *v.* Mayor, etc., of Baltimore, 54 Am. & Eng. R. Cas. 11, 77 Md. 352, 26 Atl. Rep. 510.

The fee of the made or reclaimed ground between Randolph street and Park row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, is in the city. Subject to the right of the railroad company to its use of the tracks on ground reclaimed by it, and the continuance of the breakwater, the city possesses the right of riparian ownership, and is at full liberty to exercise it. *Illinois C. R. Co.* v. *Illinois*, 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110; *affirming* 33 *Fed. Rep.* 730.

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— — — employés, see EMPLOYÉS, INJURIES TO, **182-295.**

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ST. PAUL & P. R. CO.

1. Creation of.* — Minnesota Act of March 10, 1862, created the above company, and did not merely continue the old corporation of the Minnesota & Pacific railroad company. Therefore the former is a different corporation, and cannot be sued at law on bonds issued by the latter. *Hopkins* v. *St. Paul & P. R. Co.*, 2 *Dill.* (*U. S.*) 396.

Upon the organization by the persons named in the above act, the company became vested with the roads, lands, and franchises, including the corporate franchise, of the Minnesota & Pacific R. Co. *First Div. St. P. & P. R. Co.* v. *Parcher*, 14 *Minn.* 297 (*Gil.* 224).—FOLLOWED IN Secombe *v.* Milwaukee & St. P. R. Co., 2 Dill. (U. S.) 469.

Upon a transfer by the company to certain persons of a portion of its line, and the lands and franchises pertaining thereto, it

* See also LAND GRANTS, **110.**

was competent for the legislature to consent that such persons should organize as a corporation distinct from that company. In view of section 21 of the charter of the Minnesota & Pacific railroad company, this would not be forming a corporation by special act within the meaning of the constitution. *First Div. St. P. & P. R. Co.*, v. *Parcher*, 14 *Minn.* 297 (*Gil.* 224).—REFERRED TO IN Welsh *v.* First Div. St. P. & P. R. Co., 25 Minn. 314.

To the organization by such persons as the First Division of the St. Paul & Pacific railroad company, the legislature consented by the act of March 4, 1864, relating to the registry of railroad organizations, and the act of February 6, 1866, entitled "An act to legalize and confirm the organization, acts, and proceedings of the First Division of the St. Paul & Pacific Railroad Company, and in relation to the character and powers of said company," and thereupon said company became a body corporate. *First Div. St. P. & P. R. Co.* v. *Parcher*, 14 *Minn.* 297 (*Gil.* 224).— FOLLOWED IN Secomb *v.* Milwaukee & St. P. R. Co., 49 How. Pr. (N. Y.) 75.

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Without foreclosure, under power in mortgage, see MORTGAGES, **164.**
See also JUDICIAL SALE.

1. What constitutes a sale—Validity.*—A company bought certain articles from plaintiff, who agreed to take pay for the same in capital stock of the company, but nothing was said as to the value the stock was to bear. *Held*, that the par value should be inferred. *Tilkey* v. *Augusta, G. & S. R. Co.*, 83 *Ga.* 757, 10 *S. E. Rep.* 448.

Where a contract for the sale and delivery of railroad ties, in the beginning purports to be entered into by the president, and recites that the other is to furnish the ties to the company, and it is signed in the name of the company by its president, it will be construed as obligating the company to pay the price. *Havana, R. & E. R. Co.* v. *Walsh*, 85 *Ill.* 58.

The purchase of a lot of cotton by a railroad company, chartered and domiciliated in Mississippi, from a party residing in Louisiana, is not affected by the prohibitions contained in La. Act of 1855, that "no corporation shall engage in mercantile or agricultural business nor in commission, brokerage, stock jobbing, exchange, or banking business of any kind." The statute only refers to the buying and selling of articles of merchandise as an employment, and implies operations conducted with a view of realizing the profits which come from skilful purchase, barter, speculation, and sale. *Graham* v. *Hendricks*, 22 *La. Ann.* 523.

A company purchased two locomotive engines and gave its promissory notes therefor. After a part had been paid, it executed an absolute bill of sale of the engines to the manufacturers, taking back an agreement to sell the engines to the company upon payment of the rest of the notes, and to allow it the use of the engines meanwhile. The engines were formally delivered to the manufacturers, but remained in the actual possession of the corporation, and the agreement was not recorded. Afterwards a new agreement was substituted, by which the manufacturers leased the engines to the corporation, and agreed to sell and transfer them upon being paid the amount remaining due. *Held*, that the bill of sale was void as against creditors of the corporation; that the bill of sale and contemporaneous agreement constituted at most only a mortgage, so that the property was still liable to attachment against the corporation; and that the subsequent agreement gave the manufacturers no additional right in the engines. *Potter* v. *Boston Locomotive Works*, 12 *Gray* (*Mass.*) 154.

A contract to furnish ties and other material, and to construct and complete a definite line of single-track railroad, for a given compensation, payable in instalments as the work progresses, upon monthly estimates of the amount of work done and material furnished, is a contract for work and material, and not of sale. Until placed in the track, the property in ties furnished under such a contract remains in the contractor, even though, prior thereto, they may have been inspected by the company

* Manner of acceptance must comply with offer, see note, 29 AM. & ENG. R. CAS. 585.

and included in the monthly estimates. *Chandler* v. *De Graff*, 22 *Minn.* 471, 18 *Am. Ry. Rep.* 425.

A railroad company organized in this state, but extending into another state, and which is authorized to raise money by a sale of its bonds, may sell the bonds either within or without the state, and the transaction will be a sale and not a loan. *Bank of Ashland* v. *Jones*, 16 *Ohio St.* 145.

Before such a sale can be declared invalid as contravening the settled policy of the state, the repugnancy must be plain and substantial. The fact that the bonds bear a higher rate of interest in the state than may be prescribed for similar bonds issued under authority of the state, but which are authorized to be sold at any price, does not create such repugnancy. *Bank of Ashland* v. *Jones*, 16 *Ohio St.* 145.

2. Sale or bailment. — An individual agreed to furnish materials, except certain iron boxes, and build cars for defendant company, the company agreeing to furnish the boxes, and to deduct the price from the price of the cars. There was a delay in furnishing the boxes, which extended the time for completing the cars, during which time they were destroyed while in the builder's possession. *Held*, that this was an agreement for the sale of the cars when constructed, and the title thereto still remained in the builder at the time of the loss, which would prevent him from recovering against the company. *McConihe* v. *New York & E. R. Co.*, 20 *N. Y.* 495.—REVIEWED IN Pittsburgh, C. & St. L. R. Co. *v.* Heck, 50 Ind. 303.

A railroad company entered into contract with a rolling-mill company for renewal of rails, in pursuance of which the railroad company delivered its old rails to the rolling-mill company; and the latter, adding new iron as was needed, remade them into new rails. While this was going on, the rails were seized on execution as the property of the rolling-mill company. *Held:* (1) that the right of property to the iron while the work was going on, and to the rails when completed, remained in the railway company; (2) that the transaction between the two companies is of the nature of the bailment denominated by law writers of the class *locatio operis faciendi*. The transaction was a regular contract of hire, if the railway company furnished the chief or principal part of the material of the new rails; and if such was the case, the proprietary interest in the iron let was not changed. The material inquiry is, which company furnished the chief or principal portion of the material for the manufacture of the new rails. *Arnott* v. *Kansas Pac. R. Co.*, 19 *Kan.* 95, 14 *Am. Ry. Rep.* 246.

3. Requirements of the statute of frauds.—Defendant company agreed generally, by parol, to take railroad ties of plaintiff, but no definite amount or number was specified. *Held*, that the acceptance of a certain number cannot be held to obligate the company to receive others. A parol contract to furnish ties to the amount of $50 or more in value is not a contract for work and labor, but for the sale of goods and chattels, and within the statute of frauds. *Russell* v. *Wisconsin, M. & P. R. Co.*, 39 *Minn.* 145, 39 *N. W. Rep.* 302.

Plaintiff made a parol, executory contract to sell ties to a company, exceeding in value $50. *Held*, that the receiving of the ties by the company's employés was no evidence of an acceptance under the contract by the company so as to take the case out of the statute of frauds. Such an acceptance might bind the company to pay for the ties received, but not so as to bind it by the contract. *Wade* v. *New York & O. M. R. Co.*, 52 *N. Y.* 627, *mem.*

Plaintiff contracted, by parol, to sell, and defendant to purchase, 1000 cords of wood, or so much thereof as plaintiff could cut and deliver, at a specified price per cord; no time for performance was fixed. Plaintiff delivered, and received pay for, about 322 cords, and had about 200 cords more ready for delivery; this he commenced to draw, and had piled nineteen cords by the side of defendant's road, when he was notified not to bring more, that defendant did not want it; and it refused to pay for the nineteen cords. In an action to recover damages—*held*, that the partial delivery and acceptance answered the requirements of the statute of frauds, and validated the contract; that the contract was not one that could not be performed within a year; also, that the contract was not so indefinite as to be void. *Van Woert* v. *Albany & S. R. Co.*, 67 *N. Y.* 538; *affirming* 1 *T. & C.* 256.

In an action to recover the value of certain wood sold, standing at the time of the sale upon the land of plaintiff, it was in evidence that the wood was sold by the cord. *Held*, that plaintiff was entitled to recover,

and that no memorandum of the contract in writing was necessary, because, when cut and corded, the wood became personal property. *Green* v. *North Carolina R. Co.*, 73 *N. Car.* 524.

4. Delivery, generally. — Defendants entered into a contract with the representatives of a company to complete a stated part of a railroad. In executing such contract, they appropriated and used certain ties and timber. *Held*, in an action to recover the value thereof, that it was proper to give in evidence the memorandum of agreement between plaintiffs and the company, for the purpose of showing whether the hauling of said ties and timber and placing them along the right of way, was a full delivery, and passed title thereto to the company. *Hobart* v. *Beers*, 26 *Kan.* 329.

Individuals ordered certain nursery stock to be shipped by rail, and to be paid for by their notes at six and twelve months upon receipt of the stock. *Held*, that the title to the stock passed only upon its arrival at the place of destination, and the execution of the notes by the consignees. Therefore, the shipper might maintain an action against the carrier for a delay in transportation. *Congar* v. *Galena & C. U. R. Co.*, 17 *Wis.* 477.

5. —— to carrier. — Plaintiff bought hay and directed it to be shipped to him by rail. It was delivered to defendant company marked to plaintiff, and defendant was directed to carry it to plaintiff, but afterwards was directed to deliver it to another person. *Held*, that the title of the hay passed when it was delivered to the company, and, therefore, it was liable to plaintiff for the wrong delivery. *Odell* v. *Boston & M. R. Co.*, 109 *Mass.* 50.

Delivery of personal property to a common carrier for transportation to the vendee, whether in accordance with his expressed or implied instructions, is a delivery to the vendee's agent, and equivalent to a delivery to the vendee himself. *Colcord* v. *Dryfus*, 1 *Okla.* 228, 32 *Pac. Rep.* 329.

6. —— measurement, separation, etc.—Plaintiff placed upon the line of defendant's road a quantity of firewood, which, by contract, defendant was to measure, receive, and pay for at a certain price per cord. Defendant was notified of the placing of the wood, but a portion thereof was not measured, received, or paid for as agreed upon, which was insured by plaintiff as his own after it should have been accepted, and was destroyed by fire without plaintiff's fault. *Held*, that an action thereon was not an action for the contract price of the wood, but an action for not accepting the wood according to contract; and the measure of damages was the difference between the contract price and the market price at the time and place at which the wood ought to have been accepted. *Pittsburgh, C. & St. L. R. Co.* v. *Heck*, 50 *Ind.* 303.—REVIEWING McConihe *v.* New York & E. R. Co., 20 N. Y. 495.

When goods are sold by number, weight, or measure, the sale is incomplete and the risk continues with the seller until the specific property is separated from the entire lot or quantity, and identified. *Hutchinson* v. *Grand Trunk R. Co.*, 59 *N. H.* 487.

7. —— inspection.—A stipulation in a contract with a company for the manufacture and delivery of ties, that differences and disputes as to the sufficiency of the performance of the work, and the price to be paid therefor, should be referred to the engineer—*held*, to be a valid and binding stipulation between the parties, and that one of the parties could not arbitrarily ignore or revoke the stipulation and resort in the first instance to the courts of law. *Denver & H. O. Constr. Co.* v. *Stout*, 8 *Colo.* 61, 5 *Pac. Rep.* 627.

Where a written contract for the sale and delivery of ties provides that the same shall be inspected before payment, and that they shall be loaded on the company's cars at a certain place, but is silent as to where the inspection shall be made, it may be shown that it was the understanding of the parties that the ties were to be shipped, and inspected when unloaded, and, when this is shown, a neglect to inspect a portion when delivered furnishes no excuse for delay in making a delivery before the inspection was had. *Havana, R. & E. R. Co.* v. *Walsh*, 85 *Ill.* 58.

A contract provided that plaintiffs should receive certain specified sums for ties and timber delivered along the line of the road, subject to the inspection and acceptance of the chief engineer of the company. *Held*, that such proviso was for the benefit of the company, and might be waived by it, and if any other officer than the chief engineer, by direction of the company, inspected and accepted the ties and timber, the delivery was complete, and the title passed to the

company; and this though plaintiffs never consented to an inspection by such officer. *Hobart* v. *Beers*, 26 *Kan.* 329.

Under a contract by a railroad company to purchase coal of plaintiff, certain quantities of which are to be delivered each day, of such quality as shall be "satisfactory" to the company's masters of transportation and machinery, although the coal tendered is rejected by the masters, yet if the rejection is not made in good faith, it does not justify the company in refusing to receive the coal. *Baltimore & O. R. Co.* v. *Brydon*, 25 *Am. & Eng. R. Cas.* 287, 65 *Md.* 198, 7 *Cent. Rep.* 396, 3 *Atl. Rep.* 306, 9 *Atl. Rep.* 126.

Under the above contract plaintiff had the right to tender coal every day during the time covered by the contract, provided it was of a quality satisfactory to the masters; and the masters could not deprive him of the right by condemning his coal once for all. If, however, they assumed to do so, their action relieved him from the necessity of making tender thereafter, but would not impair any of his rights under the contract. *Baltimore & O. R. Co.* v. *Brydon*, 25 *Am. & Eng. R. Cas.* 287, 65 *Md.* 198, 7 *Cent. Rep.* 396, 3 *Atl. Rep.* 306, 9 *Atl. Rep.* 126.

Under a contract providing that ties should conform to certain specifications and should be subject to inspection by any inspectors whom the defendant company might send, the latter is not bound to accept or pay for any ties rejected by its inspector. *Chapman* v. *Kansas City, C. & S. R. Co.*, 114 *Mo.* 542, 21 *S. W. Rep.* 858.

Plaintiff received over defendant's road six car-loads of lumber amounting to about 75,000 feet. After it was unloaded from the cars on a lumber yard plaintiff negotiated with lumber dealers a sale of 100,000 feet of lumber, including the six car-loads, the remainder to be furnished later, to be inspected by a person agreed on, the price of the different grades being fixed. *Held*, that the inspection fixed title in the buyer immediately; and was not affected by the fact that the whole 100,000 feet of lumber was not inspected at the same time. *Records* v. *Philadelphia, W. & B. R. Co.*, 9 *Phila.* (*Pa.*) 55.—DISTINGUISHING Nicholson *v.* Taylor, 31 Pa. St. 128.

If a company uses cross-ties furnished under contract, to be paid for only after inspection, it must be assumed that the ties so used were such as the contract specified, in the absence of evidence by the company tending to show that, though used, they were defective. *Draffin* v. *Charleston, C. & C. R. Co.*, 34 *So. Car.* 464, 13 *S. E. Rep.* 427.

8. When the title passes, generally.—A written order by the seller to the purchaser, directing a warehouseman, with whom cotton is stored, to deliver it to a railroad company, for inspection and examination by the purchaser, on his paying the storage, does not pass the title to him nor change the character of the original contract between the parties, but the company becomes the bailee of the seller, as between him and the purchaser. *Leigh* v. *Mobile & O. R. Co.*, 58 *Ala.* 165.

Where, in the absence of a special contract, it is the custom to deliver ties on the line of a railroad for inspection and acceptance, such delivery amounts to a proposal to sell, and a subsequent appropriation by the railroad completes the contract of sale and operates to pass title. *Kinney* v. *South & N. Ala. R. Co.*, 82 *Ala.* 368, 3 *So. Rep.* 113.

Plaintiff agreed to manufacture a cable for operating street-cars, and to deliver it to the company for trial, to be paid for at an agreed price if acceptable, and if not to be returned. After a test the company refused to accept it and returned it to plaintiff, who received it, and brought suit for goods sold and delivered. *Held*, that, the contract being executory, the action would not lie, where it was found that the cable was unfit for the purpose intended; and an acceptance of it by plaintiff was a rescission of the contract. *Hallidie* v. *Sutter St. R. Co.*, 63 *Cal.* 575.

By the terms of an agreement for the sale and delivery of ties, they were to be estimated before payment. *Held*, that the sale was not complete until estimation, and the ties unestimated continued the property of the vendor. *Toledo, W. & W. R. Co.* v. *Chew*, 67 *Ill.* 378.

Where a company is bound by contract to receive from plaintiff all ties required for the construction of a certain portion of its road which should be accepted by its engineer, and certain ties included in the engineer's estimates are not used and certain ones not included are used instead, and by agreement of the parties those not used are excepted from settlement, they still remain the property of plaintiff. *Smyth* v. *Ward*, 46 *Iowa* 339.

Individuals owning ties along a railroad made a contract with the company by which the latter was authorized to take as many ties as it needed for the repair of its track. It was stipulated that the ties were to be counted and paid for after they were placed under the track, and that the title should not pass until after they were under the rails. *Held*, that such stipulation, as to the time of passing the title, was valid, and that no creditor of the company, having notice of such contract, could, prior to such time, acquire title thereto by a levy and sale on execution against the company, although its employés had taken possession of the ties and moved them to different places along the road. *Owens* v. *Hastings*, 18 *Kan.* 446.

Defendants bought certain cars, paid a builder for them, and received them into their possession; but the builder afterwards induced plaintiffs to buy and pay for the same cars, by falsely representing that he had delivered them to plaintiffs' agent. *Held*, that plaintiffs could not recover them from defendants, the first purchaser. *Ohio & M. R. Co.* v. *Kasson*, 37 *N. Y.* 218.

A railroad corporation entered into a contract with M. by which the latter agreed to deliver to the former, at certain specified points on the company's lands, 20,000 ties, at fifty-five cents each for first-class ties, and thirty-five cents "for what shall be adjudged second-class ties," to be inspected and counted by a person named. The company agreed to advance fifteen cents apiece for ties as they were delivered, "the remainder to be paid on or about the time the ties are taken and used." M. delivered a quantity of ties, which were counted, and the company paid the advance agreed upon. The ties were never inspected or divided into classes. The company became insolvent, and its property and franchises were sold on foreclosure. *Held*, that the title did not pass to the company by the delivery; that it was not bound to take all the ties, but only such as should be adjudged first and second class, the inspector having power to reject unmerchantable ties, and so it could not be known until inspection and separation were made how many of the ties were to be taken. *Cornell* v. *Clark*, 104 *N. Y.* 451, 10 *N. E. Rep.* 888, 5 *N. Y. S. R.* 772.

A contractor agreed to deliver a large quantity of ties to a railroad company, along its right of way, to be inspected monthly, and to be paid for the following month. A portion of the contract was sublet a second time, and a subcontractor delivered a portion of the ties on the right of way. *Held*, that the title passed to the company when the ties were delivered and inspected, though the subcontractor had no knowledge of such inspection and acceptance, and might not have received pay for the ties. *Seattle & M. R. Co.* v. *Claussen-Sweeney Brew. Co.*, 5 *Wash.* 462, 32 *Pac. Rep.* 102.

9. Conditional sales.*—It was agreed between a railroad company and plaintiffs, that plaintiffs should deliver to the company a certain quantity of iron rails; that it should lay them in a designated part of the track, and that, upon payment of a specified price, the rails should become the property of the company; but, until such payment, they should remain the property of plaintiffs. *Held*, that rails laid in the track did not become the property of the company until they were paid for, and that plaintiffs might hold rails not paid for against subsequent mortgagees of the road, who had notice of plaintiffs' interest. *Haven* v. *Emery*, 33 *N. H.* 66.—FOLLOWED IN Hunt *v.* Bay State Iron Co., 97 Mass. 279.

The sale of railroad fare boxes to be paid for, or returned, within a year, and subject to certain requirements as to their use, is a conditional sale, and the company has no right to a year's use before the sale becomes absolute merely by a failure to return. *Slawson* v. *Albany R. Co.*, 3 *T. & C.* (*N. Y.*) 768, 1 *Hun* 438; *affirmed in* 60 *N. Y.* 606, *mem.*

10. Warranties.—A statementas of fact by the vendor of an article, on which the purchaser has a right to rely, and on which he does rely, purchasing on the faith of it, constitutes, if false, a good defense to an action for the purchase money, though not known by the seller to be false; and this, not on the ground of fraud, but of failure of consideration; but this principle does not apply to a statement which is merely the expression of an opinion. *Montgomery Southern R. Co.* v. *Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 357, 54 *Am. Rep.* 60.

Plaintiffs contracted to construct certain cars for defendant, of a specified pattern and quality, within a fixed time, warranting them to be of the kind and quality agreed

* Conditional sale or lease of rolling stock, see note, 57 AM. & ENG. R. CAS. 239.

upon. The evidence showed that certain defects existed, but that they were the fault of defendant, and that the time for completing the cars had been extended. *Held:* (1) that, though the contract was executory, the vendee might rely upon the breach of warranty without offering to return the cars or rescind the sale; (2) that the warranty did not cover such defects as were apparent to defendant when he received the cars. *Gilbert Car Mfg. Co.* v. *Mann*, 3 *N. Y. S. R.* 301.

11. Rights of the parties—Bona fide purchasers.—A railroad company contracted to purchase a large amount of coal, to be delivered at different times, to be of such a quality as should be satisfactory to certain officers of the company. After a portion had been delivered the company refused to receive any more, because it had been condemned as unsatisfactory by such officers. *Held*, that the judgment of such officers was conclusive, in the absence of fraud. *Baltimore & O. R. Co.* v. *Brydon*, 25 *Am. & Eng. R. Cas.* 287, 65 *Md.* 198, 7 *Cent. Rep.* 396, 3 *Atl. Rep.* 306, 9 *Atl. Rep.* 126.

In such case, where the company sought to justify its refusal to accept other coal by showing that it contained red or rusty coal, it was competent for the plaintiff to show that the rust did not affect its value, and that the company subsequently, in purchasing coal, did not reject coal similarly affected. *Baltimore & O. R. Co.* v. *Brydon*, 25 *Am. & Eng. R. Cas.* 287, 65 *Md.* 198, 7 *Cent. Rep.* 396, 3 *Atl. Rep.* 306, 9 *Atl. Rep.* 126.

After taking a contract to construct a railroad, to be paid for in the stock of the company, the contractor arranged with an importer to furnish the rails on a credit and to hold the stock as collateral, the rails to be delivered directly to the company, and the stock to be forwarded directly to the importer. The importer put a cargo of rails in a bonded warehouse, and took the receipt in his own name, and forwarded to the contractor a bill, which he transferred to the company. The corporation and the contractor became insolvent, and the importer refused to transfer the warehouse receipt until the rails were paid for, whereupon the company filed a bill to compel a delivery of the rails. *Held*, that the company had such an interest in the contract as equity would enforce; but that the importer had a lien on the rails for the price, which must be paid before the company was entitled to possession. *Ware River R. Co.* v. *Vibbard*, 114 *Mass.* 447.

The failure of the vendee of property to remove it from the land of the vendor within the time stipulated in the contract of sale, does not, necessarily and as matter of law, defeat the vendee's title to the property. *Stackpole* v. *Eastern R. Co.*, 62 *N. H.* 493.

If the vendee is not hindered by the vendor in the removal of the property within the stipulated time, and is prevented from subsequently removing it by acts of the vendor reasonably necessary for the protection and beneficial enjoyment of his land, it is not a conversion of the vendor's property by the vendee for which an action of trover can be maintained. *Stackpole* v. *Eastern R. Co.*, 62 *N. H.* 493.

Property purchased from a private corporation, in good faith and for an adequate consideration, is not subject to a trust for the satisfaction of unpaid debts in the hands of a purchaser at the time of the purchase. And the rule is the same whether the purchase includes all the property of the corporation or only a part of it. *Branson* v. *Oregonian R. Co.*, 16 *Am. & Eng. R. Cas.* 517, 11 *Oreg.* 161, 2 *Pac. Rep.* 86.

12. Seller's action for the price.—In an action against a company to recover the price of ties, it was pleaded that a portion of the ties were cut and removed from land belonging to defendant, and after receiving the same it became aware, for the first time, that the ties were taken from its own land. *Held*, that the plea contained no matter of recoupment, as it did not aver possession of the ties in the vendor at the time of the sale, so that a warranty of title could be implied therefrom, nor did it aver any affirmation of title. In the absence of both of these elements, the purchaser buys at his own peril. *Illinois C. R. Co.* v. *Leidig*, 64 *Ill.* 151.

Plaintiff sued to recover a balance on ties delivered, and the company set up a claim for damages for a failure of plaintiff to deliver the full amount contracted for. *Held*, that the fact that the number of ties which plaintiff failed to deliver could not have been purchased for immediate delivery according to the contract would not of itself establish that there was no market value for such ties at that time and place. *Jemmison* v. *Gray*, 29 *Iowa* 537.

After the delivery of iron rails, defendant company leased its road to another company which assumed the debts of defendant. Defendant offered to show entries in the accounts between said lessee and another company, of whom C., who delivered the material to defendant, testified that he bought it. In these entries the iron in question was charged by the latter company to the former; this was objected to and excluded. *Held*, no error; that plaintiff's title, or right to recover, could not be affected by transactions subsequent to the delivery between third persons; and that the evidence was not competent as bearing upon the understanding of defendant's directors. *Scott* v. *Middletown, U. & W. G. R. Co.*, 4 *Am. & Eng. R. Cas.* 114, 86 *N. Y.* 200; *affirming* 21 *Hun* 231.

Where plaintiff sues to recover the agreed price of ties delivered, and there is no dispute as to their value, and it is admitted that defendant received and accepted the ties, but no agreed price is established, a verdict for the value of the ties is warranted. *Terwilliger* v. *Ontario, C. & S. R. Co.*, 55 *N. Y. S. R.* 919, 73 *Hun* 335, 26 *N. Y. Supp.* 268.

In such case the company set up a defense that it had paid a third person for the ties, who had a right to receive the money under a verbal agreement with plaintiff. *Held*, that such agreement, if made, was immaterial, as it was within the statute of frauds. *Terwilliger* v. *Ontario, C. & S. R. Co.*, 55 *N. Y. S. R.* 919, 73 *Hun* 335, 26 *N. Y. Supp.* 268.

A petition alleging the delivery of ties at a railroad, and that defendants, who were contractors for building the road, received said ties and converted them to their own use in the construction of the road, sufficiently sets forth a contract binding upon defendants. *Miller* v. *Duff*, 34 *Mo.* 167.

Where, in an action to recover the value of cross-ties appropriated by a company, plaintiff is unable to prove the exact number taken by defendant, and defendant fails to show the number, though able to do so, the jury should not be instructed to find for defendant because of plaintiff's failure to make such proof, if his evidence furnish data upon which the jury by an estimate can approximate the number. *Natchez, J. & C. R. Co.* v. *Bolls*, 62 *Miss.* 50.

As to cross-ties which were first rejected but afterwards taken and appropriated by the company, the court may permit plaintiff to prove the price paid him by a third party for cross-ties which were accepted by defendant under a contract with such party, as a circumstance for the jury to consider in arriving at the value of the cross-ties which are the subject of the suit. *Natchez, J. & C. R. Co.* v. *Bolls*, 62 *Miss.* 50.

When, in pursuance of an order for goods, directed by the purchaser to be shipped to him C. O. D., the vendor has delivered them to a common carrier, with instructions to collect their price from the consignee before delivering them to him, the transaction as a sale is complete, so far as the vendor is concerned. *Com.* v. *Fleming*, 130 *Pa. St.* 138, 18 *Atl. Rep.* 622.

In such case, while the title to the goods does not pass to the purchaser if they be not delivered to him by the carrier, that circumstance does not affect the character of the transaction as a completed contract of sale; the seller's right to recover the price, if the purchaser refuse to take the goods, is as complete as if he had taken them without payment. *Com.* v. *Fleming*, 130 *Pa. St.* 138, 18 *Atl. Rep.* 622.

In an action for the purchase price of coal, evidence that a portion of the coal had been improperly condemned by inspectors whose conclusion, by stipulation of the contract, was to be final, is inadmissible in the absence of fraud and collusion between the inspectors and the purchasers. *Lucas Coal Co.* v. *Delaware & H. Canal Co.*, 148 *Pa. St.* 227, 23 *Atl. Rep.* 990.

In an action to recover damages for breach of a contract to pay for a certain amount of lumber, to be delivered by plaintiff to defendant at a certain place, the true and only measure of damages is the difference between the contract and the market price of the lumber which plaintiff tendered to defendant and which the latter refused to accept. *Stack* v. *Charlotte, C. & A. R. Co.*, 10 *So. Car.* 91.

13. Seller's action for fraud in inducing the sale. — The president of a railroad company, who was also one of its directors, having knowledge, by reason of his official position, that the true value of the stock of the company was very largely in excess of its nominal market value, purchased, at much less than its real worth, the stock of a non-official stockholder who was ignorant of the company's financial condition and of facts giving an extraordinary value to the stock, without disclosing to

the seller the facts and circumstances within his knowledge as to its real value. *Held*, that the relation of trustee and *cestui que trust* did not exist between the parties, and that in the absence of actual fraud the purchase was valid. The purchaser was not bound to communicate to the seller his knowledge of the worth of the stock, although the same was obtained by reason of his official relation to the company, nor was he required, in order to make a valid purchase, to pay a fair and adequate price for the stock. (Downey, C. J., dissenting.) *Tippecanoe County Com'rs* v. *Reynolds*, 44 *Ind.* 509.

14. Buyer's remedy for breach of warranty.—Where there is a breach of warranty as to the quality of an article purchased, the purchaser may refuse to receive it, and treat the contract as rescinded; but where it has been shipped to him by rail, and he has paid the freight thereon, he cannot recover back the amount from the carrier, but he might from the seller. *Jack* v. *Des Moines & Ft. D. R. Co.*, 53 *Iowa* 399, 5 *N. W. Rep.* 537.

15. —— for breach of contract to deliver—Sunday. — Where a contract with a railway company for a supply of rails shows that the parties intended the final expression of the company's engineer's satisfaction with the rails as delivered to be conclusive, the company, after the rails have been accepted and delivered and partially laid down, cannot maintain an action for breach of contract on the ground that the rails are defective. *Dunaberg & W. R. Co.* v. *Hopkins*, 36 *L. T.* 733.

Defendants agreed to ship to plaintiffs "all the balance of the iron for said railroad, now lying in Boston or New York," and which was described as amounting to "about" fifteen tons, and which was originally purchased from a certain named firm. *Held*, that this was merely descriptive of the iron, and did not constitute a warranty that the particular iron existed; and if the iron was not in the places mentioned, a failure to ship it would not constitute a breach of contract on the part of defendants. *Robinson* v. *Flint*, 58 *Barb.* (*N. Y.*) 100.

In such case defendants were not liable in an action for deceit, in the absence of proof that they knew that the language used in the contract was false. *Robinson* v. *Flint*, 58 *Barb.* (*N. Y.*) 100.

Evidence of the market price of a commodity on Sunday in a state where business transactions on that day are forbidden will not be heard in support of an action to recover damages for a breach of contract to deliver the goods on that day. *Waters* v. *Richmond & D. R. Co.*, 108 *N. Car.* 349, 12 *S. E. Rep.* 950.

Evidence of the market value of coal is inadmissible in an action on a contract to sell at the price paid by a certain railroad company, the best evidence being the books of the company. *Lucas Coal Co.* v. *Delaware & H. Canal Co.*, 148 *Pa. St.* 227, 23 *Atl. Rep.* 990.

16. —— to recover back purchase money.—A sale of stock by the commissioner of contracts of a railroad company, with a secret agreement that plaintiff may receive land of the company at a future day, and pay in stock certificates, entitles him to recover back the money advanced, with interest, if the company refuses to execute the agreement. Such a contract is entire, and if the company would retain the money, it must convey the land according to agreement. *Weeden* v. *Lake Erie & M. R. R. Co.*, 14 *Ohio* 563.

Such commissioner has not the authority to make such a contract; but if he and plaintiff acted under a mutual mistake as to his power, the law raises an implied promise on the part of the company to pay back the money, with interest. On refusing to convey the land, the money may be recovered back, also, on the ground of failure of consideration. *Weeden* v. *Lake Erie & M. R. R. Co.*, 14 *Ohio* 563.

SALES OF RAILROADS.

1. When the power to sell exists.—A company, having power, by its charter, to construct a railroad, and also power to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with a company to construct a part of its road, and to sell and deliver it to the latter company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the latter company. *Held*, that this contract was not *ultra vires*. *Branch* v. *Jesup*, 9 *Am. & Eng. R. Cas.* 558, 106 *U. S.* 468, 1 *Sup. Ct. Rep.* 495.—APPLIED IN Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47. APPROVED IN

Camden & A. R. Co. *v.* Mays Landing & E. H. C. R. Co., 48 N. J. L. 530. FOLLOWED IN Mackintosh *v.* Flint & P. M. R. Co., 36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582.

The company building the road had the same general power, except that of incorporating its stock with that of other companies, and had the right under its charter also to construct a railroad over the same route. *Held*, that it was not acting *ultra vires* to make the purchase of said road and franchises as above stated, and to pay for the same by issuing its own stock therefor, which was delivered to and accepted by the contractors in lieu of the stock of the other company, which latter stock they had subscribed for and agreed to take in payment for the work of construction. *Branch* v. *Jesup*, 9 *Am. & Eng. R. Cas.* 558, 106 *U. S.* 468, 1 *Sup. Ct. Rep.* 495.

Where the charter of one railroad company authorizes it to purchase the franchise and property of another company, the authority to sell is implied to the latter company. *New York & N. E. R. Co.* v. *New York, N. H. & H. R. Co.*, 25 *Am. & Eng. R. Cas.* 215, 52 *Conn.* 274.

Technically speaking, franchises are property, but of a peculiar nature, arising only from legislative grant, and are not ordinarily subject to execution or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature. *Randolph* v. *Larned*, 27 *N. J. Eq.* 557.

But New Jersey Act of May 13, 1866, provides that where the property of an insolvent corporation in the hands of a receiver is encumbered with mortgages or other liens, the legality of which is questioned, a court of chancery may order the receiver to sell the same clear of encumbrances. *Held*, that it was not the intention of the legislature to confine the remedy to mischief arising from litigation of any particular character, but it extended to all litigation between encumbrancers respecting the validity, extent, or priority of their liens; and the chancellor may order a sale of the franchises as well as the property of the company, clear of encumbrances. *Randolph* v. *Larned*, 27 *N. J. Eq.* 557.

One railroad whose charter has expired but which is renewed and five years additional allowed in which to complete its road, with leave to sell to a second company, can convey a good title as against the lessee of a third company which claimed the right to the lands in question on which it had trespassed and partially built a road. *Grand Junction R. Co.* v. *Midland R. Co.*, 7 *Ont. App.* 681.

2. —— and when not.—The authority given a company to construct a railway and to take and purchase lands does not impliedly authorize it to purchase land on a part of which another railway is constructed, nor does it authorize such other company to sell any part of its actual line. *Reg.* v. *South Wales R. Co.*, 14 *Q. B.* 902, 6 *Railw. Cas.* 489, 14 *Jur.* 828, 19 *L. J. Q. B.* 272.

There is no statutory provision in Michigan authorizing one railway company to acquire the stock and franchise of another completed company with the intention of itself exercising such franchise. *Mackintosh* v. *Flint & P. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 340, 34 *Fed. Rep.* 582.—FOLLOWING Pearce *v.* Madison & I. R. Co., 21 How. 442; Thomas *v.* West Jersey R. Co., 101 U. S. 71; Branch *v.* Jesup, 106 U. S. 478, 1 Sup Ct. Rep. 495; Pennsylvania R. Co. *v.* St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. Rep. 1094.

A contract to sell and transfer the rights, franchises, and property of a railroad company, before the road is constructed, is against public policy and cannot be enforced by legal proceedings. If such contract is fully executed, the court will not disturb it, but leave the parties to abide the consequences; if it is not executed, the court will not lend its aid to carry it into effect. *Clarke* v. *Omaha & S. W. R. Co.*, 5 *Neb.* 314.

3. Necessity of legislative authority.—The charter and franchises of a railway corporation cannot be sold, unless authorized by statute. *Bruffett* v. *Great Western R. Co.*, 25 *Ill.* 353.

4. Inability to complete road as ground for sale.—A railroad may be said to be "uncompleted" within the meaning of Michigan statutes authorizing companies to sell their roads when they are not able to complete them, when it has neither station houses, side tracks, turntables, nor rolling stock fit for use, the company having leased rolling stock about as long as it could, and where it is unable to complete the construction and equip the road. *Young* v. *Toledo & S. H. R. Co.*, 40 *Am. & Eng. R. Cas.* 514, 76 *Mich.* 485, 43 *N. W. Rep.* 632.—FOLLOWED IN Farmers' L. & T. Co. *v.*

Toledo & S. H. R. Co., 54 Fed. Rep. 759, 4 C. C. A. 561.

5. Assent of stockholders. — How. Mich. St. § 3403, authorizing one railroad company to sell its franchises and property to another, when authorized by a vote of two thirds of the stockholders, applies to a corporation organized after the passage of the law, and such a sale is conclusive as against dissenting stockholders, even where the terms of the sale provide that the stockholders shall be paid in new stock. (Taft, J., dissenting.) *Farmers' L. & T. Co.* v. *Toledo & S. H. R. Co.*, 54 *Fed. Rep.* 759, 4 *C. C. A.* 561.—APPLYING Buffalo & N. Y. City R. Co. *v.* Dudley, 14 N. Y. 337; Durfee *v.* Old Colony & F. R. R. Co., 5 Allen (Mass.) 240. FOLLOWING Young *v.* Toledo & S. H. R. Co., 76 Mich. 485, 43 N. W. Rep. 632.

An amendment to a railroad charter authorizing the company to purchase another road, and declaring that the purchased road should become a part of the road authorized to be constructed by the charter, contained a proviso that nothing in this act contained should in any wise affect any right whatever, either at law or in equity, of any stockholder or other person in, or any claim or demand against, the company whose road it was contemplated to purchase. *Held*, that the purchase authorized by the supplement did affect the rights of the stockholders in the company whose road was to be purchased; and that the legislature intended, when it provided that nothing in that act contained should in any wise affect any right whatever, that such purchase should not occur without that which alone could prevent its affecting such rights, viz., the consent of every stockholder. *Kean* v. *Johnson*, 9 *N. J. Eq.* 401.

Where the company whose road was purchased under the above supplement, and which was not a necessary party to any of the different kinds of relief prayed, had not been made a party to a bill filed by one who was a protesting stockholder, against the directors of both roads, and the company in possession of the road, and all its property but the franchise, and the objection was not taken until the hearing of a general demurrer to the equity of the bill, the court disposed of the case on its merits, without requiring such formal parties to be joined. *Kean* v. *Johnson*, 9 *N. J. Eq.* 401.

Under the ordinary powers granted to a railroad having its *termini* in Tennessee, the directory has no power to purchase other railroads without the sanction of the stockholders. *Deaderick* v. *Wilson*, 8 *Baxt.* (*Tenn.*) 108.

6. Construction of statute. — By Miss. Act of Dec. 26, 1856, authorizing the Southern railroad company to buy out and absorb the Vicksburg & Jackson railroad company, it was expressly empowered to issue bonds and execute mortgages to secure the same upon its property, real and personal, and upon its appurtenances and franchise; which bonds might be used in paying the indebtedness growing out of the purchase of the Vicksburg & Jackson railroad, or in the construction of the unfinished portion of said road, or in such other way as the company might desire. *McAllister* v. *Plant*, 54 *Miss.* 106, 17 *Am. Ry. Rep.* 389.

7. —— of executory contracts of sale.—An executory contract made by a railway corporation in its corporate capacity for the sale to another railway company of certain franchises, with an agreement to secure and transfer additional rights of way over designated portions of the route of a proposed motor line, and an executed contract of sale of the entire stock of the former corporation, made by the plaintiff and his associates as natural persons acting in their individual capacity, cannot be construed as one contract, although the plaintiff and his associates were the stockholders, directors, and officers of the corporation at the time the first contract was made; and the plaintiff was under no obligation to procure or furnish the rights of way in question, nor to answer for the default of the corporation, if any occurred in so doing. *Blagen* v. *Thompson*, 56 *Am. & Eng. R. Cas.* 530, 23 *Oreg.* 239, 31 *Pac. Rep.* 647, 18 *L. R. A.* 315.

A stipulation in the contract by which plaintiff transferred the stock of his corporation required the purchasing company to complete its railway within a specified time, over the route for which plaintiff's corporation had agreed to secure the rights of way. *Held*, that the failure of plaintiff's company to secure the designated rights of way was no defense to an action by plaintiff for a breach of the agreement to construct the railway. *Blagen* v. *Thompson*, 56 *Am. & Eng. R. Cas.* 530, 23 *Oreg.* 239, 31 *Pac. Rep.* 647, 18 *L. R. A.* 315.

The rule for the measure of damages in

this case, for breach of the contract sued on, was the difference in value of the land without the road on the day on which the proposed railway would have been completed according to the contract—not less in amount than the price plaintiff agreed to pay for it—and what its value would have been on that day with the road completed and in operation. *Blagen* v. *Thompson*, 56 *Am. & Eng. R. Cas.* 530, 23 *Oreg.* 239, 31 *Pac. Rep.* 647, 18 *L. R. A.* 315.

8. What land and easement will pass.—The sale of the Iron Mountain railroad and its appurtenances, under Mo. Act of February 22, 1851, and acts pursuant thereto, embraced railroad land, although outside of the railroad and not necessary to its use. *Whitehead* v. *Vineyard*, 50 *Mo.* 30, 3 *Am. Ry. Rep.* 7.

Where a railroad, with its appurtenances, is pledged to the state in security for a loan, and, the pledge being forfeited, is sold by the state, the easement passes by the sale, and is vested in the purchaser, and this result is in no way affected by the fact that the purchase is made, mediately or immediately, by another railroad company, if there be legislative authority to make the purchase, and if the original object and consideration of the grant of the easement be not thereby changed or defeated. *Junction R. Co.* v. *Ruggles*, 7 *Ohio St.* 1.—REVIEWED IN Platt *v.* Pennsylvania Co., 43 Ohio St. 228.

9. Restraining unauthorized sale. — Where by charter a company is empowered to sell its road, appurtenances, and franchise, to any other incorporated railroad of the state, and the board of directors authorizes the president to receive proposals and open correspondence with such persons as he may deem advisable, and in accordance with such direction, the president offers to receive qroposals for the road, or for the iron alone, or for the real estate, roadbed, and franchise, the court, at the instance of stockholders, will grant an injunction restraining such sale in this manner, as in violation of its charter. *Upson County R. Co.* v. *Sharman*, 37 *Ga.* 644.

10. Validity of particular sales.—Where a minority of stockholders combine, and, on an *ex parte* order, seize a valuable railroad property, and under the laws of the state (La.) sell it for a nominal sum, themselves bidding it in, in such a manner as clearly to show a fraudulent combination, equity will not allow them to profit by the transaction, but will set it aside. *Jackson* v. *Ludeling*, 21 *Wall.* (*U. S.*) 616, 6 *Am. Ry. Rep.* 457.—DISTINGUISHED IN Kitchen *v.* St. Louis, K. C. & N. R. Co., 69 Mo. 224.

The sale of the Macon & Brunswick railroad is valid and binding upon the state, and equity will hold the title good in the purchasers, though all the regulations prescribed for the manner of conducting it have not been literally complied with, if carried into execution substantially by the executive, the purchase money having been largely paid and the transaction virtually ratified by subsequent acquiescence of the legislative department. Under such circumstances, the case must be strong indeed to authorize judicial interference. *Wood* v. *Macon & B. R. Co.*, 68 *Ga.* 539.

Where the permission to a foreign corporation to purchase a domestic railroad, with all its rights and franchises, is an original and direct grant by the legislature, the purchaser, as soon as the purchase is made, becomes *eo instanti* the offspring of the legislative will of this state; nor does it matter that the purchaser is not called by name. It is not a mere license to carry out a power already potential, nor does it take the place of the vendee company by mere implication, but by direct grant of power. *Angier* v. *East Tenn., V. & G. R. Co.*, 20 *Am. & Eng. R. Cas.* 618, 74 *Ga.* 634.

By Maine Special Laws of 1857, ch. 122, the Portland & Oxford Central railroad company was authorized to purchase the franchise and all the property of the Buckfield Branch railroad, "with all the privileges, rights of way, and other immunities whatsoever pertaining to said road." *Held*, that this included the right to connect with another railroad, which was a right secured to the road sold. *Portland & O. C. R. Co.* v. *Grand Trunk R. Co.*, 46 *Me.* 69.

The ordinance of the Mo. convention adopted April 8, 1865, does not suspend the right and power of the general assembly to provide by law for a sale of the railroads, or either of them, until there is a refusal or neglect to pay the tax required to be imposed by the ordinance. *Answers to Questions by Governor*, 37 *Mo.* 129.

No such sale can be made without reserving a lien upon the property and franchises sold, for all sums remaining unpaid by the purchaser. *Answers to Questions by Governor*, 37 *Mo.* 129.

When a railroad shall be sold under the ordinance of April 8, 1865, the state cannot receive, in payment, shares of stock to be issued by the corporation purchasing such railroad. *Answers to Questions by Governor*, 37 *Mo.* 129.

The St. Joseph & Iowa railroad company had no authority under its charter to sell its franchises, although it had power to pledge them. The power to sell was only given by Mo. Act of March 24, 1870. *State ex rel.* v. *Chicago, B. & K. C. R. Co.*, 89 *Mo.* 523, 14 *S. W. Rep.* 522.

The last proviso of section 2 of said act of 1870, though using different language, was designed to be as broad as the previous portion of the section, and to include all those cases where a railroad company of another state is allowed to make arrangements for the operation of a road in this state, whether by lease, purchase, or otherwise. *State ex rel.* v. *Chicago, B. & K. C. R. Co.*, 89 *Mo.* 523, 14 *S. W. Rep.* 522.

In transferring a railroad by the directors, the vendors received in bonds of the purchasing company the full value of the road and secured by a mortgage on the same property, and in addition a large amount of fully paid-up stock, possessing a considerable market value, for which no consideration was paid. *Held*, that such contract and the bonds issued under it were valid as to *bona fide* purchasers for value without notice, but voidable as to others; and this is so though the parties acted under legal advice, and believed they were making a valid contract. *Central Trust Co.* v. *New York City & N. R. Co.*, 18 *Abb. N. Cas.* (*N. Y.*) 381.

The conveyance made by the East Line & Red River railroad company to the Missouri, Kansas & Texas railroad company, on Nov. 28, 1881, of all its property and corporate franchises of every character whatever necessary to the conduct of the business for which it was created, except the mere franchise to be a corporation, until such time as by agreement of the parties this might be taken away by dissolution, was not authorized by law. *East Line & R. R. R. Co.* v. *State ex rel.*, 40 *Am. & Eng. R. Cas.* 574, 75 *Tex.* 434, 12 *S. W. Rep.* 690.

To authorize such a sale, power to sell and the power of the purchaser to acquire title by the sale must both exist. One company had no power to sell its road or franchise, and the other company had no power to buy. *East Line & R. R. R. Co.* v. *State ex rel.*, 40 *Am. & Eng. R. Cas.* 574, 75 *Tex.* 434, 12 *S. W. Rep.* 690.—FOLLOWING East Line & R. R. R. Co. *v.* Rushing, 69 Tex. 306.

The purchasing company being a corporation chartered and organized under the laws of Kansas and Missouri, the sale was in clear violation of Tex. Const. art. 10, § 6. *East Line & R. R. R. Co.* v. *State ex rel.*, 40 *Am. & Eng. R. Cas.* 574, 75 *Tex.* 434, 12 *S. W. Rep.* 690.

11. Power to purchase. — When a company has the right of constructing a particular railroad, with general power to purchase all kinds of property, of whatever nature or kind, it may purchase from another company a road constructed upon that line, if the latter company has power to sell the same. *Branch* v. *Jesup*, 9 *Am. & Eng. R. Cas.* 558, 106 *U. S.* 468, 1 *Sup. Ct. Rep.* 495.

The legislature of Missouri in giving a corporation of another state power to purchase a railroad in this state, with the privileges and franchises belonging to it, had the right to prescribe the terms upon which the purchase should be made. *State ex rel.* v. *Chicago, B. & K. C. R. Co.*, 89 *Mo.* 523, 14 *S. W. Rep.* 522.

A grant of power to a company to locate and construct branch roads, does not confer authority to purchase and operate the railroad of another company constructed under a different charter. *Campbell* v. *Marietta & C. R. Co.*, 23 *Ohio St.* 168.

A railway company chartered under general laws cannot purchase the railway of another company; it results that, since the power to make such a purchase could not exist under an original charter of incorporation, it could not be obtained through an amended charter, in the absence of legislative permission. *Gulf, C. & S. F. R. Co.* v. *Morris*, 35 *Am. & Eng. R. Cas.* 94, 67 *Tex.* 692, 4 *S. W. Rep.* 156.

A railroad company can only be authorized by statute to purchase the property and franchises of another road; and in order to make such sale valid, there must be both the power to sell and the power to purchase. Where two roads are parallel or competing, then one road has no power to sell to the other. *East Line & R. R. R. Co.* v. *Rushing*, 34 *Am. & Eng. R. Cas.* 367, 69 *Tex.* 306, 6 *S. W. Rep.* 834.

12. Rights of purchasers, generally.—One company was authorized to take for its roadbed land not exceeding 66 feet in width. Another company was authorized to purchase the former road, and the act conferring such authority contained a provision that the road so purchased, "in its further construction and completion, maintenance, use, and enjoyment, should be regulated and governed by the provisions of the charter of the" former company. The latter company was authorized to take land for its roadbed not exceeding 100 feet in width. *Held*, that the latter company had the right to widen the roadbed of the other to a width not to exceed 100 feet. *Childs* v. *Central R. Co.*, 33 *N. J. L.* 323.

The Carolina Central railroad company, by virtue of the statutes under which it was organized, and the titles acquired under the judicial sales of the Wilmington & Charlotte railroad company, the Wilmington, Charlotte & Rutherfordton railroad company, and the Carolina Central railroad company, became the owner of all the rights, powers, privileges, etc., of those corporations, and likewise became liable for all damages and assessments on account of the appropriation of lands of individuals for the right of way. *Hendrick* v. *Carolina C. R. Co.*, 101 *N. Car.* 617, 8 *S. E. Rep.* 236.

Where a railroad is purchased by another company, in pursuance of a statute, in the absence of any provision of law to the contrary, the road passes to the purchasing company subject to the same restrictions and limitations as to rates chargeable for transportation as attached to it in the hands of the vendor. *Campbell* v. *Marietta & C. R. Co.*, 23 *Ohio St.* 168.—FOLLOWED IN Peters *v.* Marietta & C. R. Co., 18 Am. & Eng. R. Cas. 492, 42 Ohio St. 275. QUOTED IN Daniels *v.* St. Louis, K. C. & N. R. Co., 62 Mo. 43.

The purchasers of a sold-out railway succeed to all its rights, powers, and privileges, and may continue business in its name. No change of name is required; no notice need be given of the purchase and merger; nor in its future dealings with strangers is it compelled to show by what special action or authority it claims succession. *Acres* v. *Moyne*, 59 *Tex.* 623.

Neither under Texas Act of August 15, 1870, nor under the joint resolution of May 18, 1871, can the governor, after a sale has been made to the state of a certain railroad, exact from a subsequent purchaser a bond conditioned that he will keep said railroad in running order, and that he will not remove or cause to be removed any of the iron from the track of the road or any of the rolling stock therefrom. *Ireland* v. *Taylor*, 68 *Tex.* 158, 4 *S. W. Rep.* 65.

Since the governor is neither authorized by the legislature to require such bond, nor to annex such conditions to the sale of the road, such bond is without lawful consideration to support it, and is, therefore, invalid. *Ireland* v. *Taylor*, 68 *Tex.* 158, 4 *S. W. Rep.* 65.

13. Their liabilities, generally.—Where the former owners of a railroad are in nominal possession, but the actual management and beneficial ownership is in purchasers, both, or either, may be liable for injuries caused by negligence in the management of the road. *Lockhart* v. *Little Rock & M. R. Co.*, 40 *Fed. Rep.* 631.—REFERRING TO O'Neill *v.* Chicago & N. W. R. Co., 1 McCrary (U. S.) 505.

A statute, authorizing one company to purchase the road of another, provided that it should not be discontinued, but that through cars should be run on the same. *Held*, that the state only could maintain an action for a failure to comply with these conditions. *Elizabethtown* v. *Chesapeake, O. & S. W. R. Co.*, (*Ky.*) 22 *S. W. Rep.* 609.

A purchase of the property and franchises of a railroad, under judicial process or under a deed of trust, will work a transfer to the purchaser of its statutory and common law obligations to the public. *Central & M. R. Co.* v. *Morris*, 28 *Am. & Eng. R. Cas.* 50, 68 *Tex.* 49, 3 *S. W. Rep.* 457.

14. Liability to perform engagements of selling company.—A purchaser of the roadbed, property, and franchises of a railroad company is not liable for its obligations, which are not liens upon the property. *Sappington* v. *Little Rock, M. R. & T. R. Co.*, 11 *Am. & Eng. R. Cas.* 330, 37 *Ark.* 23. *Chesapeake, O. & S. W. R. Co.* v. *Griest*, 30 *Am. & Eng. R. Cas.* 149, 85 *Ky.* 619, 4 *S. W. Rep.* 323.—REVIEWING Powell *v.* North Mo. R. Co., 42 Mo. 68.—*Menasha* v. *Milwaukee & N. R. Co.*, 5 *Am. & Eng. R. Cas.* 300, 52 *Wis.* 414, 9 *N. W. Rep.* 396.—QUOTED IN People ex rel. *v.* Louisville & N. R. Co., (Ill.) 25 Am. & Eng. R. Cas. 235, 5 N. E. Rep. 379.

Persons owning a coal mine built a short line of railroad connecting the mine with a main line, and afterwards sold their short line to a railroad, fixing in the convey-

ance the price to be charged for hauling coal. On the same day the road was sold to a second company which operated it for three years, carrying coal at the agreed price. *Held*, that the second company thereafter was bound by the rate fixed in the contract with the first company. *Chicago & A. R. Co.* v. *Chicago, V. & W. Coal Co.*, 79 *Ill.* 121.

A contract of a railway company to perform certain conditions with a county making a subscription or donation in its aid in consideration thereof, is merely a personal undertaking, and not in the nature of a covenant running with land; and a purchaser of such company's road and property is under no personal obligation to perform such contract. *People ex rel.* v. *Louisville & N. R. Co.*, 120 *Ill.* 48, 10 *N. E. Rep.* 657.

15. Rights of creditors—Assumption of debts of selling company.—An agreement by one railroad in purchasing another to assume all the "bonded and floating indebtedness" of the selling company does not bind the purchasing company to pay the whole of the expenses of running the road as consolidated while in a receiver's hands, so as to leave a larger fund for the bondholders of the selling company. *Union Trust Co.* v. *Illinois Midland R. Co.*, 25 *Am. & Eng. R. Cas.* 560, 117 *U. S.* 434, 6 *Sup. Ct. Rep.* 809.

Where the charter of a railroad company authorizes it to buy another, and provides that the purchase shall in no way affect the rights of the creditors of the selling company, this provision will be held as including unsecured creditors. *Montgomery & W. P. R. Co.* v. *Branch*, 59 *Ala.* 139.—REVIEWED IN Spence *v.* Mobile & M. R. Co., 79 Ala. 576.

The judgment creditors of a selling company do not acquire any equitable lien upon the property sold by virtue of the purchasing company assuming payment of the indebtedness of the selling company. They merely acquire the right to look to the purchasing company for payment. *Hervey* v. *Illinois Midland R. Co.*, 28 *Fed. Rep.* 169.

If a person makes an agreement with a railway company by which he buys all its property and credits, and assumes to pay all its debts, a creditor of the corporation may recover his debt of such party. *Snell* v. *Ives*, 85 *Ill.* 279.

16. Liability for torts of selling company.—Where the purchasing corporation undertakes to pay "all current indebtedness" incurred by the vendor in the operation of its railroad, the contracting corporations being railroads, even if the contract can be construed to render the purchaser liable for a tort committed by the vendor in the operation of its road, the claim must first be reduced to judgment in an action against the vendor, the corporation which committed the tort. *Chesapeake, O. & S. W. R. Co.* v. *Griest*, 30 *Am. & Eng. R. Cas.* 149, 85 *Ky.* 619, 4 *S. W. Rep.* 323.

The power and franchise of the plaintiff in error to take by purchase, own, and operate the Sioux City railroad is derived from the provisions of the Neb. Act of March 1, 1881, entitled "An act authorizing the sale and purchase of railroads in certain cases," and plaintiff in error is bound by the provisions of said act, and is liable under said act for damages for an injury done an employé of the Sioux City road before its purchase by the plaintiff in error. The word indebtedness, as used in the first section of the act, was intended to and does mean and embrace all debts and demands against the selling company or railroad upon which a suit could be maintained either at law or in equity. *Chicago, St. P., M. & O. R. Co.* v. *Lundstrom*, 21 *Am. & Eng. R. Cas.* 528, 16 *Neb.* 254, 49 *Am. Rep.* 718, 20 *N. W. Rep.* 198.

Where a railroad company is sold by order of court to pay debts, a purchasing company is not responsible for injuries done by the former company to adjoining lands while it was in control. *Hammond* v. *Port Royal & A. R. Co.*, 11 *Am. & Eng. R. Cas.* 352, 15 *So. Car.* 10.

SALVAGE.

Claims for salvage services, see ADMIRALTY, **4.**

Lien for, see CARRIAGE OF MERCHANDISE, **376.**

SAMPLES.

Of commercial traveler, special damages for loss of, see CARRIAGE OF MERCHANDISE, **805.**

When may be carried as baggage, see BAGGAGE, **42.**

SATISFACTION.

Of judgments, see JUDGMENT, **39–41.**

— — cancellation of, see EQUITY, **15.**

See also ACCORD AND SATISFACTION.

SAVANNAH.

Decisions particularly applicable to, see MUNICIPAL CORPORATIONS, 54.

SAVING CLAUSES.

In statutes, see STATUTES, 69.

SCALING LAWS.

Effect of, generally, see BONDS, 59.

SCALPERS.

See TICKET BROKERS, 150, 151.

SCHEDULE.

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1. In general. — A set-off cannot be pleaded by a defendant in a proceeding by the commonwealth to enforce the payment of a tax due the state, as a tax is not a mere debt due from the citizen to the government. *Newport & C. Bridge Co.* v. *Douglass*, 12 *Bush* (*Ky.*) 673, 18 *Am. Ry. Rep.* 221.

Upon a company defaulting in the payment of interest on its bonds, the mortgage trustees took possession of the property, and operated it for a time for the benefit of the bondholders, and subsequently the mortgage was foreclosed, and the road sold to the trustees. Afterward they commenced action against defendant to recover moneys received from the government for transporting the mails after they took possession; and defendant claimed a set-off for

moneys due on a note that the company had given him prior to the time the trustees took possession, and which was not due when they took possession. *Held*, that it was not a proper set-off. *Murray* v. *Deyo*, 10 *Hun* (*N. Y.*) 3.

An obligation for money to be paid in the bonds of a railroad company, by a given day, may, if not complied with, be the subject of set-off in a suit against the original holder of said obligation, or his assignee, for money due said company. And this is so, whether the obligation fixes the value at which the bonds are to be received or not, the law having established a rule by which the value may be ascertained and rendered certain. *Memphis & L. R. R. Co.* v. *Walker*, 2 *Head* (*Tenn.*) 467.

The right to a set-off is incidental to, and dependent upon, the fact of the plaintiff's having established a right to recovery against the defendant. If this fails, the right of set-off cannot exist; and judgment cannot be rendered under the act of 1852, for any excess that may be found in favor of the defendant. *Brazelton* v. *Nashville & C. R. Co.*, 3 *Head* (*Tenn.*) 570.

Where an injured employé sues to enforce an agreement to compromise a claim for personal injuries, whereby his company agrees to pay him a fixed amount, and he agrees to perform such labor for the company as he is able to do, the company is not entitled to a set-off for the value of services that he performed about his private affairs, where it appears that he was not able to do the work of the company, and was not called upon to do it. *Frazier* v. *East Tenn., V. & G. R. Co.*, 40 *Am. & Eng. R. Cas.* 358, 88 *Tenn.* 138, 12 *S. W. Rep.* 537.

A railroad company obtained a judgment against defendant for the possession of certain rolling stock, and used it until the judgment was reversed on appeal, and possession of the property awarded to defendant. Subsequently the railroad company was garnisheed for money which was claimed to be due defendant for the use of the rolling stock. *Held*, that the use of the rolling stock implied a promise or undertaking on the part of the company to pay therefor, but the defendant might offset it against the judgment that the company held against him, and it was, therefore, not subject to garnishment. *Keyes* v. *Milwaukee & St. P. R. Co.*, 25 *Wis.* 691.

Two persons subscribed individually for certain shares of railroad stock, agreeing to pay therefor, when the railroad company had paid for certain timber that they had contracted jointly to furnish the company. It was found that the subscriptions were several, and therefore the joint book account could not be set off against the subscriptions. *Held*, that this left each party to enforce the separate accounts, according to agreement. *Gleason* v. *Vermont C. R. Co.*, 25 *Vt.* 37.

2. Mutuality.—Two persons each subscribed for certain shares of the capital stock of a railroad company, but by the terms of the subscription each became a separate and individual debt. Afterwards the two subscribers became the creditors of the railroad company by a joint book account. *Held*, that there was no mutuality between the subscriptions and the book account, and the latter could not be set off in an action by the company to recover on the subscriptions. *Gleason* v. *Vermont C. R. Co.*, 25 *Vt.* 37.

3. Unliquidated demands.*—A set-off cannot be pleaded to an action for unliquidated damages, arising out of the breach of a contract, in refusing to permit the plaintiff to perform services which he had contracted to perform. *George* v. *Cahawba & M. R. Co.*, 8 *Ala.* 234.

Under R. I. Gen. St. ch. 201, § 14, a set-off covers only claims which may be ascertained by calculation, and which need no proof except of the liability. Therefore, where a carrier sues an individual in assumpsit, the defendant cannot plead as a set-off an unliquidated claim for damages against the carrier for the loss of goods shipped, growing out of a different transaction from the one on which the plaintiff's claim is based. *Clyde* v. *Knight*, 12 *R. I.* 194.

Plaintiff was expecting an express package containing money, and requested defendant to take it up and hold it until plaintiff's return from a short trip. Defendant received the package, but refused to deliver it unless plaintiff would liquidate, or allow him to take therefrom, the amount of several claims which defendant held against plaintiff, and when sued insisted on a set-off of the amount of such claims. *Held*, that there was an implied promise to deliver the money to plaintiff, and a refusal to do

* See also CHARGES, 85, 86.

so was a breach of contract and conversion of the money, giving plaintiff the right to recover the money, with legal interest. *Jones* v. *Hunt*, 74 *Tex.* 657, 12 *S. W. Rep.* 832.

Texas Rev. St. art. 649 provides that "if the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff." *Held*, that the amount of plaintiff's claim was the principal with legal interest, and could be readily ascertained by a mathematical calculation; and was, therefore, not "uncertain," within the meaning of the statute, and the set-off was allowable. *Jones* v. *Hunt*, 74 *Tex.* 657, 12 *S. W. Rep.* 832.

4. What may be set off in equity. —Where the United States holds a decree against a railroad for the payment of money, another company, succeeding to the property and liabilities of the former, cannot apply an independent claim it holds against the government, and which could only be enforced in the court of claims, in payment of such judgment. *Nashville & C. R. Co.* v. *United States*, 101 *U. S.* 639.

A. being indebted, by an open account, to a railroad company, the latter assigned the debt to B., to whom the company was largely indebted, and by whom suit was brought against A., in the name of the company, and a judgment obtained thereon. Pending the suit against him, A. paid for the company a large debt, as its surety, which debt existed previous to the assignment, by the company, to B. The company being insolvent at the time of the assignment—*held*, that A. could set off, in equity, the money he had paid for the company against the judgment obtained by B. *Tuscumbia, C. & D. R. Co.* v. *Rhodes*, 8 *Ala.* 206.

It is not essential to the proper allowance of a legal demand as a set-off in equity against a judgment in law, on the ground of the insolvency of the party in whose favor the judgment was recovered, that the insolvency should have occurred subsequent to the judgment. The set-off may be allowed irrespective of the time of the occurrence of the insolvency, whether before or subsequent to the judgment. *Galena & S. W. R. Co.* v. *Ennor*, 116 *Ill.* 55, 4 *N. E. Rep.* 762.—EXPLAINING Chicago, D. & V. R. Co. *v.* Field, 86 Ill. 270.

In answer to a bill filed by the state against a railroad company, to enforce payment of an annuity, secured by a mortgage, the company set up, by way of offset or discount, the fact that certain bridges on its road were destroyed by the mayor and police commissioners of Baltimore, and with the approval and sanction of the governor, and claimed a large sum for such damage and waste. *Held*, that there is no principle of discount, set-off, or recoupment, which would authorize the court to recognize such a claim as a debt, obligation, or liability, for damages liquidated or unliquidated. *State* v. *Northern C. R. Co.*, 18 *Md.* 193.

A manager was employed by the receiver of a railroad mainly to perform duties which the receiver himself should have attended to. An amount was awarded to the receiver as compensation for his services, and he was directed to pay the manager a specified portion thereof. He refused to do so, claiming that the manager was indebted to him individually in a larger amount. *Held*, the indebtedness from the manager to the receiver being admitted, that a petition by the manager for an order compelling the receiver to pay him the amount specified should be dismissed for want of equity. *Gatzmer* v. *Philadelphia & A. C. R. Co.*, 26 *Am. & Eng. R. Cas.* 403, 39 *N. J. Eq.* 363.

5. In actions for price of ties sold. —Where a party under a contract to sell and deliver railroad ties, neglects to deliver in time, without any sufficient excuse, and damages are shown in consequence thereof, a verdict for the full price of the ties, without allowing any damages, cannot be sustained. *Havana, R. & E. R. Co.* v. *Walsh*, 85 *Ill.* 58.

6. —— for wages of employe.—Where a company is sued by a conductor to recover wages, it may set off damages to its cars caused by the negligence of the plaintiff; and, if the set-off exceeds the amount of plaintiff's damages, the company may take judgment for the excess. *Mobile & M. R. Co.* v. *Clanton*, 59 *Ala.* 392. *Harlan* v. *St. Paul, M. & M. R. Co.*, 15 *Am. & Eng. R. Cas.* 130, 31 *Minn.* 427, 18 *N. W. Rep.* 147.

A railway company maintained an infirmary for treatment of employés injured in its service. Employés were entitled to the benefit of this institution regardless of whether the company owed them wages at the date of the injury. They were free to accept or reject the benefits of this institution, but if

they accepted, then it was agreed that the reasonable charges of treatment should be retained out of wages then due or thereafter earned by the employé. *Held*, that the charges for treatment in the infirmary were a proper set-off against wages due an employé. *Louisville, N. O. & T. R. Co.* v. *Kennedy*, 90 *Tenn.* 185, 16 *S. W. Rep.* 113.

7. What is a valid counterclaim.—Under Ky. Civ. Code, § 126, a counterclaim must be one which ordinarily and naturally, or necessarily, arises out of the contract sued on. Therefore, where a railroad company sues an individual to recover on a subscription to stock, he may file a counterclaim for damages to his land by the construction of the road, under a contract with the company's agent whereby he was to have the privilege of paying the subscription by such damages. *Louisville & N. R. Co.* v. *Thompson*, 18 *B. Mon.* (*Ky.*) 735.—FOLLOWING Henderson & N. R. Co. *v.* Dickerson, 17 B. Mon. 180.

A foreclosure suit was commenced by a company created by the consolidation of three other companies. Before the consolidation two of the companies had created mortgages to secure their bonds, which were in default as to the interest. Defendant, a trust company, was the trustee in one of these underlying mortgages, and filed an answer in the nature of a cross-bill, setting out all the matters necessary in a foreclosure suit, and prayed for the usual relief. *Held*, that the matter set up was the proper subject of counterclaim under N. Y. Code Civ. Pro. § 501, where it appeared that it might go in some degree to diminish plaintiff's demand. *Metropolitan Trust Co.* v. *Tonawanda Valley & C. R. Co.*, 7 *N. Y. S. R.* 90, 43 *Hun* 521, 18 *Abb. N. Cas.* 368; *affirmed in* 106 *N. Y.* 673, *mem.*, 13 *N. E. Rep.* 937.

The requisite of connection of the defendant's cause of action with the subject of the plaintiff's action is not defined or restricted by the provision of the statute. There must only be some connection and it must have such relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the counterclaim should be settled in one action by one litigation. *Metropolitan Trust Co.* v. *Tonawanda Valley & C. R. Co.*, 7 *N. Y. S. R.* 90, 43 *Hun* 521, 18 *Abb. N. Cas.* 368; *affirmed in* 106 *N. Y.* 673, *mem.*, 13 *N. E. Rep.* 937.

A company contracted to complete a road in five years and continuously operate the same, in consideration of an annual subsidy for thirty-five years and a grant of 5000 acres of land for each mile of road completed. After part of the road was completed, part of the subsidy paid, and part of the land granted, the company broke the contract and the government refused further payments. *Held*, that by the law of the colony the government was entitled to a counterclaim for unliquidated damages for the company's breach of contract in not completing the line. *Newfoundland* v. *Newfoundland R. Co., L. R.* 13 *App. Cas.* 199.—APPROVING Young *v.* Kitchin, 3 Ex. D. 127. REVIEWING Watson *v.* Mid Wales R. Co., 2 C. P. 593; In re Milan Tramways Co., 22 Ch. D. 122.

In such case the set-off availed against the assignees of the company, the claim and counterclaim having their origin in the same portion of the same contract, the obligations which gave rise to them being closely intertwined. *Newfoundland* v. *Newfoundland R. Co., L. R.* 13 *App. Cas.* 199.

8. What counterclaims are not enforceable.—In a suit against an express company for goods destroyed by fire through negligence, a counterclaim growing out of plaintiff's negligence in causing the fire cannot include attorneys' fees and expenses in defending other suits brought against defendant by third parties for damages sustained from such fire. *Pacific Exp. Co.* v. *Malin*, 132 *U. S.* 531, 10 *Sup. Ct. Rep.* 166.

Where a railroad company is sued for killing a horse, and one paragraph of the complaint charges the company with negligence in failing to fence its track, and the other with negligently killing the horse, the company cannot plead a counterclaim arising from plaintiff's negligence in allowing his horse to go upon the track, whereby its cars were thrown off and greatly damaged. Such claim does not arise out of plaintiff's cause of action, within the meaning of Ind. Rev. St., 1881, § 350. *Terre Haute & I. R. Co.* v. *Pierce*, 19 *Am. & Eng. R. Cas.* 581, 95 *Ind.* 496.—DISTINGUISHING Judah *v.* Vincennes University, 16 Ind. 56; Grimes *v.* Duzan, 32 Ind. 361.

In an action for damages for negligence, a counterclaim for libel was excluded, on the ground of the inconvenience which would arise in trying the two causes of action together, but leave to bring an independ-

ent action was given. *McLean* v. *Hamilton St. R. Co.*, 11 *Ont. Pr.* 193.

9. What damages may be proved by way of recoupment.* — The owner of live stock transported by railroad, when sued for the charges of transportation, may recoup damages sustained by reason of injuries to them through the carrier's negligence. *South & N. Ala. R. Co.* v. *Henlein*, 56 *Ala.* 368, 19 *Am. Ry. Rep.* 200.

In an action by a railroad company, upon a note given to aid the road, defendant may prove by way of recoupment, damages arising from the construction of the road across his lands, in violation of an agreement not to do so, made at the time of giving the note. *Bross* v. *Cairo & V. R. Co.*, 9 *Ill. App.* 363.

10. —— and what may not be. — Plaintiff sued to recover for money due on contract for labor. The evidence showed that he was regularly employed as a carpenter for defendant company, but was specially employed one night to watch an engine, which he did so negligently that the engine was damaged. *Held*, that the claim of the company for damages to the engine could not be used as a counterclaim against plaintiff's demand, except as to the pay for the one night. *Emery* v. *St. Louis, K. & N. W. R. Co.*, 77 *Mo.* 339.

Goods were shipped to pass over two or more roads. The last carrier received them and paid the freight charges on the preceding roads and forwarded and delivered the goods to the consignees. They were found to be badly damaged, and the consignees claimed the right to recoup the damages against the amount of freight charges. It appeared that the company was not associated with the preceding carriers, and it did not appear on what road the damage occurred. *Held*, that the recoupment could not be allowed. *Knight* v. *Providence & W. R. Co.*, 9 *Am. & Eng. R. Cas.* 90, 13 *R. I.* 572, 43 *Am. Rep.* 46.—APPROVED IN Savannah, F. & W. R. Co. *v.* Harris, 26 Fla. 148.

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Non-liability for negligence of fellow-servants in, see FELLOW-SERVANTS, **41.**

SICK FUND.

Deduction from wages as contribution for, see RELIEF ASSOCIATIONS, **2.**

SICK PASSENGERS.

Allowing time to, for alighting from train, see CARRIAGE OF PASSENGERS, **235.**
Care required from carrier towards, see CARRIAGE OF PASSENGERS, **145**; NEGLIGENCE, **14.**
Expulsion of, see EJECTION OF PASSENGERS, **46**; STREET RAILWAYS, **530.**
Liability for injuries to, see STREET RAILWAYS, **327.**
Obligation to carry, see CARRIAGE OF PASSENGERS, **110, 113.**

SIDE TRACKS.

Assumption of risk as to obstruction of, a question for jury, see EMPLOYÉS, INJURIES TO, **711.**
Construction of, under provisions of charter, see CHARTERS, **67.**
Duty of company as to safety of, see EMPLOYÉS, INJURIES TO, **69, 70.**
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Municipal aid for construction of, see MUNICIPAL AND LOCAL AID, **69.**
Regulation of, by commissioners, see RAILWAY COMMISSIONERS, **19.**

Taking land for, when for a public use, see EMINENT DOMAIN, **184.**

When subject to execution, see EXECUTION, **12.**

1. Authority to construct.* — (1) *In general.*—The power of railroads to make necessary side tracks means to make them when they become necessary, otherwise it would be the power to make unnecessary side tracks. Such a power may be exercised when necessary, and hence is not exhausted by one exercise. *St. Louis, I. M. & S. R. Co.* v. *Petty*, 57 *Ark.* 359, 21 *S. W. Rep.* 884.

In the absence of clear abuse, the discretion of a railroad company in placing additional side tracks upon one side of its main track, rather than the other, will not be interfered with. *St. Louis, I. M. & S. R. Co.* v. *Petty*, 57 *Ark.* 359, 21 *S. W. Rep.* 884.

The use of a siding in connection with the main track, is incident to a right of way for railroad purposes. It is a part of the easement, as much so as is the running of the trains over the main track of the road. *Ogle* v. *Philadelphia, W. & B. R. Co.*, 3 *Houst.* (*Del.*) 302; *affirming* 3 *Houst.* 267. *Knight* v. *Carrollton R. Co.*, 9 *La. Ann.* 284.—FOLLOWING New Orleans & C. R. Co. *v.* Second Municipality, 1 La. Ann. 128. —REVIEWED IN Mississippi & T. R. Co. *v.* Devaney, 42 Miss. 555, 2 Am. Rep. 608.—*Galveston, H. & S. A. R. Co.* v. *State*, 51 *Am. & Eng. R. Cas.* 287, 81 *Tex.* 572, 17 *S. W. Rep.* 67.

After railways have been connected for nearly thirty years under a special act of the legislature providing for their connection in a city with the consent of the [illegible] thereof, the people having consented by popular vote cast within the year following the passage of the act, and the connection having been made within the next year after the vote was taken, no authority can be derived from the act for holding another election giving consent to the laying of additional side tracks or turnouts on the streets of the city by one or more of the railway companies. When the connection was completed, with the side tracks then constructed, the power conferred by the act to encroach on the streets was exhausted. *Savannah & W. R. Co.* v. *Woodruff*, 86 *Ga.* 94, 13 *S. E. Rep.* 156.

Ill. General Railroad Act requires the persons incorporating a company to name the places from and to which it is intended to construct the proposed railway, but no limitation is laid down as to the places where switches, turnouts, or side tracks shall be constructed. *South Chicago R. Co.* v. *Dix*, 17 *Am. & Eng. R. Cas.* 157, 109 *Ill.* 237.

An ordinance of a city, in 1865, authorized a railroad company to construct its tracks upon certain streets in the city. *Held*, that after the adoption of Iowa Code, §§ 1321, 464, as amended, the successor in interest of said company, and its rights under said ordinance, had no right to construct switches or side tracks on such streets without making compensation to the abutting lot owners for injuries resulting therefrom, whether arising from change of grade made in the course of such construction, or other cause, although, prior to the adoption of said sections, it may have constructed its main line of track through said streets. *Drady* v. *Des Moines & Ft. D. R. Co.*, 14 *Am. & Eng. R. Cas.* 130, 57 *Iowa* 393, 10 *N. W. Rep.* 754.—DISTINGUISHING Cleveland & P. R. Co. *v.* Speer, 56 Pa. St. 326.

A railroad corporation may lay side tracks for its convenience over any land it may own in fee, or land of individuals giving legal consent thereto, if no public interest or private right is affected. *Bangor, O. & M. R. Co.* v. *Smith*, 47 *Me.* 34.—QUOTED IN Barre R. Co. *v.* Montpelier & W. R. R. Co., 61 Vt. 1.

An ordinance authorized a company to construct its main line through a city, and upon and across certain streets "and also from time to time to construct, operate, and maintain from its main track to commercial and manufacturing establishments and yards * * * such side tracks and switch tracks as such commercial and industrial interests may require." *Held*, that the ordinance was a sufficient consent on the part of the city to the laying of a switch track, partly upon a public alley and partly upon private property. *Chicago, B. & N. R. Co.* v. *Porter*, 43 *Am. & Eng. R. Cas.* 170, 43 *Minn.* 527, 46 *N. W. Rep.* 75.

Whether the use for which lands for the construction of a railroad side track are to be taken is a public or private use, does not depend on the number of persons who may have occasion to use it; if all persons have a right to its use, it is a public use,

* Power to condemn right of way for side tracks to private establishments, see notes, 20 L. R. A. 434; 17 AM. & ENG. R. CAS. 162.

though the number who require the use may be small. *Chicago, B. & N. R. Co.* v. *Porter*, 43 *Am. & Eng. R. Cas.* 170, 43 *Minn.* 527, 46 *N. W. Rep.* 75.

While lands taken and appropriated for right of way and side tracks, otherwise than by consent of the owner, cannot exceed two hundred feet in width, yet this does not prevent the company from purchasing with the consent of the owner all the land it may require for side tracks and depot grounds. *Burlington & M. R. R. Co.* v. *Lancaster County Com'rs*, 7 *Neb.* 33.—FOLLOWED IN Red Willow County *v.* Chicago, B. & Q. R. Co., 39 Am. & Eng. R. Cas. 556, 26 Neb. 660.

The fact that the company did not obtain the fee to the land crossed, but only the consent of the owners, does not vary the case. Such license is good as against a third party, at least until it is revoked. *Barre R. Co.* v. *Montpelier & W. R. R. Co.*, 39 *Am. & Eng. R. Cas.* 17, 61 *Vt.* 1, 4 *L. R. A.* 785, 17 *Atl. Rep.* 923.

(2) *In Pennsylvania.* — The grant of a right to construct a railroad carries with it, by necessary implication, the right to construct all works and appendages usual in the convenient operation of a railroad. Sidings are among such works. *Getz's Appeal*, 3 *Am. & Eng. R. Cas.* 186, 10 *W. N. C.* (*Pa.*) 453.

The Philadelphia & Reading R. Co., by virtue of Pa. General Railroad Law of Feb. 19, 1849, and of the act of April 13, 1846, § 17, extended to said company by the act of April 14, 1864, is authorized to construct sidings leading to manufacturing or mining establishments held by private owners, and for this purpose may take, by virtue of the delegated power of eminent domain in it reposed, the interjacent lands belonging to other parties. *Getz's Appeal*, 3 *Am. & Eng. R. Cas.* 186, 10 *W. N. C.* (*Pa.*) 453.

The right of running sidings to such private establishments, and of taking the necessary land for the purpose, is clearly within the constitutional power of the legislature to confer, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the state and promoting the general wealth and prosperity of the community. *Getz's Appeal*, 3 *Am. & Eng. R. Cas.* 186, 10 *W. N. C.* (*Pa.*) 453.

An ordinance authorized the construction of "a single-track railroad for ordinary railroad purposes with suitable and necessary turnouts into and upon the warehouses and wharves." Subsequently, certain abutting landowners brought suit against the company, and a decree was entered by consent which stipulated that the company should lay down "a single track only, without sidings for standing or passing trains," and should "at no time lay down or construct any such switches or turnouts." *Held*, that the decree only prohibited the construction of switches or turnouts for standing or passing trains, and did not forbid the company from constructing a turnout connecting its track with a warehouse. *Philadelphia* v. *River Front R. Co.*, 43 *Am. & Eng. R. Cas.* 167, 133 *Pa. St.* 134, 19 *Atl. Rep.* 356.

When a railway company has constructed its road within the period limited by law, it may subsequently construct, from time to time, such switches or sidings as may be necessary for the handling of its business, and the operation of its road. *Pottsville* v. *People's R. Co.*, 148 *Pa. St.* 175, 23 *Atl. Rep.* 900.

The right to construct such switches or sidings is not forfeited or lost because not exercised by the company within the period limited for the location and construction of its road. *Pottsville* v. *People's R. Co.*, 148 *Pa. St.* 175, 23 *Atl. Rep.* 900.

2. Duty to construct, or permit others to do so.—(1) *In Illinois.*—By the common law, railroad companies cannot be compelled to permit individuals to connect side tracks of their own with the tracks of the companies, and where it is sought to compel a railroad to permit such connection, upon the ground of custom among the companies whose lines concentrate at the place indicated, the custom must be made clearly to appear, and to have existed so long as to have the force of law. *People* v. *Chicago & N. W. R. Co.*, 57 *Ill.* 436, 10 *Am. Ry. Rep.* 457.—REVIEWED IN Chicago, B. & Q. R. Co. *v.* Hoyt, 1 Ill. App. 374.

The owner of a lot, having erected a grain elevator thereon, was permitted, by contract with a railroad, to connect a side track, extending from his elevator to the company's line, with its track. So far as appeared, the contract was purely personal, and in no way attached to the realty. *Held*, that a subsequent lessee of the elevator did not succeed to any of the rights of his lessor, in respect to such contract. *People* v. *Chicago & N. W. R. Co.*, 57 *Ill.* 436, 10 *Am. Ry. Rep.* 457.—

DISTINGUISHED IN State ex rel. *v.* Missouri Pac. R. Co., 29 Neb. 550.

Railroad tracks laid on streets of a city, connected with existing railroads, and extending to public warehouses, malt houses, or manufacturing establishments, or to public wharves and landings, are in their nature public and for the public good, and all railroad companies are required by law to permit such connections to be made with their tracks. *Chicago D. & C. Co.* v. *Garrity*, 115 *Ill.* 155, 3 *N. E. Rep.* 448.—DISTINGUISHING Attorney-General *v.* Chicago & E. R. Co., 112 Ill. 520.

By Ill. Const. art. 13, § 5, it is made the duty of railroad companies to permit connections to be made with their tracks, so that any public warehouse, coal bank, or coal yard may be reached by the cars on their roads. The command to allow such connection is imperative. *Chicago & A. R. Co.* v. *Suffern*, 38 *Am. & Eng. R. Cas.* 508, 129 *Ill.* 274, 21 *N. E. Rep.* 824; *affirming* 27 *Ill. App.* 404.

When the constitution enjoins it as a duty upon a railroad company to permit a connection between its tracks and any coal mine, the right is impliedly conferred upon the owner of such coal mine to call upon the company to grant such permission, and to continue it when once granted. *Chicago & A. R. Co.* v. *Suffern*, 38 *Am. & Eng. R. Cas.* 508, 129 *Ill.* 274, 21 *N. E. Rep.* 824; *affirming* 27 *Ill. App.* 404.

Should a mine owner make an improper use of a switch or side track to a mine, so as to injure in any way the railway company allowing the connection, the courts will furnish the company a remedy for the wrong. But this will not authorize the company to take the law into its own hands, and refuse to do what the constitution requires it to do—or in other words, to cut off the connections of such switch with its tracks. *Chicago & A. R. Co.* v. *Suffern*, 38 *Am. & Eng. R. Cas.* 508, 129 *Ill.* 274, 21 *N. E. Rep.* 824; *affirming* 27 *Ill. App.* 404.

Where a railroad company lays a side track, under a verbal agreement, upon its own land, for the benefit of an individual, and at his expense, it may revoke the right to continue the track at any time; and the question whether it has presented a bill for the cost of the track, or the work has been paid for, is immaterial. *Lake Shore & M. S. R. Co.* v. *Hoffert*, 40 *Ill. App.* 631.

(2) *In England.*—Where it is necessary that a railway company make a siding to accommodate local traffic, lands within the limits of deviation in the deposited plans, but not actually taken in the first instance, may be taken for the purpose. *In re Yorkshire D. & G. R. Co.*, 1 *Jur. N. S.* 975.

An agreement between a railway company and a landowner to construct and maintain a siding together with all necessary approaches for public use, for the reception and delivery of goods, does not bind the company to erect sheds or to keep a servant in attendance; but the company is obliged to construct a proper siding with approaches and a platform for loading and unloading. *Lytton* v. *Great Northern R. Co.*, 2 *Kay & J.* 394, 2 *Jur. N. S.* 436.

An agreement between a railway company and a landowner for the construction of a siding upon the owner's land, and for his use, and to his reasonable satisfaction, is not incapable of being enforced by a court of equity. *Greene* v. *West Cheshire R. Co.*, *L. R.* 13 *Eq.* 44, 41 *L. J. Ch.* 17, 25 *L. T.* 409, 20 *W. R.* 54.

The obligation of an act of a railway company, binding it to make a siding on a specified field of a landowner, is not broken, although the company took for other purposes so much of the specified field as not to leave any to furnish access from the siding to an adjoining road without passing over the land taken, or outside of the specified field. *Dowling* v. *Pontypool, C. & N. R. Co.*, 43 *L. J. Ch.* 761, *L. R.* 18 *Eq.* 714.

A connection between an adjoining owner's works and a railway by means of a siding is a reasonable facility, within the meaning of the Railway and Canal Traffic Act, 1854, § 2, which the railway commissioners have jurisdiction to order. *Beeston Brewery Co.* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 53.

The fact that such connections are granted to other traders at other places on the company's line and refused to the applicant will, if the circumstances are shown to be the same, constitute an undue and unreasonable prejudice within the meaning of that section. *Beeston Brewery Co.* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 53.

The "continuance" of a siding which has been constructed for the use of a particular individual may be a reasonable facility to which that individual is entitled, under the Railway and Canal Traffic Act of 1854, § 2, so that the taking up of such a siding by the

railway company, while competitors in trade of the individual in question were not deprived of a similar facility, would constitue an undue prejudice within the meaning of that section. *Beeston Brewery Co.* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 53.

The siding having been constructed under an agreement between the railway company and complainant, the railway commissioners had no jurisdiction in the matter. *Beeston Brewery Co.* v *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 53.

The *onus* of proving that the facility is given under like circumstances is upon the person complaining that he is unduly prejudiced. *Beeston Brewery Co.* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 53.

Upon complaint that a railway company had taken up portions of a private siding, it appeared that such siding was constructed under an agreement giving the company the right to terminate it at any time on three months' notice and, at the expiry of such notice, to take up the rails, etc., that the sole object of the company was to compel the applicants to pay station rates, and that if the applicants would consent to pay such rates they might have the siding restored. The applicants alleged that by the refusal of the company to continue the siding, it failed to afford all reasonable facilities for the receiving, forwarding, and delivery of the applicants' traffic. *Held*, that the applicants were entitled to be given siding accommodation as before, but that, under the circumstances, the company might require that before it gave such accommodation there should be an agreement which, besides having such terms as are the common form of siding agreements, should provide that the applicants should pay the station rates for the time being, without rebate or deduction, assuming those rates to be in themselves unobjectionable. *Girardot* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 60.

Section 2 of the Railway and Canal Traffic Act, 1854, is as much applicable to a siding, both as to construction and user as to any other means of affording facilities or conveniences to traffic, and if a company has siding agreements with traders with whom an applicant competes, the existence of these agreements may furnish a ground for a complaint of undue preference or prejudice, and may make it necessary for the company if it continues to give sidings to others, to put down also a siding for the applicant, so that all may be treated alike. *Girardot* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 60.

Apart from the question of undue preference, if the particular siding was claimed merely on the ground of due facility, the company would have a good defense to the claim in its statement that it gave due facilities for all traffic at its general goods station, and that it rests with it to say at what points at that terminus it will receive or deliver traffic of which it is the carrier, and that even if due facilities were not given, it would more likely be a case for an injunction in general terms to make proper arrangements than for an order to execute any specific work, such as a private siding. *Girardot* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 60.

A siding constructed under an agreement with a railway company for the private use of a trader is the creature of an agreement into which the commissioners have no power to inquire, and which they have no jurisdiction to enforce. A railway company affords all reasonable facility for the receiving, forwarding, and delivering of traffic, as provided for in section 2 of the Railway and Canal Traffic Act, 1854, when it carries such traffic into its public station and delivers it there to the consignee, and the commissioners have no power to require a railway company to lay down, or to restore, a siding or branch railway for an adjoining landowner, even though he may be suffering prejudice or disadvantage by reason of the enjoyment of that accommodation by others. *Girardot* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 60.

Where the existence of a siding affords great facilities for receiving and delivery of traffic, and the railway company is not required to do any work or expend any money, but merely to permit a connection to be made with its line by and at the expense of the siding owners, it might well be that the commissioners have jurisdiction to order the railway company to permit such a siding to be put in, although the commissioners would have no jurisdiction to order it to make it, and further, although the commissioners could not order the railway company to work such a siding itself, it might be within the commissioners' jurisdiction to direct the railway company to give proper facilities for its working by the owners in such cases, on such terms as

might be reasonable. *Girardot* v. *Midland R. Co.*, 5 *Ry. & C. T. Cas.* 60.

3. Enforcement of the duty to construct.—Where a company has permitted the owner of a coal mine to build a side track connecting its main track with the mine, and continues for years to furnish cars to haul coal from the mine over its line, such side track must be considered as a part of its line; and if it disconnects such side track, it may, by mandamus, be compelled to restore such connection. *Chicago & A. R. Co.* v. *Suffern*, 38 *Am. & Eng. R. Cas.* 508, 129 *Ill.* 274, 21 *N. E. Rep.* 824; *affirming* 27 *Ill. App.* 404.

When the side track was first laid, the respondent may have had the right to say how it should be laid. It may have then been vested with such discretionary power, as that it was authorized to direct in what particular manner the connection should be made with its main track. But its discretion in this regard was exhausted after the completion of the switch, and its use without objection for a number of years. *Chicago & A. R. Co.* v. *Suffern*, 38 *Am. & Eng. R. Cas.* 508, 129 *Ill.* 274, 21 *N. E. Rep.* 824; *affirming* 27 *Ill. App.* 404.—QUOTING People *v.* Louisville & N. R. Co., 120 Ill. 48.

Specific performance will not be decreed of an agreement by a railway company with a landowner to construct a siding and approaches without decreeing that the company maintain them when made. *Lytton* v. *Great Northern R. Co.*, 2 *Kay & J.* 394, 2 *Jur. N. S.* 436.

Where a railway company as compensation for injury to a mill constructs a siding from such mill to its line and subsequently takes it up on account of the mill owner not using it, but agrees to replace it whenever required, the non-user of the siding and the expenses caused to the company thereby, under the regulations of the board of trade, are not a defense to an action for specific performance of the agreement to replace the siding, and the company is not entitled to any indemnity against those expenses before replacing the siding. *Todd* v. *Midland G. W. R. Co.*, 9 *L. R., Ir.* 85.

4. Rights and liabilities incident to their use by the company.—(1) *In general.*—The rule of law that a railroad track is in itself a warning of danger applies as well to a side track as to a main line. *Mynning* v. *Detroit, L. & N. R. Co.*, 23 *Am. & Eng. R. Cas.* 317, 59 *Mich.* 257, 26 *N. W. Rep.* 514.

A switch track leading to and terminating at certain manufacturing establishments is not devoted to a private use when it forms part of a system of track belonging to a general enterprise of maintaining and operating a railroad for public use, and all persons upon such switch track are entitled to use it for the shipment of freight. *Chicago, B. & N. R. Co.* v. *Porter*, 43 *Am. & Eng. R. Cas.* 170, 43 *Minn.* 527, 46 *N. W. Rep.* 75.

Where a railroad company, with the consent of the landowners, builds side tracks to granite yards near its depot for the accommodation and with the concurrence of the owners, such tracks become a part of its railroad, and the company is under the same obligations and acquires the same rights with reference thereto as in case of its main line. *Barre R. Co.* v. *Montpelier & W. R. R. Co.*, 39 *Am. & Eng. R. Cas.* 17, 61 *Vt.* 1, 4 *L. R. A.* 785, 17 *Atl. Rep.* 923.—QUOTING Bangor, O. & M. R. Co. *v.* Smith, 47 Me. 46.

(2) *Leaving cars on.*—If, after an avenue has been laid out across a railroad and dedicated to public use, the company raises the grade of it in the avenue and raises embankments sloping downward from the road into the avenue, to facilitate the crossing of the road by vehicles, and consents to their crossing the road when using the avenue, it will not amount to such a recognition or acknowledgment that the avenue is a public highway, or to such an acquiescence, concurrence, or co-operation on its part in the dedication of it to the uses of the public, as will operate as a waiver of its right to keep cars standing on a siding partly within the limits of the avenue, and so near as to frighten horses crossing the railroad, or estop it from denying the right of the public to use that, as well as all other parts of the avenue, as a common highway. *Ogle* v. *Philadelphia, W. & B. R. Co.*, 3 *Houst.* (*Del.*) 302; *affirming* 3 *Houst.* 267.

A company has a right to place its cars on its side tracks, and to allow them to stand there for such time as the exigency of its business may require. Therefore, where a company is sued for causing death at a public crossing, it is error to instruct the jury that it was negligence in the company to permit its cars to stand on a side track

so as materially to obstruct the view of approaching trains, by persons about to cross the track. *Wabash, St. L. & P. R. Co.* v. *Hicks*, 13 *Ill. App.* 407.—QUOTING Garland *v.* Chicago & N. W. R. Co., 8 Ill. App. 571.

Plaintiff claimed special damage caused by the occupation of a siding as a stand for cars, cutting off access to his lots, etc., and an injunction was asked restraining defendant from the use of the siding for its cars. The court impaneled a jury to assess the damages, reserving the question of law. The jury were instructed that in assessing the damages they were to assume that the siding was constructed without lawful right, and to take into consideration the annoyance plaintiff and his family had suffered. This was excepted to on the ground that the road was authorized by the common council of the city. The court subsequently directed judgment for the damages assessed and for an injunction restraining the use of the siding as a stand for cars, having decided against plaintiff on the issue as to the lawfulness of the siding, and basing its decision on the ground of unreasonable use. *Held*, that the charge was erroneous, as plaintiff was only entitled to the special damages caused by the improper use of the siding; and that defendant was entitled to a new trial. *Mahady* v. *Bushwick R. Co.*, 14 *Am. & Eng. R. Cas.* 142, 91 *N. Y.* 148, 43 *Am. Rep.* 661.

Leaving cars standing on a side track is not of itself negligence; certainly it is not when the cars are not in the way of trains passing on the main track. *Grant* v. *Raleigh & G. R. Co.*, 108 *N. Car.* 462, 13 *S. E. Rep.* 209.

(3) *Injuries caused by moving cars on.*—A railroad company running cars on a private track, to be there unloaded by servants of a mill owner, is bound to use ordinary care to prevent injury to such servants. *Pennsylvania Co.* v. *Backes*, 133 *Ill.* 255, 24 *N. E. Rep.* 563; *affirming* 35 *Ill. App.* 375.

When a railroad company puts loaded cars upon a side track for the purpose of being unloaded by the owners of the freight, and such owners, their agents or servants, with the express or implied consent of the company, proceed to remove the freight, the company in such case has no right, without special notice and warning, to run or back a train in upon the same track while the cars are being unloaded. *Gessley* v. *Missouri Pac. R. Co.*, 32 *Mo. App.* 413.—DISTINGUISHED IN Harris *v.* Missouri Pac. R. Co., 40 Mo. App. 255.—*Chicago & N. W. R. Co.* v. *Goebel*, 119 *Ill.* 515, 10 *N. E. Rep.* 369; *affirming* 20 *Ill. App.* 163.

A company negligently left a side track in a defective condition, and the cars of a backing train left it and ran against a dwelling house, producing such a shock to a female inmate as to produce serious sickness and injury. *Held*, that the company was liable. *Chicago & N. W. R. Co.* v. *Huneberg*, 16 *Ill. App.* 387.—QUOTING Vandenburgh *v.* Truax, 4 Den. (N. Y.) 465.

A railway company having permission to use the side track of another company will be liable for an injury to a person on the side track, unloading cars belonging to the company owning the side track, which is caused by the negligence of the company so using the side track; and this is so though the usual signal was given that the train was about to be switched to the side track, if it does not also appear that such further reasonable precautions and warnings were adopted as the nature of the case might require. *New Orleans, J. & G. N. R. Co.* v. *Bailey*, 40 *Miss.* 395.—CRITICISED IN Chicago, St. L. & N. O. R. Co. *v.* Scurr, 59 Miss. 456. QUOTED IN Atlantic & G. W. R. Co. *v.* Dunn, 19 Ohio St. 162. REVIEWED IN Memphis & C. R. Co. *v.* Whi[illegible] 44 Miss. 466.

Defendant company contracted with a coal company to construct and maintain in proper order a side track, and to run coal over it for transferring to boats. Plaintiff's barge was awaiting a load of coal, and through some defect in the side track a car left the track near the end and fell on the barge and injured it. It was contended by defendant that the accident was due to the negligence of the coal company in not maintaining the side track in proper order, and that it alone was liable. *Held*, that the running of the cars was the proximate cause of the injury; therefore, defendant was liable. *Fawcett* v. *Pittsburg, C. & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 1, 24 *W. Va.* 755.

A company erected a siding, where there was no station nor highway crossing, for the purpose of loading lumber from a sawmill. The deceased was at the place with a team for the purpose of taking away lumber when a train came through a cut and frightened his team, and in his effort to control it he was dragged on the track and killed. *Held*,

that the company was under no special duty to ring a bell or sound a whistle in approaching, or in passing, the siding. *New Brunswick R. Co.* v. *Vanwart*, 17 *Can. Sup. Ct.* 35.—DISTINGUISHING Rosenberger *v.* Grand Trunk R. Co., 8 Ont. App. 482, 9 Can. Sup. Ct. 311. QUOTING Wakelin *v.* London & S. W. R. Co., 12 App. Cas. 41. REVIEWING Vanwart *v.* New Brunswick R. Co., 27 New Brun. 59; Sneesby *v.* Lancashire & Y. R. Co., L. R. 9 Q. B. 263, 1 Q. B. D. 42; Victorian R. Com'rs *v.* Coultas, 13 App. Cas. 222; Simkin *v.* London & N. W. R. Co., 21 Q. B. D. 453.

5. Rights and liabilities of third persons using side tracks.—A gas company owned a side track near its works and employed a third party to unload coal for its use from a car standing on such side track, who negligently left the car, when unloaded, so near the main track that a passing train collided therewith. *Held*, that both the gas company and the person so employed by it were jointly liable to the railroad company for the damage; and that the gas company cannot avoid liability by showing that leaving the car too near the track was an honest mistake of such person. *Montgomery & E. R. Co.* v. *Chambers*, 79 *Ala.* 338.

A private switch from a railroad to coal lands, which is not owned by the railway company, but by individuals for their own private use, is not a public highway, within the meaning of Ill. Const. art. 11, § 12, and, therefore, is not free to all persons for transportation. That section applies only to public railroads. *Koella* v. *Knecht*, 99 *Ill.* 396.

Proof that a switch track in a coal mine was built upon a grade does not of itself tend to establish negligence on the part of the proprietor of the mine in so building it, for it may not have been possible to build it otherwise; and an instruction in this case, based on a contrary theory, was erroneous. *Heath* v. *Whitebreast C. & M. Co.*, 65 *Iowa* 738, 23 *N. W. Rep.* 148.

A switch was built by a railway company for the joint convenience and use of it and a mining company, under an agreement which expressly excepted a certain part from the use of the mining company. The assigns of the mining company claim the right to use such excepted part. *Held:* (1) that a mere use by the permission of the railroad company conferred no right; (2) that such switch is not "a public highway," within the meaning of the charter of the railroad company; (3) that the fact that the railway company built such switch without legislative authority does not give the assigns the right to use it. *Coe* v. *New Jersey Midland R. Co.*, 28 *N. J. Eq.* 100, 14 *Am. Ry. Rep.* 17; *affirming* 28 *N. J. Eq.* 593.

The owner of a lot laid a side track thereon for his own use and connected it by a switch to a regular railroad. *Held*, that an agreement to maintain a switch permanently could not be inferred from the maintenance and use thereof for seventeen years, and from the receipt by the company of the cost of mending the siding and the expense of the castings for the switch. *Heyl* v. *Philadelphia, W. & B. R. Co.*, 51 *Pa. St.* 469.

Where a person has acquired a perpetual right to use a siding connecting a foundry with a railway, he cannot be required by the company to contribute to the expense of a new junction apparatus required by the board of trade, and is entitled to an injunction restraining the company, on his refusal to pay such expense, from taking up the junction points. *Woodruff* v. *Brecon & M. T. J. R. Co.*, *L. R.* 28 *Ch. D.* 190, 54 *L. J. Ch.* 620, 5 *Ry. & C. T. Cas.* ix, 52 *L. T.* 69, 33 *W. R.* 125; *affirming* 54 *L. J. Ch. D.* 29, 51 *L. T.* 536, 33 *W. R.* 95.

6. Injuries to employes.—See *Ragon* v. *Toledo, A. A. & N. M. R. Co.*, 91 *Mich.* 379, 51 *N. W. Rep.* 1004. *Finnell* v. *Delaware, L. & W. R. Co.*, 129 *N. Y.* 669, 29 *N. E. Rep.* 825, 3 *Silv. App.* 643, 42 *N. Y. S. R.* 354; *reversing* 36 *N. Y. S. R.* 1020. *Pennsylvania Co.* v. *McCormack*, 53 *Am. & Eng. R. Cas.* 107, 131 *Ind.* 250, 30 *N. E. Rep.* 27. *Atchison, T. & S. F. R. Co.* v. *Alsdurf*, 47 *Ill. App.* 200. *Batterson* v. *Chicago & G. T. R. Co.*, 53 *Mich.* 125, 18 *N. W. Rep.* 584. *Hewitt* v. *Flint & P. M. R. Co.*, 31 *Am. & Eng. R. Cas.* 249, 67 *Mich.* 61, 11 *West. Rep.* 148, 34 *N. W. Rep.* 659.

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III LIABILITY OF RAILROAD COMPANY. 139

I. IN GENERAL.

1. Duty to haul cars of another company.—The C. company was bound

to afford to Scottish east-coast traffic of the N. B. company using its railway all usual facilities, including, so far as might reasonably be required, through carriages, and also any greater facilities which it might grant to any other company in respect of such traffic, or of any traffic competitive with it. The C. company ran for the convenience of traffic competitive with the Scottish east-coast traffic of the N. B. company, in one case a saloon sleeping carriage weighing three tons, and fitted to carry twelve persons; and in another, a composite carriage, of which one compartment had sleeping berths for three persons. *Held*, that a Pullman car weighing twenty-one tons and to hold twenty-two persons, was so dissimilar in character, both to the saloon and composite carriages, that the N. B. company was not entitled to insist on the forwarding of it by the C. company, as a similar facility, nor as a reasonable requirement, unless the N. B. company guaranteed to the C. company a mileage proportion on eight fares. *Caledonian R. Co.* v. *North British R. Co.*, 3 *Ry. & C. T. Cas.* 56.

2. Interpretation and effect of car leases.—A railroad contracted to use Pullman palace cars exclusively over its line, and over all roads which it then, or in the future, might control by "ownership, lease, or otherwise." Afterwards it consolidated with another road and a new corporation was formed, but with the same name as the contracting company. *Held*, that the contract did not extend to the additional line thus acquired. *Pullman Palace Car Co.* v. *Missouri Pac. R. Co.*, 23 *Am. & Eng. R. Cas.* 537, 115 *U. S.* 587, 6 *Sup. Ct. Rep.* 194. —QUOTED IN Jessup *v.* Illinois C. R. Co., 36 Fed. Rep. 735; Atchison, T. & S. F. R. Co. *v.* Cochran, 41 Am. & Eng. R. Cas. 48, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. Rep. 151. REVIEWED IN Chicago, St. P. & K. C. R. Co. *v.* Kansas City, St. J. & C. B. R. Co., 38 Fed. Rep. 58.

A contract in the nature of a lease of the right to manufacture and hire sleeping cars provided for payment to the lessor of a fixed annual sum, but if the revenue derived from hiring cars should fall below that sum, then the lessee might declare the contract ended, or pay such sum as the parties might agree on. *Held*, that if the revenue fell below the annual rent, then the lessee was only liable for such sum as might be agreed on, and in case they did not agree, then for a sum in the nature of a *quantum meruit*, but not exceeding the whole net revenue. *Pullman Palace Car Co.* v. *Central Transp. Co.*, 139 *U. S.* 62, 11 *Sup. Ct. Rep.* 489.

Three railroad companies whose roads connected made running arrangements by which the same cars might pass over the through line, and entered into a joint contract by which they granted to an individual the exclusive right to run sleeping cars over their roads "for the purpose of accommodating passengers traveling on said roads, which cars may be run each way, every night, over the line of said roads * * * in connection with a night passenger-express through train." *Held*, that the exclusive right thus granted was limited to through transportation, and did not prevent the companies from furnishing and running other sleeping cars over a portion of the through route. *Stanley* v. *Cleveland, C. & C. R. Co.*, 18 *Ohio St.* 552.

3. Validity of leases or contracts.—A corporation chartered to manufacture and hire sleeping cars, was by a subsequent law authorized "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them or any of them, of its railway cars and other personal property." The corporation then entered into a contract with another company by which it, for a fixed annual sum, leased for the full term of its charter, all cars, contracts, patents, and property of all kinds, and agreed not to engage again in the manufacture and hiring of cars, during the terms of the lease. *Held*, that the lease was void, being both *ultra vires* and against public policy. *Central Transp. Co.* v. *Pullman Palace Car Co.*, 45 *Am. & Eng. R. Cas.* 607, 139 *U. S.* 24, 11 *Sup. Ct. Rep.* 478. —FOLLOWED IN Hamilton *v.* Savannah, F. & W. R. Co., 52 Am. & Eng. R. Cas. 130, 49 Fed. Rep. 412. QUOTED IN Clarke *v.* Central R. & B. Co., 52 Am. & Eng. R. Cas. 115, 50 Fed. Rep. 338. REVIEWED IN Union Pac. R. Co. *v.* Chicago, R. I. & P. R. Co., 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174.

A contract between a sleeping-car company and a railroad by which the former agrees to furnish the latter with sufficient cars for the public demand, in good condition, and the railroad agrees not to hire cars of any other company, is not void as in restraint of trade. *Chicago, St. L. & N. O.*

R. Co. v. *Pullman Southern Car Co.*, 139 *U. S.* 79, 11 *Sup. Ct. Rep.* 490.

A railroad company in Texas may contract with a palace-car company, giving it the exclusive right to furnish cars for use on its road for a term of years. But a court of equity will not, by injunction, restrain the railroad from breaking the contract, as it would unreasonably tax the time and resources of the court for a term of years, and because the contract being the grant of a monopoly, a court of equity will exercise its discretion in restraining its breach. *Pullman Palace Car Co.* v. *Texas & P. R. Co.*, 4 *Woods* (*U. S.*) 317, 11 *Fed. Rep.* 625.

4. Recovery for loss or destruction of cars.—A railroad leased sleeping cars, assuming responsibility for loss thereto by "accident or casualty." Two cars burned, one being in the exclusive control of the railroad, and the other in the repair shop of the lessor at the time. The cause of the fire was unknown. *Held*, that the fire was an "accident or casualty"; and that the railroad was liable for the loss of the car in its possession, but not the other. *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.*, 139 *U. S.* 79, 11 *Sup. Ct. Rep.* 490.

An insurance company paid the insurance on leased sleeping cars to the owners, and at the same time made an agreement that the owners should pay the insurance company one half of the value of the cars that might be recovered from the railroad having them leased. *Held*, that such contract would not prevent a recovery against the railroad. *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car. Co.*, 139 *U. S.* 79, 11 *Sup. Ct. Rep.* 490.

II. DUTIES AND LIABILITIES TO PASSENGERS.

1. *In General.*

5. Liability of sleeping-car company as a carrier of passengers.—The Pullman Palace Car company is not a common carrier. Where a railroad company, which is a common carrier, receives as a part of its train the cars belonging to such car company, the same form a part of its train, and are under its control, except as to providing lodging for the accommodation of those who pay for riding in the palace cars. The agents of the railroad company have a right to determine who shall ride in the palace cars, as a part of its train. *Lemon* v. *Pullman Palace Car Co.*, 52 *Fed. Rep.* 262.

Where a railroad company and a sleeping-car company are jointly sued for failing to remove or restrain an insane passenger, whereby another passenger is injured, it is error merely to instruct the jury that the sleeping-car company is not ordinarily a common carrier, as it might lead the jury to infer that its powers in this respect were more limited than those of the railroad company. The company had the right, if necessary, to restrain or eject from its cars an insane person. *Meyer* v. *St. Louis, I. M. & S. R. Co.*, 54 *Fed. Rep.* 116, 10 *U. S. App.* 677, 4 *C. C. A.* 221.

The liability of a sleeping-car company is not that of a common carrier; its liability is only for ordinary and reasonable care of the passenger and his effects while he is asleep in the car. *Scaling* v. *Pullman Palace Car Co.*, 24 *Mo. App.* 29.—QUOTING Pullman Palace Car Co. *v.* Gardner, (Pa.) 16 Am. & Eng. R. Cas. 324.

The liability of a sleeping-car company is not affected by the fact that the railway company, to whose train the sleeping car is attached may receive the greater part of the money paid by the passenger for his transportation. The sleeping-car company is still a carrier of passengers, and it is liable as such. *Pullman Palace Car Co.* v. *Pollock*, 34 *Am. & Eng. R. Cas.* 217, 69 *Tex.* 120, 5 *Am. St. Rep.* 31, 5 *S. W. Rep.* 814.

6. Duty to awaken passenger seasonably.—The failure of the servants of a sleeping-car company to awaken a passenger in sufficient time to leave the car at his destination is a good cause of action against the company. *Pullman Palace Car Co.* v. *Smith*, 79 *Tex.* 468, 14 *S. W. Rep.* 993.

The obligation to awaken and notify the passenger in time for him to prepare to leave the train with comfort and safety at the point of destination is directly involved in the contract for the use of the sleeping berth. *Pullman Palace Car Co.* v. *Smith*, 79 *Tex.* 468, 14 *S. W. Rep.* 993.

7. Reciprocal duties of passenger and car company.—A sleeping-car company operating and running sleeping coaches over railroads, by force of law, independ-

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* Contract of sleeping-car company implied from sale of ticket, see note, 26 AM. ST. REP. 339.

Duties and liabilities of sleeping-car companies, generally, see notes, 5 AM. ST. REP. 34; 26 *Id.* 331; 21 AM. & ENG. R. CAS. 446.

For failure to exercise reasonable care, see note, 26 AM. ST. REP. 333.

ently of contract, owes duties to the public as a common carrier, one of which is that it shall treat all persons whose patronage it has solicited with fairness and without unjust discrimination, and it is liable in case for a breach of such duty to the party injured thereby. *Nevin* v. *Pullman Palace Car Co.*, 11 *Am. & Eng. R. Cas.* 92, 106 *Ill.* 222.

Where a berth in a sleeping car is engaged, the passenger impliedly agrees to conduct himself in a quiet and orderly manner, to take proper care of the berth while in his possession, and to give up the same at the end of his journey; and the carrier company impliedly stipulates to use all reasonable and proper means to preserve order and decorum in the sleeper, to furnish and keep on hand such supplies and conveniences as are usually found in like sleepers, and are necessary to the health, comfort, and safety of passengers, and also to permit the passenger quietly and peaceably to occupy his berth for the time engaged. And case lies for the breach of such implied contract against the carrier, as well as assumpsit. *Nevin* v. *Pullman Palace Car Co.*, 11 *Am. & Eng. R. Cas.* 92, 106 *Ill.* 222.

8. Right to collect extra fare on chair cars.—Where a railway company furnishes sufficient first-class cars with the usual appliances, and upon the same train carries a chair car which furnishes extra service and accommodations, a regulation that persons traveling a distance less than one hundred miles shall pay twenty-five cents in addition to the maximum charge for first-class passage is reasonable, and not prohibited by the statute which limits the sum railways may collect for first-class passage. *St. Louis, A. & T. R. Co.* v. *Hardy*, 52 *Am. & Eng. R. Cas.* 224, 55 *Ark.* 134, 17 *S. W. Rep.* 711.

Where a passenger in a chair car declines to pay the extra charge demanded, he cannot recover damages because he is removed to a first-class passenger car, if it is done without unnecessary force. *St. Louis, A. & T. R. Co.* v. *Hardy*, 52 *Am. & Eng. R. Cas.* 224, 55 *Ark.* 134, 17 *S. W. Rep.* 711.

An advertisement by a railway company which states generally that free reclining-chair cars will be run upon its road, and specially that such cars will be run to a certain city, does not warrant the inference that such cars are free to all passengers under all circumstances, or that they are free at all except to those taking passage to the city named; nor, if such inference is warranted, could one removed from a chair car for refusing to pay the extra charge recover damages therefor without showing that he was misled to his damage. *St. Louis, A. & T. R. Co.* v. *Hardy*, 52 *Am. & Eng. R. Cas.* 224, 55 *Ark.* 134, 17 *S. W. Rep.* 711.

2. *Duty to Furnish Berths, etc.*

9. Generally.* — A sleeping-car company may lawfully sell a whole section in a car to one passenger, and may refuse to sell the upper berth to another passenger, although it is unoccupied. *Searles* v. *Mann Boudoir Car Co.*, 45 *Fed. Rep.* 330.

Where a section in a sleeping car is sold to an intermediate point, the company is not liable for the refusal of the conductor to sell it from that point on, to another passenger, where the application is made before the intermediate point is reached. *Searles* v. *Mann Boudoir Car Co.*, 45 *Fed. Rep.* 330.

Where a passenger, who is entitled to a berth upon payment or tender of the usual fare, and to whom no personal objection attaches, enters a sleeping car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering to pay or tendering the customary price therefor, the company is bound by law to furnish it, provided it has a vacant one at its disposal. *Nevin* v. *Pullman Palace Car Co.*, 11 *Am. & Eng. R. Cas.* 92, 106 *Ill.* 222.

Where a passenger purchases a ticket, which purports to entitle him to a continuous passage in a certain sleeping car and berth to his destination, he is entitled to a continuous passage in such berth, or in one equally desirable for safety, convenience, and comfort. *Pullman Palace Car Co.* v. *Taylor*, 65 *Ind.* 153.

Where a sleeping-car company is sued for failing to furnish a continuous passage in the same car, an answer alleging that defendant had simply furnished the car to the railroad companies, for the use of passengers, for a certain rent, pursuant to a contract between it and such companies, but admitting that the change of cars was made as alleged in the complaint, is insufficient.

* Duty of sleeping-car company to furnish berths to all entitled to them, see note, 26 Am. St. Rep. 338.

Pullman Palace Car Co. v. *Taylor*, 65 *Ind.* 153.

Plaintiff was a passenger on a sleeping car, and at half-past eight in the evening, asked the porter to prepare his berth for sleeping. The porter replied that he could not do so until he had served certain lunches which had been ordered; whereupon plaintiff demanded in an angry manner that the berth be prepared immediately, and the porter refused in a like angry manner. Thereupon plaintiff demanded of the conductor that his berth be prepared at once, or his money returned, which was refused. The berth was prepared by nine o'clock in the evening, but the plaintiff refused to occupy it and sat up all night. *Held*, that he had no cause of action against the company. *Pullman Palace Car Co.* v. *Ehrman*, 34 *Am. & Eng. R. Cas.* 362, 65 *Miss.* 383, 4 *So. Rep.* 113.

10. Berth sold a second time by mistake.— No recovery can be had for damages sustained by expulsion from a sleeping-car berth when it appears that the berth in question was reserved by a standing order of the company, that it was erroneously sold by the conductor, who, on discovering his error, notified the passenger and offered equal accommodation in another berth, which was refused by the passenger, who thereupon, without compulsion, left the car. *Mann Boudoir Car Co.* v. *Dupre*, 58 *Am. & Eng. R. Cas.* 575, 54 *Fed. Rep.* 646, 4 *C. C. A.* 540.

11. Joint occupancy of berth by husband and wife.—When a berth in a sleeping car is contracted for by a husband either with an express understanding that it is engaged for the joint occupancy of himself and wife or under circumstances that are not misleading within themselves, the refusal to permit such joint occupancy without other reason than the difference of sex, and when such refusal would be a breach of contract, will give the injured party a right for damages. *Pullman Palace Car Co.* v. *Bales*, 47 *Am. & Eng. R. Cas.* 416, 80 *Tex.* 211, 15 *S. W. Rep.* 785.

But where a husband and wife, traveling in the same car, each contract for one berth, the sleeping-car company is not liable for the refusal of the conductor and porter to allow the husband to admit his wife to his berth, although these servants act in an exceedingly rude manner and pull aside the curtains exposing to view the husband and wife undressed. *Pullman Palace Car Co.* v. *Bales*, 47 *Am. & Eng. R. Cas.* 416, 80 *Tex.* 211, 15 *S. W. Rep.* 785.

It is the duty of the servants of a sleeping-car company to investigate matters apparently showing improper conduct by passengers; but such investigation should be conducted without rudeness or greater publicity than necessary; but rudeness of manner in discharging the duty, not accompanied by violence, will not of itself be a cause of action, although it might be considered in aggravation of damages, if a cause of action otherwise existed. *Pullman Palace Car Co.* v. *Bales*, 47 *Am. & Eng. R. Cas.* 416, 80 *Tex.* 211, 15 *S. W. Rep.* 785.

12. Rule requiring passenger to have first-class ticket.—A rule requiring a passenger to have a first-class ticket before he can enter or use a sleeping car is a reasonable one and can be enforced. *Pullman Palace Car Co.* v. *Lee*, 49 *Ill. App.* 75.

An agent who was charged with selling both railroad tickets and sleeping-car tickets, refused to sell a sleeping-car ticket to a passenger, for the reason that he did not hold a first-class railroad ticket. *Held*, that he acted as the agent of the railroad company in determining that the ticket was not first class, and the sleeping-car company was not liable for his act; but having determined that the ticket was not first class, he was justified in refusing to sell a sleeping-car ticket. *Lemon* v. *Pullman Palace Car Co.*, 52 *Fed. Rep.* 262.

But if it be admitted, in such case, that the agent acted also for the sleeping-car company, and acted in good faith in passing upon the question of whether the ticket was first class, the passenger would only be entitled to actual damages. Punitive damages could not be recovered, unless the agent acted in some rude manner, which was insulting, or which would show malice on his part. *Lemon* v. *Pullman Palace Car Co.*, 52 *Fed. Rep.* 262.

13. Rule requiring through tickets between certain points. — By a contract between a railroad company and a sleeping-car company it was provided that the latter should furnish cars for the transportation of passengers and run them under the rules and regulations of the former. By a regulation of the railroad company passengers on certain trains were not entitled to purchase sleeping-car accom-

modations unless they held through tickets. Plaintiff, holding a "split" ticket, or two tickets covering the distance, having applied for a sleeping-car ticket, and the railroad company's agent having refused to sell him one, was expelled from the sleeping car, its conductor assisting the train conductor in leading him from that car to one of the other passenger cars on the train, no force being used or bodily harm done him. *Held*, that the sleeping-car company was not obliged to furnish plaintiff a berth, nor is it responsible for the act of the railroad conductor in expelling him from the car, although he was assisted by one of its own employés. *Lawrence* v. *Pullman Palace Car Co.*, 28 *Am. & Eng. R. Cas.* 151, 144 *Mass.* 1, 10 *N. E. Rep.* 723.

14. Where passenger has lost his ticket.—Plaintiff purchased a ticket which entitled him to ride in a drawing-room car, which was limited to that day and train only. Before taking passage he lost it, and went to the agent who gave him a personal statement that he had sold a ticket, but which the conductor refused, and upon his refusal to pay again, required him to ride in a common coach. The ticket was not presented, and no one else claimed the seat. *Held*, that the conductor exceeded his authority, and that the company was liable. *Buck* v. *Webb*, 33 *N. Y. S. R.* 824, 58 *Hun* 185, 11 *N. Y. Supp.* 617.

In such a case, where no personal injury is done and no physical force used, a verdict for $1000 is excessive. *Buck* v. *Webb*, 33 *N. Y. S. R.* 824, 58 *Hun* 185, 11 *N. Y. Supp.* 617.

3. *Liability for Personal Injuries.*

15. Generally.*—A sleeping-car company, which manufactures cars and puts them on railroads belonging to others, is not liable for injuries received by the occupants of its cars from accidents connected with the movement of the train. Nor is it liable for the negligence or misconduct of those charged with the duty of operating the train. *Campbell* v. *Pullman Palace Car Co.*, 42 *Fed. Rep.* 484.

But such company does assume certain duties and obligations to its passengers, and becomes bound to the exercise of reasonable care in the performance thereof. It is liable for any injury to an occupant of a car resulting from the negligence or wilful misconduct of persons in charge of the car, of such a nature as to interfere with the safe and comfortable use of the car by the passenger. So a company is liable for an indecent assault made by a porter upon female passenger. *Campbell* v. *Pullman Palace Car Co.*, 42 *Fed. Rep.* 484.

16. Caused by wrongful expulsion from berth.—A female passenger may recover of a sleeping-car company for a miscarriage produced by her wrongful expulsion from a berth, although her condition was not known to the servants of the company. *Mann Boudoir Car Co.* v. *Dupre*, 58 *Am. & Eng. R. Cas.* 575, 54 *Fed. Rep.* 646, 4 *C. C. A.* 540.

17. Expulsion from sleeping car at improper place.—The fact that a railroad company might be liable for putting a passenger off at an improper place, will not relieve a sleeping-car company from liability where its own servants fail to notify the passenger in time to get off at the proper place. *Pullman Palace Car Co.* v. *Smith*, 79 *Tex.* 468, 14 *S. W. Rep.* 993.

18. Injuries caused by negligence of employes.—A passenger on a sleeping car sued the company for injuries received by the porter negligently letting a pistol fall on the floor, which was discharged, and the ball lodged in the passenger's limb. The company filed a plea in bar, that the porter was acting in violation of its orders at the time; that the pistol belonged to a passenger, and that the porter had violated a rule of the company in taking it. *Held*, that the plea was demurrable. The question of the company's liability depended upon whether the act of the porter was within the scope or general course of his employment, and not whether it was done contrary to the company's rules. *Heenrich* v. *Pullman Palace Car Co.*, 18 *Am. & Eng. R. Cas.* 379, 20 *Fed. Rep.* 100.

19. Assault upon passengers by employe.—A sleeping-car company that manufactures cars and puts them on roads belonging to other companies is not liable to passengers for matters connected with the movement of the train, but it is liable for assaults committed on passengers by porters and such employés as it furnishes. *Campbell* v. *Pullman Palace Car Co.*, 42 *Fed. Rep.* 484.

Where a passenger upon a railroad train

* Liability for torts of servant, see 47 AM. & ENG. R. CAS. 420, *abstr.*

is assaulted by the porter of a sleeping car in which he has hired a section, during an altercation which occurred after the passenger had been transferred to another train, owing to a washout, the question whether or not the porter was in the performance of his duties as the agent of the railroad company when the assault was inflicted is a question for the jury under all the facts and circumstances of the case. *Devinelle* v. *New York C. & H. R. R. Co.*, 33 *Am. & Eng. R. Cas.* 384, 120 *N. Y.* 117, 24 *N. E. Rep.* 319, 30 *N. Y. S. R.* 578, 8 *L. R. A.* 224, 17 *Am. St. Rep.* 611; *reversing* 15 *Hun* 139, 9 *N. Y. S. R.* 838.

20. Assault upon one not a passenger though lawfully in the car.—The obligation of a sleeping-car company for injury to a stranger who enters the car for the purpose of asking the privilege of washing his hands, and is there wantonly and without provocation assaulted and beaten by the porter of the car, is not governed by the principles regulating the liability of common carriers, under the contract of carriage, for like assaults committed by servants on their passengers. The two cases discriminated, and authorities reviewed. *Williams* v. *Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 407, 40 *La. Ann.* 87, 3 *So. Rep.* 631.—QUOTING Keene *v.* Lizardi, 5 La. 431. QUOTING AND DISTINGUISHING Goddard *v.* Grand Trunk R. Co., 57 Me. 202.

The facts that the party injured was not a trespasser, but was lawfully on defendant's premises, and was properly dealing with the defendant's servant as a servant, do not suffice to fix defendant's liability, if the assault was wanton and entirely foreign to the functions committed to the servant; otherwise a bank or a merchant or a householder would be liable for wanton assaults committed by their clerks or servants upon customers or visitors, which liability would clearly not exist unless the masters were guilty of fault in employing so dangerous a servant. *Williams* v. *Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 407, 40 *La. Ann.* 87, 3 *So. Rep.* 631.

The evidence establishes that the porter offending in this case had been in defendant's employment for three years, and had always conducted himself properly, and bore a good character for amiability, sobriety, and politeness; that porters are mere menial servants, having no police authority whatever, and no connection with the enforcement of the rules of the service, except to report violations of them to the conductor; and that he had no authority to use violence towards any person for any purpose whatever. Hence this wanton assault was entirely foreign to the functions of his employment, and defendant cannot be held responsible therefor. *Williams* v. *Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 407, 40 *La. Ann.* 87, 3 *So. Rep.* 631.

21. Failure to eject or restrain insane passenger.—In an action against a railroad company and a sleeping-car company for failure to eject or restrain an insane passenger who caused the death of plaintiff's intestate, a fellow-passenger, the jury were instructed that the sleeping-car company was not a common carrier and under obligations as such to protect its passengers from injury, but were not instructed that such company had the right to eject or restrain such a passenger, though an instruction to that effect had been previously given as to the right of the railroad company. *Held*, that the instruction was erroneous, as the jury might infer therefrom that the rights of the sleeping-car company were more limited than those of the railroad company. *Meyer* v. *St. Louis, I. M. & S. R. Co.*, 58 *Am. & Eng. R. Cas.* 111, 54 *Fed. Rep.* 116.

22. Increased risk due to passenger's physical condition.—Persons who are ill have a right to enter and travel in the cars of a railroad company, and as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from the conditions of health affecting their fitness to travel, certainly where such conditions are unknown to the carrier, must be assumed by the passenger. *Pullman Palace Car Co.* v. *Barker*, 4 *Colo.* 344.

Plaintiff, a woman, was a passenger on a sleeping car of defendant, which, through the negligence of defendant, caught fire, and plaintiff was compelled, in a half-clad condition, to leave the car, and caught cold which resulted in the suppression of her menses and subsequent illness. *Held*, that plaintiff, being "unwell" at the time, there was in her then physical condition an intermediate and independent cause of the subsequent illness, which was the remote and not the proximate result of the defendant's negligence. *Pullman Palace Car Co.* v.

Barker, 4 *Colo.* 344.—DENIED IN Louisville, N. A. & C. R. Co. *v.* Falvey, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409. DOUBTED IN Lapleine *v.* Morgan's L. & T. R. & S. Co., 37 Am. & Eng. R. Cas. 348, 40 La. Ann. 661, 1 L. R. A. 378, 4 So. Rep. 875.

23. Contributory negligence as a defense.—A passenger on a sleeping car is not guilty of contributory negligence *per se* in going into an unlighted dressing room at night and in attempting to enter a water-closet, but by mistake opened the rear door of the car and fell out, instead of, as claimed by the company, calling a porter and waiting for a light. *Piper* v. *New York C. & H. R. R. Co.*, 27 *N. Y. Supp.* 593, 76 *Hun* 44.

4. *Liability for Loss of Property, Money, etc.*

24. Generally.*—Where the action is for a loss by theft from a passenger on a sleeping car, and the company is charged with negligence in not keeping a proper guard, the court may instruct the jury as to what special acts constitute negligence, so as to render the company liable, but it is not bound to do so. *Scaling* v. *Pullman Palace Car Co.*, 24 *Mo. App.* 29.—REVIEWING Goodwin *v.* Chicago, R. I. & P. R. Co., 75 Mo. 73; Yarnall *v.* St. Louis, K. C. & N. R. Co., 75 Mo. 575; Boland *v.* Missouri R. Co., 36 Mo. 491; Kennedy *v.* North Mo. R. Co., 36 Mo. 351; Smith *v.* Hannibal & St. J. R. Co., 37 Mo. 287; Callahan *v.* Warne, 40 Mo. 131; Liddy *v.* St. Louis R. Co., 40 Mo. 506.

The liability of a sleeping-car company should extend to, and be made to cover, such articles of baggage as are ordinarily or usually carried by travelers in like situations, in valises which they carry with them into such cars, provided they are such articles as would be considered baggage in an action against ordinary carriers of passengers. The fact that the passenger may have a trunk with him or have placed in his valise articles he may not need while on the car, and only to be used in case of stopping over, does not militate against the right of recovery. *Hampton* v. *Pullman Palace Car Co.*, 42 *Mo. App.* 134.

A person in whose custody property has been placed for the use of a fellow-passenger has sufficient title to the property stolen to enable him to maintain an action for its recovery. *Pullman Palace Car Co.* v. *Gavin*, 58 *Am. & Eng. R. Cas.* 585, 93 *Tenn.* 53, 23 *S. W. Rep.* 70.

Considerations of public policy require that a company operating a sleeping car attached to a railway train, and used for the comfort and transportation of passengers, should use reasonable care to guard the passengers from theft. When a failure to exercise such care results in the loss by theft of such personal effects as a passenger may reasonably carry with him, the sleeping-car company is liable. *Pullman Palace Car Co.* v. *Pollock*, 34 *Am. & Eng. R. Cas.* 217, 69 *Tex.* 120, 5 *Am. St. Rep.* 31, 5 *S. W. Rep.* 814.—QUOTING Lewis *v.* New York Sleeping Car Co., 28 Am. & Eng. R. Cas. 150, 143 Mass. 267.—QUOTED IN Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654.

25. Liability not that of an innkeeper.*—A sleeping-car company, so far as it renders service similar in kind to an innkeeper, is subject to the same liabilities; and where an article of wearing apparel belonging to a passenger in one of such cars has been placed in the care of the porter, and is stolen from the car, the company is liable therefor. *Pullman Palace Car Co.* v. *Lowe*, 40 *Am. & Eng. R. Cas.* 637, 28 *Neb.* 239, 44 *N. W. Rep.* 226, 6 *L. R. A.* 809.

The liability of a palace-car company to passengers for loss of articles which they carry into the cars, is not, in the absence of special contract, greater than that of other carriers of passengers. Such companies are not held to the strict liabilities of innkeepers. *Welch* v. *Pullman Palace Car Co.*, 16 *Abb. Pr. N. S.* (*N. Y.*) 352, 1 *Sheld.* 457.

Sleeping-car companies are not liable as innkeepers for the loss or theft of articles from guests, for the reason that passengers on such a train retain the exclusive possession and control of their valuables. *Pullman Palace Car Co.* v. *Gavin*, 58 *Am. & Eng. R. Cas.* 585, 93 *Tenn.* 53, 23 *S. W. Rep.* 70. *Dargan* v. *Pullman Palace Car Co.*, (*Tex.*) 26 *Am. & Eng. R. Cas.* 149. *Pullman Palace Car Co.* v. *Matthews*, 74 *Tex.* 654, 12 *S. W. Rep.* 744.

26. Degree of care required.—Sleeping-car companies are bound to exer-

* Liability of sleeping-car companies for loss of passenger's effects. Sufficiency of evidence, see 40 AM. & ENG. R. CAS. 644, *abstr.*

* Sleeping-car companies not common carriers or innkeepers, see note, 26 AM. ST. REP. 332.

cise ordinary care for the security of passengers' valuables. *Woodruff S. & P. Coach Co.* v. *Diehl*, 9 *Am. & Eng. R. Cas.* 294, 84 *Ind.* 474, 43 *Am. Rep.* 102.

Such care to be measured with reference to the danger reasonably to be apprehended. *Dargan* v. *Pullman Palace Car Co.*, (*Tex.*) 26 *Am. & Eng. R. Cas.* 149.

Whether such care was exercised under the circumstances is a question for the jury. *Pullman Palace Car Co.* v. *Gardner*, 16 *Am. & Eng. R. Cas.* 324, 3 *Pennyp.* (*Pa.*) 78.

A passenger who rides in a palace car belonging to a company separate from the railroad company, and who retains in his possession articles of apparel, cannot hold the palace-car company to any stricter liability for loss than he could the railroad company. *Welch* v. *Pullman Palace Car Co.*, 16 *Abb. Pr. N. S.* (*N. Y.*) 352, 1 *Sheld.* 457.—APPROVING Tower *v.* Utica & S. R. Co., 7 Hill (N. Y.) 47.

While a sleeping-car company is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft; and if through want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable. *Pullman Palace Car Co.* v. *Matthews*, 74 *Tex.* 654, 12 *S. W. Rep.* 744.—QUOTING Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120. See also *Lewis* v. *New York Sleeping Car Co.*, 28 *Am. & Eng. R. Cas.* 148, 143 *Mass.* 267, 56 *Am. Rep.* 852, *n.*, 9 *N. E. Rep.* 615.

27. Duty to provide a watchman.—It is the duty of the sleeping-car company to protect, by reasonable watch, the occupant of a berth in its car while asleep, in his person and property, and it is liable to such occupant for its negligence or want of reasonable care in the protection of his personal goods and money. *Woodruff S. & P. Coach Co.* v. *Diehl*, 9 *Am. & Eng. R. Cas.* 294, 84 *Ind.* 474, 43 *Am. Rep.* 102.—QUOTING Crozier *v.* Boston, N. Y. & N. Steamboat Co., 43 How. Pr. (N. Y.) 466. REVIEWING Blum *v.* Southern Pullman Palace Car Co., 1 Flipp. (U. S.) 500.—*Pullman Palace Car Co.* v. *Martin*, 58 *Am. & Eng. R. Cas.* 583, 92 *Ga.* 161, 18 *S. E. Rep.* 364. *Carpenter* v. *New York, N. H. & H. R. Co.*, 47 *Am. & Eng. R. Cas.* 421, 124 *N. Y.* 53, 26 *N. E. Rep.* 277, 34 *N. Y. S. R.* 854; *affirming* 15 *N. Y. S. R.* 345, 14 *Daly* 457, *which reversed* 13 *N. Y. S. R.* 718.

Defendant runs upon its road sleeping cars, with the usual accommodations. Plaintiff purchased and was assigned a lower berth; when he went to bed, he placed his pocketbook, containing money, in the inside pocket of his vest, which he placed under his pillow on the side next to the window; the next morning he found his vest under his pillow on the side next to the passage-way, with his pocketbook in the pocket, but the money had been stolen. The upper berth was occupied by a stranger, but was unoccupied when plaintiff arose in the morning. At one end of the car was the porter's closet. A full view of the passage-way of the car could not be had from all parts of the space at that end. The train made a number of stops at large cities during the night. The porter was the only employé on the car; he acted as conductor, and for his own profit blackened the passengers' boots. The court granted a motion by defendant to dismiss the complaint. *Held*, error; that the evidence was sufficient to put defendant to proof of the care it took of the occupants of the sleeper on the trip in question, and, in the absence of explanation, it was sufficient to require the question, whether plaintiff's loss was caused by defendant's negligence, to be submitted to the jury. *Carpenter* v. *New York, N. H. & H. R. Co.*, 47 *Am. & Eng. R. Cas.* 421, 124 *N. Y.* 53, 26 *N. E. Rep.* 277, 34 *N. Y. S. R.* 854; *affirming* 15 *N. Y. S. R.* 345, 14 *Daly* 457, *which reversed* 13 *N. Y. S. R.* 718.

Where the regulations require a watchman to stay in the aisle of the car continuously until danger is over, and he goes out of the aisle even for a very few minutes, and during that time a robbery occurs, and the jury believe that if he had been in his place of observation it would not have occurred without detection, the company is liable. The watching must be continuous and active. *Pullman Palace Car Co.* v. *Gardner*, 16 *Am. & Eng. R. Cas.* 324, 3 *Pennyp.* (*Pa.*) 78.

In an action for a loss by theft from a passenger on a sleeping car, where the evidence is conflicting as to whether the company's servants kept proper guard, it is proper to instruct that the jury should find for the plaintiff if they find from the evidence that the goods were stolen from him through the defendant's carelessness or negligence. *Scaling* v. *Pullman Palace Car*

Co., 24 *Mo. App.* 29.—FOLLOWING Florida *v.* Pullman Palace Car Co. 37 Mo. App. 598.

The duty of a sleeping-car company is that of a bailee for hire, and it is responsible only for the negligence of its servants in guarding the property of a passenger while he is asleep, or while he is necessarily absent from his berth. *Root* v. *New York C. Sleeping Car Co.*, 28 *Mo. App.* 199.

28. Posting notice disclaiming liability.—A notice posted in the wash room by which the company seeks to avoid liability, if not known to the passenger, cannot avail the company. It appearing that two larcenies had been committed, and that the porter was found asleep when he ought to have been on duty—*held*, sufficient to submit the case to the jury. *Lewis* v. *New York Sleeping Car Co.*, 28 *Am. & Eng. R. Cas.* 148, 143 *Mass.* 267, 56 *Am. Rep.* 852, *n.*, 9 *N. E. Rep.* 615.—QUOTED IN Pullman Palace Car Co. *v.* Pollock, 34 Am. & Eng. R. Cas. 217, 69 Tex. 120, 5 Am. St. Rep. 31, 5 S. W. Rep. 814.

29. Notice to passenger printed on ticket.—A Pullman car ticket had printed on its face, "Wearing apparel or baggage placed in the car will be entirely at the risk of the owners." Plaintiff, who was riding on such ticket, left his valise in the care of the Pullman porter, which was lost. *Held:* (1) that the railroad company was liable for the loss; (2) that plaintiff's contract with the Pullman car company could not relieve the railroad company from liability; (3) that in a suit against the railroad company only the condition printed on the ticket was immaterial. *Louisville, N. & G. S. R. Co.* v. *Katzenberger*, 16 *Lea (Tenn.)* 380, 1 *S. W. Rep.* 44, 57 *Am. Rep.* 232.—REVIEWING Pennsylvania Co. *v.* Roy, 102 U. S. 452.

30. Passenger's duty to give notice of possession of valuables.—A passenger, having in a pocket of his overcoat a sum of money, gave the overcoat to the porter without mentioning the money, and the porter hung the coat in the passenger's berth. *Held*, that the money was in his own custody and at his risk; and the fact that soon afterwards an accident overturned the car, and the passenger, on making his way out, told the porter and brakeman of the railway company that the money was in the car, put no liability for the money on the company as gratuitous bailee or otherwise, and it was not in such case responsible for the loss of the money. *Hillis* v. *Chicago, R. I. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 108, 72 *Iowa* 228, 33 *N. W. Rep.* 643.

The company had, in such case, a right to notice, in the outset, of this money, and to be paid accordingly if responsibility was to arise in case of accident; and the occurrence of the accident did not change the rule as to the degree of care required, even on the theory of a gratuitous bailment. *Hillis* v. *Chicago, R. I. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 108, 72 *Iowa* 228, 33 *N. W. Rep.* 643.

31. Property stolen by employes.*—The owners of sleeping cars, who receive pay in advance from lodgers merely for the sleeping accommodation afforded by their cars, are not liable as innkeepers or carriers for money that may be stolen from the person of such lodgers on their cars. *Pullman Palace Car Co.* v. *Smith*, 73 *Ill.* 360, 9 *Am. Ry. Rep.* 328.—QUOTED IN Stearn *v.* Pullman Car Co., 8 Ont. 171.—*Woodruff S. & P. Coach Co.* v. *Diehl*, 9 *Am. & Eng. R. Cas.* 294, 84 *Ind.* 474, 43 *Am. Rep.* 102.

If the property of a passenger be stolen by a servant or agent of the company charged with the duty of watching and protecting such property, the company is responsible. *Pullman Palace Car Co.* v. *Gavin*, 58 *Am. & Eng. R. Cas.* 585, 93 *Tenn.* 53, 23 *S. W. Rep.* 70.

The fact that a passenger left his money in his berth, and thereby tempted the employés of the company to steal it, does not release the company from its obligation to protect passengers against the employés' wrongful acts. *Pullman Palace Car Co.* v. *Matthews*, 74 *Tex.* 654, 12 *S. W. Rep.* 744.

32. Contributory negligence.†—Plaintiff was a passenger in one of defendant's parlor cars, and when about to go from the car for the purpose of obtaining refreshments, left her reticule upon the sill of the car window. During her absence it was stolen. *Held*, that plaintiff was guilty of negligence which contributed to her loss, and the company was not liable. *Whitney* v. *Pullman Palace Car Co.*, 28 *Am. & Eng. R. Cas.* 147, 143 *Mass.* 243, 9 *N. E. Rep.* 619.

If a passenger, on leaving a sleeping car

* Liability of sleeping-car company for theft by servants, see note, 26 AM. ST. REP. 336.

† When contributory negligence defeats action against sleeping-car companies for loss of property, etc., see note, 26 AM. ST. REP. 336.

at his destination, negligently leaves his pocketbook containing money on the car, the sleeping-car company is not responsible for the property so left, if it be stolen by some one not in the employ of the company, unless an agent of the company discovered before the theft that such property had been left. *Illinois C. R. Co.* v. *Handy*, 63 *Miss.* 609.

A passenger on retiring placed his clothes in the unoccupied upper berth, and during the night they were stolen. *Held*, that in the absence of evidence that the place selected was an unusual or dangerous place for a deposit of a passenger's wearing apparel or that he knew, or had reason to know, that it could not, or would not, be as effectually guarded there, as in any other place where he might have deposited it, there was no warrant whatever for withdrawing the case from the consideration of the court, sitting as a jury, on the ground of contributory negligence. *Florida* v. *Pullman Palace Car Co.*, 37 *Mo. App.* 598.

If a loss be chargeable to the negligence of a sleeping-car company's servants in guarding the property of a passenger, there can be no recovery if the passenger's negligence contributed directly to the loss. *Root* v. *New York C. Sleeping Car Co.*, 28 *Mo. App.* 199.

A passenger who, without notice to the company's servants, leaves in his berth, in an exposed condition, a large sum of money which could easily be carried on his person, is, as a matter of law, guilty of contributory negligence. *Root* v. *New York C. Sleeping Car Co.*, 28 *Mo. App.* 199.

33. Admissibility of evidence.—The declarations of a third person are inadmissible, although made concerning a fact which would be relevant if proved by a competent witness. So where a sleeping-car passenger sues for being robbed in the night, the declarations of the car porter as to his suspicions of two men who left the car during the night, are not admissible. *Bevis* v. *Baltimore & O. R. Co.*, 26 *Mo. App.* 19.—RECONCILED IN Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

It is the duty of the servants of a sleeping-car company to keep a reasonable watch over the hand baggage of its passengers, and to use reasonable diligence to prevent its loss by theft; and in an action for lost baggage it is proper to admit evidence as to where the conductor placed the baggage and what he said while so doing. *Hampton* v. *Pullman Palace Car Co.*, 42 *Mo. App.* 134.—DISTINGUISHING McDermott *v.* Hannibal & St. J. R. Co., 73 Mo. 516; Adams *v.* Hannibal & St. J. R. Co., 74 Mo. 553. RECONCILING Bevis *v.* Baltimore & O. R. Co., 26 Mo. App. 19. REVIEWING Morse *v.* Connecticut River R. Co., 6 Gray (Mass.) 450; Lane *v.* Boston & A. R. Co., 112 Mass. 455.

While evidence to the effect that another passenger was robbed on the same night and in the same sleeping car as the plaintiff is not relevant to prove that the plaintiff was in fact robbed, it is admissible as bearing on the absence of proper care by the defendant company. *Pullman Palace Car Co.* v. *Gardner*, 16 *Am. & Eng. R. Cas.* 324, 3 *Pennyp.* (*Pa.*) 78.

Declarations of the porter left in the care of a car by the company that, during the night in which the robbery occurred, he went to the toilet stand, from which the berths were not visible, to black the boots of a passenger, are admissible. *Pullman Palace Car Co.* v. *Gardner*, 16 *Am. & Eng. R. Cas.* 324, 3 *Pennyp.* (*Pa.*) 78.

A berth check, given to the plaintiff when he entered the car in exchange for his ticket, and which contained the notice, "Wearing apparel or baggage placed in the car will be entirely at the owner's risk," is properly excluded from the evidence. *Pullman Palace Car Co.* v. *Gardner*, 16 *Am. & Eng. R. Cas.* 324, 3 *Pennyp.* (*Pa.*) 78.

34. Burden of proof—Prima facie case.—Proof of loss of the property of a sleeping-car passenger, under circumstances which tend to show that, but for the defendant's negligence, the loss would not have occurred, is *prima facie* evidence of negligence, and shifts the burden of proof. *Bevis* v. *Baltimore & O. R. Co.*, 26 *Mo. App.* 19. *Pullman Palace Car Co.* v. *Freudenstein*, 58 *Am. & Eng. R. Cas.* 589, 3 *Colo. App.* 540, 34 *Pac. Rep.* 578.

But the presumption thus raised that the company was negligent is rebutted by the uncontradicted testimony of the porter in charge of the car that he maintained an absolute continuous watch during the entire period within which the loss must have occurred. *Pullman Palace Car Co.* v. *Freudenstein*, 58 *Am. & Eng. R. Cas.* 589, 3 *Colo. App.* 540, 34 *Pac. Rep.* 578.

Gross negligence is not to be presumed. Hence it was not error to refuse to charge

the jury that if they found that, by reason of the accident, the money passed into the possession and control of the defendant, as detailed by the evidence, then the burden of proof was upon the defendant to show that the failure to return the money was not by reason of its gross negligence. If plaintiff relied on the theory of a gratuitous bailment, he should have both averred and proved gross negligence. *Hillis* v. *Chicago, R. I. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 108, 72 *Iowa* 228, 33 *N. W. Rep.* 643.

It seems that the mere proof of the loss of money by a passenger while occupying a berth in such a car, does not make out a *prima facie* case against the corporation; some further evidence tending to show negligence on its part must be given. *Carpenter* v. *New York, N. H. & H. R. Co.*, 47 *Am. & Eng. R. Cas.* 421, 124 *N. Y.* 53, 26 *N. E. Rep.* 277, 34 *N. Y. S. R.* 854; *affirming* 15 *N. Y. S. R.* 345, 14 *Daly* 457.

It may be conceded that sleeping-car companies owe greater duties to their customers than ordinary railroad companies, still they are only liable for property lost while under the control of the passengers upon some proof of fault or negligence on their part. Mere proof of loss raises no presumption of negligence. *Tracy* v. *Pullman Palace Car Co.*, 67 *How. Pr. (N. Y.)* 154.—DISTINGUISHING Pullman Palace Car Co. *v.* Gardner, 29 Alb. L. J. 8; Woodruff S. & P. Coach Co. *v.* Diehl, 84 Ind. 474.

Before going to sleep plaintiff put his pocketbook containing his money in his trousers pocket, rolled up his trousers and put his suspenders around them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocketbook and money were gone. No negligence in the defendant was shown. *Held*, that no liability attached to defendant. *Stearn* v. *Pullman Car Co.*, 21 *Am. & Eng. R. Cas.* 443, 8 *Ont.* 171.—QUOTING Pullman Palace Car Co. *v.* Gardner, 29 Alb. L. J. 8; Pullman Palace Car Co. *v.* Smith, 73 Ill. 360, 24 Am. Rep. 258.

35. Measure of damages.—If a passenger in a sleeping car loses money or goods, by reason of the negligence of the company in not keeping a watch during the night, the company is liable for such articles as are usually carried by a passenger about his person, and for money reasonably necessary for traveling expenses. *Blum* v. *Southern Pullman Palace Car Co.*, 1 *Flipp. (U. S.)* 500. *Hampton* v. *Pullman Palace Car Co.*, 42 *Mo. App.* 134.

But if there be no evidence as to what is reasonably necessary, only nominal damages can be recovered. *Wilson* v. *Baltimore & O. R. Co.*, 32 *Mo. App.* 682.—FOLLOWING Root *v.* New York C. Sleeping Car Co., 28 Mo. App. 199.

But not for a sum of money (several thousand dollars) carried for a purpose other than the wants of his journey. *Barrott* v. *Pullman Palace Car Co.*, 52 *Am. & Eng. R. Cas.* 498, 51 *Fed. Rep.* 796. *Illinois C. R. Co.* v. *Handy*, 63 *Miss.* 609.—APPROVING Greenfield First Nat. Bank *v.* Marietta & C. R. Co., 20 Ohio St. 259.—*Root* v. *New York C. Sleeping Car Co.*, 28 *Mo. App.* 199.—FOLLOWED IN Wilson *v.* Baltimore & O. R. Co., 32 Mo. App. 682.

III. LIABILITY OF RAILROAD COMPANY.

36. Generally.*—Where a passenger who had a second-class ticket was ejected from a sleeping car in accordance with a rule of the company, the act of expulsion was that of the railroad company and not of the sleeping-car company, though the sleeping-car conductor and porter may have assisted the railroad employés. *Pullman Palace Car Co.* v. *Lee*, 49 *Ill. App.* 75.

A railway company is responsible for injuries received by one of its passengers at the hands of a porter of a sleeping car forming part of the railway company's train, if it appears that he was not a trespasser on that car. *Williams* v. *Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 414, 40 *La. Ann.* 417, 4 *So. Rep.* 85.—QUOTING Pennsylvania Co. *v.* Roy, 102 U. S. 458.

37. For negligence of car company.†—The general rule seems to be that a railway company which adopts a sleeping car belonging to another company as a part of its train is liable for injuries to passengers by reason of any defects in the car, as well as the company owning the car. *Pennsylvania Co.* v. *Roy*, 102 *U. S.* 451. *Kinsley* v.

* Liability to passenger on sleeping car, of both sleeping-car company, and railroad company, see note, 21 L. R. A. 289.

Should railway companies do their own sleeping and parlor car business, see note, 23 AM. & ENG. R. CAS. 570.

† Liability of sleeping-car company or railway company in running sleeping cars, for negligence towards passengers, see note, 26 AM. ST. REP. 334.

Lake Shore & M. S. R. Co., 125 *Mass.* 54. *Dwinelle* v. *New York C. & H. R. R. Co.*, 44 *Am. & Eng. R. Cas.* 384, 120 *N. Y.* 117, 17 *Am. St. Rep.* 611, 24 *N. E. Rep.* 319, 30 *N. Y. S. R.* 578, 8 *L.R.A.* 224; *reversing* 45 *Hun*, 139, 9 *N. Y. S. R.* 838. *Louisville, N. & G. S. R. Co.* v. *Katzenberger*, 16 *Lea* (*Tenn.*) 380, 57 *Am. Rep.* 232.

The negligence of Pullman car employés as to any matters involving the safety or security of passengers while being conveyed, is the negligence of the railroad company. *Williams* v. *Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 414, 40 *La. Ann.* 417, 4 *So. Rep.* 85.—QUOTING Thorpe *v.* New York C. & H. R. R. Co., 76 N. Y. 402.

On proof of injury sustained by a passenger on a railroad train, by the fall of a berth in a sleeping car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable. *Cleveland, C., C. & I. R. Co.* v. *Walrath*, 8 *Am. & Eng. R. Cas.* 371, 38 *Ohio St.* 461, 43 *Am. Rep.* 433.—DISTINGUISHING Pittsburgh, C. & St. L. R. Co. *v.* McMillan, 37 Ohio St. 554. FOLLOWING Iron R. Co. *v.* Mowery, 36 Ohio St. 418.

38. Servants of car company are servants of railroad company.—The porter and other employés of a sleeping car are, in the performance of the duties and obligations of the railroad company under its contract to carry a passenger, servants of the railroad company. *Dwinelle* v. *New York C. & H. R. R. Co.*, 44 *Am. & Eng. R. Cas.* 384, 120 *N. Y.* 117, 24 *N. E. Rep.* 319, 30 *N. Y. S. R.* 578, 8 *L. R. A.* 224; *reversing* 45 *Hun* 139, 9 *N. Y. S. R.* 838.—FOLLOWING Thorpe *v.* New York C. & H. R. R. Co., 76 N. Y. 406; Pennsylvania Co. *v.* Roy, 102 U. S. 451.—*Pennsylvania Co.* v. *Roy*, 1 *Am. & Eng. R. Cas.* 225, 102 *U. S.* 451.—EXPLAINED IN Cleveland, C., C. & I. R. Co. *v.* Walrath, 8 Am. & Eng. R. Cas. 371, 38 Ohio St. 461, 43 Am. Rep. 433. FOLLOWED IN Dwinelle *v.* New York C. & H. R. R. Co., 44 Am & Eng. R. Cas. 384, 120 N. Y. 117, 24 N. E. Rep. 319, 30 N. Y. S. R. 578, 8 L. R. A. 224. QUOTED IN Williams *v.* Pullman Palace Car Co., 33 Am. & Eng. R. Cas. 414, 40 La. Ann. 417; Madden *v.* Misissouri Pac. R. Co., 50 Mo. App. 666. REVIEWED IN Louisville, N. & G. S. R. Co. *v.* Katzenberger, 16 Lea (Tenn.) 380, 57 Am. Rep. 232.—*Williams* v. *Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 414, 40 *La. Ann.* 417, 4 *So. Rep.* 85. *Thorpe* v. *New York C. & H. R. R. Co.*, 76 *N. Y.* 402, 32 *Am. Rep.* 325; *affirming* 13 *Hun* 70.—DISTINGUISHED IN Dwinelle *v.* New York C. & H. R. R. Co., 9 N. Y. S. R. 838; Ulrich *v.* New York C. & H. R. R. Co., 34 Am. & Eng. R. Cas. 350, 108 N. Y. 80, 15 N. E. Rep. 60, 13 N. Y. S. R. 120. FOLLOWED IN Dwinelle *v.* New York C. & H. R. R. Co., 44 Am. & Eng. R. Cas. 384, 120 N. Y. 117, 24 N. E. Rep. 319, 30 N. Y. S. R. 578, 8 L. R. A. 224. QUOTED IN Williams *v.* Pullman Palace Car Co., 33 Am. & Eng. R. Cas. 414, 40 La. Ann. 417, 4 So. Rep. 85.

It appeared that one or more of the seats in the ordinary cars were occupied by passengers' luggage. A number of passengers were standing up in the passage-ways, and it did not appear that the seats so occupied by luggage would have been sufficient for the standing passengers. *Held*, that it was not the duty of plaintiff, under the circumstances, to have asked the train conductor for a seat before passing into the drawing-room car. *Thorpe* v. *New York C. & H. R. R. Co.*, 76 *N. Y.* 402, 32 *Am. Rep.* 325; *affirming* 13 *Hun* 70.

A passenger, by train of a railroad company, traveling in the coach of a sleeping-car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management, and in such case, where he sustains injury by the negligence of one in the employ of the sleeping-car company, he may maintain an action against the railroad company. What the effect of such notice would be is not determined. *Cleveland, C., C. & I. R. Co.* v. *Walrath*, 8 *Am. & Eng. R. Cas.* 371, 38 *Ohio St.* 461, 43 *Am. Rep.* 433.—EXPLAINING Pennsylvania Co. *v.* Roy, 102 U. S. 451. QUOTING Southern Exp. Co. *v.* St. Louis, I. M. & S. R. Co., 10 Fed. Rep. 210.—DISTINGUISHED IN Pennsylvania R. Co. v. MacKinney, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462.

The obligation of the company in such a case, being independent of any contractual relations, is governed by the general principles of the law of master and servant common to all systems of law, and formulated in Louisiana Civil Code as extending to all "damages occasioned by their servants in the exercise of the functions in which they are employed." *Williams* v. *Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 407, 40 *La. Ann.* 87, 3 *So. Rep.* 631.

SLIGHT NEGLIGENCE.

Liability of carrier of passengers for, see CARRIAGE OF PASSENGERS, 140.
Of person injured, rule as to, see CONTRIBUTORY NEGLIGENCE, 22.

SMOKE.

As an element of damages, see STREETS AND HIGHWAYS, 287.
— — — — — to abutting owner, see ELEVATED RAILWAYS, 157-159.
— — — — land damages, see EMINENT DOMAIN, 720.
Evidence of damage by, in eminent domain proceedings, see EMINENT DOMAIN, 612.
— — — from, see STREETS AND HIGHWAYS, 270.
Measure of damages for, see EMINENT DOMAIN, 1197.
Obstruction of view by, effect of, on duty to look and listen, see CROSSINGS, INJURIES, ETC., AT, 293.
Right of abutting owner to damages for, see STREETS AND HIGHWAYS, 255.
When deemed a nuisance, see NUISANCE, 5.

SNOW.

Duty to remove from cattle-guards, see ANIMALS, INJURIES TO, 169.
Effect of, on duty to look and listen, see CROSSINGS, INJURIES, ETC., AT, 304.
Injury to employé by, liability of company, see EMPLOYÉS, INJURIES TO, 82.

SNOW AND ICE.

In cattle-guards, liability for, see CATTLE-GUARDS, 18.
Liability for negligence in removing from track, see STREET RAILWAYS, 317.
Negligence in throwing, from track to street, see STREET RAILWAYS, 356.
On sidewalk, liability of company for injuries caused by, see STREETS AND HIGHWAYS, 381.
— steps or platform, injuries caused by, see ELEVATED RAILWAYS, 212.
Ordinance requiring removal of, see STREET RAILWAYS, 273.
Thrown from track, obstruction of street by, see STREET RAILWAYS, 174, 182.

SNOW PLOWS.

Assumption of risk in use of, see EMPLOYÉS, INJURIES TO, 201.

SOCIETY.

Action by husband for loss of, see HUSBAND AND WIFE, 17.
Alleging loss of, in action for causing death, see DEATH BY WRONGFUL ACT, 134.
Of child, damages to parent for loss of, see DEATH BY WRONGFUL ACT, 407.
— husband, damages to wife for loss of, see DEATH BY WRONGFUL ACT, 397.
— wife, measure of damages to husband for loss of, see DEATH BY WRONGFUL ACT, 402.

SOIL.

Removal of, from right of way, see RIGHT OF WAY, 20.

SOUTH CAROLINA.

Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 48.
— — — — relative to condemnation of land, see EMINENT DOMAIN, 43.
— — tax laws of, see TAXATION, 45.
Constitutional provisions in, relative to condemnation of land, see EMINENT DOMAIN, 20.
Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 752.
Degree of care required from company under stock law of, see ANIMALS, INJURIES TO, 59.
Dispensary act of, see INTOXICATING LIQUORS, 3.
Injuries to animals running at large in, see ANIMALS, INJURIES TO, 256.
Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 31.
Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, 65.
Review of town-bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 453.
Statute of, as to defective crossings, see CROSSINGS, INJURIES, ETC., AT, 33.
— — regulating liability for injuries caused by fire, see FIRES, 14.
Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, 425.
Termination of initial carrier's liability under statute of, see CARRIAGE OF MERCHANDISE, 619.

SOUTH CAROLINA R. CO.

1. Right to extend road.—The company has the right under its charter to extend its road to Boundary street in the city of Charleston, by running it over the lands of private individuals against their consent,

and to have those lands valued by commissioners appointed by the court. *Ex parte South Carolina R. Co.*, 2 *Rich.* (*So. Car.*) 434.

2. Service of process on.—The company may be made a party to a suit, by service of a writ on its president, in any district where the plaintiff resides or the cause of action accrues; and its appearance may be enforced, when necessary, by a *distringas* on its property in such district. *Glaize* v. *South Carolina R. Co.*, 1 *Strobh.* (*So. Car.*) 70.

SOUTH DAKOTA.

Assessment and levy of taxes in, see TAXATION, **281.**

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, **32.**

SOUTHERN PACIFIC R. CO.

Federal grants to, see LAND GRANTS, **84-91.**

1. Construction of statutes. — Cal. Act of April 4, 1870, authorizing said company to change the line of its road, accept the congressional grant of land, and construct its road as provided in the act incorporating the Atlantic & Pacific company, was not in violation of the state Const. art. 4, § 31, providing that corporations "shall not be created by special act, except for municipal purposes." *Southern Pac. R. Co.* v. *Orton*, 6 *Sawy.* (*U. S.*) 157.

Neither was said act, by giving the company authority to change the line of its road, an act creating a corporation in whole or in part, nor was it the creation of a new corporate power. *Southern Pac. R. Co.* v. *Orton*, 6 *Sawy.* (*U. S.*) 157.

Amended articles of association were filed by the company in pursuance of Cal. Act of March 1, 1870, applicable to all corporations before created, or to be thereafter created. *Held*, that, even if the act of April 4 were void, the company had full authority to build the road under the act of March 1, and the amended articles of association filed in pursuance of its provisions. *Southern Pac. R. Co.* v. *Orton*, 6 *Sawy.* (*U. S.*) 157.

2. The road intended.—The road to aid the construction of which a land grant was made by Act of Congress of July 27, 1866, incorporating the Atlantic & Pacific R. Co., was intended to be a road connecting with the contemplated Atlantic & Pacific road at such point on said road, near the intersection of the thirty-fifth parallel of latitude and the eastern line of California, as the Southern Pacific road should deem most suitable for a railroad line from said point of connection to San Francisco, the point and the line thence to San Francisco to be determined and located by the Southern Pacific company. *Southern Pac. R. Co.* v. *Orton*, 6 *Sawy.* (*U. S.*) 157.

The line of the road designated on the plat thereof filed by said company in the office of the commissioner of the general land office on Jan. 3, 1867, is properly located under said act. *Southern Pac. R. Co.* v. *Orton*, 6 *Sawy.* (*U. S.*) 157.

3. Consolidation.—Act of Congress of March 3, 1871, authorized the company in California, subject to the laws of that state, to construct a certain railroad, and granted it certain lands. The company, as it then existed, accepted said grant, and filed its plat of definite location in the proper office August 12, 1873. Said company, as authorized by the laws of California, consolidated with other companies under the name of the Southern Pacific railroad company, a part of its object being to construct the railroad mentioned in said act. The consolidated company built the road, as required, and the road was accepted by the president, and has performed, to the satisfaction of the government, all the services required of it under said act. *Held*, that said consolidated company, if not technically, is substantially, the same company to which said act referred. *United States* v. *Southern Pac. R. Co.*, 51 *Am. & Eng. R. Cas.* 331, 46 *Fed. Rep.* 683.—APPROVING Southern Pac. R. Co. *v.* Poole, 12 Sawy. (U. S.) 544, 32 Fed. Rep. 451; United States *v.* Southern Pac. R. Co., 45 Fed. Rep. 596.

Pursuant to state authority, recognized by and made a part of the congressional grant of March 3, 1871, the company, April 15, 1871, filed amended articles of incorporation; and August 12, 1873, filed, together with the Southern Branch, articles of amalgamation and consolidation. *Held*, that, while in one sense a new corporation was formed, each was substantially and practically the same company mentioned in the acts of congress, and was so recognized by congress, and that the articles of amendment, amalgamation, and consolidation were authorized by congressional as well as by state legislation. *United States* v. *Southern*

Pac. R. Co., 51 *Am. & Eng. R. Cas.* 331, 46 *Fed. Rep.* 683.

4. Mortgage of. — Plaintiff company conveyed its lands to trustees to secure first mortgage bonds, in the usual form of a railroad mortgage, with a condition of defeasance, and reserving to the company the right to the exclusive management and control of the lands, with only the right to the trustees to enter upon a default. *Held*, that this was a mortgage, under the California Code, and the right of possession until a default remained in the company. *Southern Pac. R. Co.* v. *Doyle*, 11 *Fed. Rep.* 253, 8 *Sawy.* (*U. S.*) 60.—QUOTING Platt *v.* Union Pac. R. Co., 99 U. S. 57.

5. Freight rates on. — The rate for freight to which the company is limited by its charter has no reference to any road except that which the company is authorized to build and operate in Texas; and a charge of freight, in excess of the limits prescribed by its charter, over a road which the company owns and operates out of Texas, would be no violation of its charter. *Knight* v. *Southern Pac. R. Co.*, 41 *Tex.* 406.

SOVEREIGNTY.

Power to take private property for public use an attribute of, see EMINENT DOMAIN, **53.**

SPARK ARRESTERS.

Liability of company for defects in, see FIRES, **41-46.**
Patents for, see PATENTS FOR INVENTIONS, **47.**

SPARKS.

As an element of damages, see STREETS AND HIGHWAYS, **287.**
Evidence of damages by, see STREETS AND HIGHWAYS, **270.**
Liability for fire caused by, see FIRES.

SPECIAL.

Appearance, see APPEARANCE, **7.**

SPECIAL ACTS.

Amendment of charters by, see CHARTERS, **29.**
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SPECIAL CONTRACTS.

As to safety of employés, duty of company under, see EMPLOYÉS, INJURIES TO, **3.**
By conductor to stop train at unusual place, see CARRIAGE OF PASSENGERS, **255.**
Effect of, on liability for acts or negligence of fellow-servants, see FELLOW-SERVANTS, **50.**
For through shipment, necessity of, see CARRIAGE OF MERCHANDISE, **609.**
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— — **for baggage,** see BAGGAGE, **103.**
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SPECIAL DAMAGES.

Complainant must show, to enjoin street railway, see STREET RAILWAYS, **200.**
How pleaded in action for expulsion from train, see EJECTION OF PASSENGERS, **89.**
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When allowable in actions against carriers of passengers, see CARRIAGE OF PASSENGERS, **611.**

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When proper, see PLEADING, **64.**

SPECIAL FINDINGS.

As to contributory negligence, see CROSSINGS, INJURIES, ETC., AT, **228.**
Errors in, when ground for new trial, see NEW TRIAL, **26.**
In actions for causing death, see DEATH BY WRONGFUL ACT, **358-360.**
— — — **injuries caused by fire,** see FIRES, **364.**
— — — **killing stock,** see ANIMALS, INJURIES TO, **558.**
Inconsistency between general verdict and, see EMINENT DOMAIN, **828**; NEW TRIAL, **27.**

SPECIAL LAWS.

Constitutionality of, see STATUTES, **17.**
Incorporation under, see INCORPORATION, ETC., **2.**
Relating to live stock, constitutionality of, see ANIMALS, INJURIES TO, **2.**

SPECIAL PLEA.

Contributory negligence, when must be interposed by, see CONTRIBUTORY NEGLIGENCE, **75.**

Form and sufficiency of, generally, see PLEADING, 48-52.
Necessity of, in condemnation proceedings, see EMINENT DOMAIN, 354.

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Costs in, see COSTS, 13.

SPECIAL PURPOSE.

Loss of goods ordered for, measure of damages, see CARRIAGE OF MERCHANDISE, 799-809.

SPECIAL QUESTIONS.

Submission of, to jury on assessment of land damages, see EMINENT DOMAIN, 593.
To jury impaneled to assess damages, see EMINENT DOMAIN, 827.

SPECIAL SERVICES.

Extra charges for, under Railway and Canal Traffic Acts, see CHARGES, 114-120.
— — — when allowable, see CHARGES, 64-67.

SPECIAL TICKETS.

Right to stop over on, see TICKETS AND FARES, 41.

SPECIAL VERDICTS.

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In actions for killing stock, see ANIMALS, INJURIES TO, 557.
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SPECIFICATION.

In applications for patents, see PATENTS FOR INVENTIONS, 7.

SPECIFIC DENIALS.

Must be, in answer, see PLEADING, 56.
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SPECIFIC INSTRUCTIONS.

As to contributory negligence, see CONTRIBUTORY NEGLIGENCE, 114.

SPECIFIC PERFORMANCE.

Action for, by landowner, in Canadian expropriation proceedings, see EMINENT DOMAIN, 1278.
Bill for, in lieu of foreclosure of mortgage, see MORTGAGES, 166.
Of agreements between connecting companies, see CONNECTING LINES, 5.
Of conditions of donation, see MUNICIPAL AND LOCAL AID, 257.
— construction contract, see CONSTRUCTION OF RAILWAYS, 103.
— contracts for crossing of railroads, see CROSSING OF RAILROADS, 3.
— — — express facilities, see EXPRESS COMPANIES, 10.
— — — joint user of right of way, see RIGHT OF WAY, 26.
— — — right of way, see EMINENT DOMAIN, 226; RIGHT OF WAY, 10.
— — — sale of stock, see STOCK, 60.
— — to locate station, see STATIONS AND DEPOTS, 45.
— judgments, actions for, see EMINENT DOMAIN, 861.
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— order of commissioners in respect to grade crossings, see CROSSING OF STREETS AND HIGHWAYS, 113.

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I. WHEN SPECIFIC PERFORMANCE WILL BE DECREED.

1. Discretion of the court.—A party cannot call upon a court of equity, as of right, to enforce the specific performance of a contract for the sale of land to a railroad, and the exercise of this branch of its jurisdiction rests in the sound discretion of the court in view of the terms of the contract and the surrounding circumstances. *Phelps* v. *Illinois C. R. Co.*, 63 *Ill.* 468.—DISTINGUISHED IN Chicago, B. & Q. R. Co. *v.* Skupa, 16 Neb. 341. QUOTED IN Missouri River, Ft. S. & G. R. Co. *v.* Brickley, 21 Kan. 275.—*New Orleans* v. *New Orleans & N. R. Co.*, 44 *La. Ann.* 64, 10 *So. Rep.* 401.—FOLLOWED IN State ex rel. *v.* Board of Liquidators, 28 La. Ann. 121.—*Menasha* v. *Wisconsin C. R. Co.*, 65 *Wis.* 502, 27 *N. W. Rep.* 169. *Shenandoah Valley R. Co.* v. *Lewis*, 12 *Am. & Eng. R. Cas.* 305, 76 *Va.* 833.

2. Requisites of the contract, generally.—Before an individual can maintain an action for specific performance, to compel a company to construct its road through a certain city, he must prove that he had an agreement with the company, which bound it to construct its road according to his demand. *Crane* v. *Chicago & N.*

W. R. Co., 17 *Am. & Eng. R. Cas.* 174, 20 *Fed. Rep.* 402.

A correspondence between a vendor and a proposed purchaser of a street railway, from which it appears that neither party intended to be bound until a formal written contract expressing all the terms of the agreement should be executed by both parties, does not, in the absence of such formal written contract, prove such a concluded agreement as may be specifically enforced by a court of equity. *Pacific Rolling Mill Co.* v. *Riverside & A. R. Co.*, 90 *Cal.* 627, 27 *Pac. Rep.* 525.

A bill for an account of fares received according to a contract previously made between the parties is not technically a bill for specific performance, so as to induce a court of equity to refuse relief on the ground that the contract is inequitable. *Sussex R. Co.* v. *Morris & E. R. Co.*, 19 *N. J. Eq.* 13; *reversed in* 19 *N. J. Eq.* 574.

3. —— must be certain.—In action for specific performance of a contract to convey a right of way across lands of defendant —*held*, that any objection on the ground of indefiniteness by defendant is cured by defendant's putting plaintiff in possession of the land contracted to be conveyed. *Ottumwa, C. F. & St. P. R. Co.* v. *Mc Williams*, 29 *Am. & Eng. R. Cas.* 544, 71 *Iowa* 164, 32 *N. W. Rep.* 315.

A provision in a deed for a right of way, that the vendee "shall build and keep in repair such bridges as may be necessary over the lands herein acquired," is too indefinite to be enforced by a court of equity. *Zeringue* v. *Texas & P. R. Co.*, 34 *Fed. Rep.* 239.

A contract to convey land was sought to be avoided on the ground that the description was too indefinite. It described the land as that part of a certain government subdivision, "lying south of the grove." *Held*, that this description was certain, and that it was no ground for refusing an order for specific performance. *Minneapolis & St. L. R. Co.* v. *Cox*, 76 *Iowa* 306, 41 *N. W. Rep.* 24.

The contract must be fixed in its terms, and the liability of the defendant so certain that the duty imposed upon him by the court in ordering the execution of the contract can readily be ascertained and as readily executed. *New Orleans* v. *New Orleans & N. R. Co.*, 44 *La. Ann.* 64, 10 *So. Rep.* 401.

The contract must be certain and definite in its terms and in all its parts, and must be clearly proved. *Shenandoah Valley R. Co.* v. *Lewis*, 12 *Am. & Eng. R. Cas.* 305, 76 *Va.* 833.

In conveying a right of way a landowner provided in the deed that the company was to construct and maintain "a neat and good bridge" at a certain place, for an overhead drive across the track. *Held*, that a failure to specify the size of the bridge and the materials of which it was to be constructed did not make the provision so indefinite that a court would refuse specific performance. A bridge suitable for a highway crossing is what was intended. *Lawrence* v. *Saratoga Lake R. Co.*, 36 *Hun* (*N. Y.*) 467.

And the same objection was made to another provision in such deed that the company was to build "a neat and tasteful station building" at a certain place for a certain purpose. The evidence showed that the company had erected similar buildings a short distance away for the same purpose. *Held*, that the provision was not too indefinite to be enforced. *Lawrence* v. *Saratoga Lake R. Co.*, 36 *Hun* (*N. Y.*) 467. —REVIEWING Wilson *v.* Northampton & B. J. R. Co., L. R. 9 Ch. 279.

The terms of an agreement for the construction of a railway were too indefinite to be enforced in a suit for specific performance; but even had the terms been sufficiently definite the agreement was of such a nature that specific performance could not have been decreed. *Greenhill* v. *Isle of Wight* (*Newport Junction*) *R. Co.*, 23 *L. T.* 885, 19 *W. R.* 345.

A rector filed a bill against a company for the specific performance of an alleged contract for a free pass for himself and his successors, as the consideration for certain rectory land conveyed by plaintiff to the company. The court of chancery decreed for plaintiff. The court of appeal, not being satisfied with the evidence of the contract, and also deeming the contract to be open to various objections, reversed the decree, and ordered the bill to be dismissed with costs. *Bettridge* v. *Great Western R. Co.*, 3 *Up. Can. E. & A.* 58.

4. —— must be mutual and possible.—When the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing under seal to convey to the projectors, their associates or successors, all the coal and iron upon

and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time, the road having been completed within the specified time, and a bill filed to compel the specific performance of the contract, the objection that it is wanting in mutuality, because of a stipulation that the projectors should not be liable in damages if they failed to construct the road, comes too late after the completion of the work. *Wilks* v. *Georgia Pac. R. Co.*, 79 *Ala.* 180.

Where two railroads contract, each party binding itself to grant to the other an easement in what had been the exclusive property of the party granting, and each right and interest becomes the consideration for the right and benefits secured in return, it cannot be objected, in a suit for specific performance, that there is no mutuality of contract. *South & N. Ala. R. Co.* v. *Highland Ave. & B. R. Co.*, 98 *Ala.* 400, 13 *So. Rep.* 682.

Certain landowners sent a written proposition to a railroad company offering to grant it in fee certain lands, for a right of way and for other purposes, upon certain specified conditions. Afterwards the president of the company answered, stating that by a resolution of the board of directors of his company he was instructed to accept the proposition on behalf of his company, adding "I beg, therefore, to state my readiness to confer with you in such steps as may be necessary to give effect to the arrangement"; and stating further that if the landowners would prepare a proper conveyance of the land, and a proper obligation on the part of the railroad company, he would submit them to the counsel of the company for approval, and then execute them so far as it was his duty. *Held*, that the two communications did not constitute a contract so defined and mutual as to be enforced by a court of equity. *Canton Co.* v. *Northern C. R. Co.*, 21 *Md.* 383.

Where, under an agreement between a railway company and a landowner, the submission of certain estimates to a person for approval is of the essence of the agreement, by the death of such person the agreement becomes incapable of being performed in the manner and form specified, and equity will not enforce performance of it. *Firth* v. *Midland R. Co., L. R.* 20 *Eq.* 100, 23 *W. R.* 509, 32 *L. T.* 219.

5. Operation of statute of frauds, generally.—Where a railroad company, through its officer, agrees by parol to sell a large amount of land, at a certain price per acre, to be paid for at different times, and after many of the tracts have been conveyed and taken possession of, and improvements made thereon, a court will not decree specific performance, after a refusal by the company to convey other tracts. *Small* v. *Northern Pac. R. Co.*, 20 *Fed. Rep.* 753.

It seems that equity will decree specific performance of a written contract giving a railroad a right of way over plaintiff's land, in consideration that it would erect a station thereon. *Haisten* v. *Savannah, G. & N. A. R. Co.*, 51 *Ga.* 199, 6 *Am. Ry. Rep.* 424.

The owner of land, through which a railroad corporation was authorized to make its road, gave it a bond to convey by a certain day, on payment of a specified sum, so much of his land as should be taken by it by authority of law for the purposes of the road; and the corporation, within the time allowed by law, entered upon and took the land for the purposes of the road; but, on the owner's tendering it, on the day named in the bond, a deed of the land, refused to pay him the stipulated sum. *Held*, that the agreement, not having been signed by the corporation, could not be specifically enforced against it in equity. *Jacobs* v. *Peterborough & S. R. Co.*, 8 *Cush.* (*Mass.*) 223.—FOLLOWING Kidder *v.* Hunt, 1 Pick. (Mass.) 328; Thompson *v.* Gould, 20 Pick. 134; Adams *v.* Townsend, 1 Metc. (Mass.) 483; Davenport *v.* Mason, 15 Mass. 85.—DISTINGUISHED IN Steenrod *v.* Wheeling, P. & B. R. Co., 27 W. Va. 1. NOT FOLLOWED IN Old Colony R. Corp. *v.* Evans, 6 Gray (Mass.) 25.

W. Va. Code, ch. 98, § 1, requires every contract for the sale of land to be signed by the party to be charged; but notwithstanding this provision, where there has been such performance as will take the case out of the operation of the statute, a written contract signed by the vendor alone may be enforced against the vendee. *So held*, where a landowner contracted to sell land to a railroad company, which took possession, and after its insolvency the land passed to another company, which continued to occupy it. *Steenrod* v. *Wheeling, P. & B. R. Co.*, 27 *W. Va.* 1.—DISTINGUISH-

ING Jacobs *v.* Peterborough & S. R. Co., 8 Cush. (Mass.) 223.

6. —— effect of part performance. —A railroad company and a landowner made an oral contract for the exchange of lands. Both went into possession, and the private owner made a deed to the company, and made large expenditures in improvements, and held possession for several years. *Held*, in an action against the company for specific performance, that this was sufficient performance to take the case out of the statute of frauds. *Union Pac. R. Co.* v. *McAlpine*, 129 *U. S.* 305, 9 *Sup. Ct. Rep.* 286; *affirming* 23 *Fed. Rep.* 168.

In case of a parol contract between the plaintiff and a railroad, giving the company a right of way through his land in consideration that it would erect a station thereon, the building of such road upon the land is not such partial performance as to enable a court of equity to decree specific performance. *Haisten* v. *Savannah, G. & N. A. R. Co.*, 51 *Ga.* 199, 6 *Am. Ry. Rep.* 424.

If a party verbally contracts with a landowner for the right to construct a railroad over the land, and is permitted to enter upon the same, and expends money in building the track, in good faith, on the owner's verbal promise to convey, and such party otherwise performs or offers to perform his part of the agreement, such performance or partial performance will, as in other cases, take the case out of the statute of frauds, and a court of equity will decree a specific performance of the agreement. *St. Louis Nat. Stock Yards* v. *Wiggins Ferry Co.*, 112 *Ill.* 384.

An oral agreement by a railroad corporation to release to a person one of two parcels of land included in its location and owned by him at the time the location was filed, upon consideration that he should not demand or collect damages for taking the land so released, is an agreement for the transfer of an interest in lands within the statute; and neither the building of fences by the corporation (after agreement made), dividing the land released from that used for the railroad, and digging a new channel for a brook along the dividing line between the land, nor the refraining by the owner from collecting compensation for the taking of the land covered by the agreement, and the continued occupation by him of the land, constitute such part performance as to warrant a decree for specific performance. *Barnes* v. *Boston & M. R. Co.*, 130 *Mass.* 388.

7. Necessity of performance by complainant. — A party seeking to enforce specific performance of a contract must show that he himself has always been ready and willing to perform the contract on his part, notwithstanding time is not made the essence of the contract. *Phelps* v. *Illinois C. R. Co.*, 63 *Ill.* 468.

Where a company enters into a contract for a conveyance of land to it, upon conditions both precedent and subsequent, such as that it shall locate and maintain a depot at a certain place, and that it shall pay for the platting of other adjoining lands of the grantor, it is not bound to perform the conditions subsequent before compelling a conveyance of the land. *Minneapolis & St. L. R. Co.* v. *Cox*, 76 *Iowa* 306, 41 *N. W. Rep.* 24.

Where a plan of reorganization provides that stockholders in the old corporation may have stock in the new, by paying certain assessments within a specified time, a court of equity will not decree specific performance, where the assessments are demanded but not made within the time, though plaintiff subsequently offers to make the payments, and demands the stock. *Dow* v. *Iowa C. R. Co.*, 70 *Hun* 186, 53 *N. Y. S. R.* 898, 24 *N. Y. Supp.* 292; *affirmed in* 144 *N. Y.* 426, 39 *N. E. Rep.* 398.

The courts will not, in the exercise of their discretionary power, enforce performance of a contract to relinquish a right of way made upon the implied stipulation that the road would be completed within a reasonable time by the company or its assignees, where the company has abandoned its right of way and route. *Beattie* v. *Carolina C. R. Co.*, 46 *Am. & Eng. R. Cas.* 524, 108 *N. Car.* 425, 12 *S. E. Rep.* 913.

8. Sufficiency of such performance.—A contract for sale of land for a certain price, on condition that the purchaser, within one year, have its railway completed across and beyond said land, and cars running thereon, when the vendors will execute a deed, and the purchase money shall become due and payable, immediate possession for the uses of the purchaser being granted, does not make payment of the purchase money within the year of the essence of the agreement, or a condition precedent to its enforcement by the purchaser. *Byers* v. *Denver Circle R. Co.*, 13 *Colo.* 552, 22 *Pac. Rep.* 951.

An undertaking in a deed, on the part of the grantee to perform certain acts, becomes, on delivery of the deed to and acceptance by him, effectual as a contract on his part to perform the undertaking, and upon refusal on his part to perform, an action for specific performance or for damages is maintainable. *Post* v. *West Shore R. Co.*, 47 *Am. & Eng. R. Cas.* 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

A landowner contracted to sell certain land to defendant company for a nominal price, in consideration of the company agreeing to erect and maintain a lawful fence on each side of its road. The fences were not built and the landowner refused the deed and brought ejectment. The company insisted on a specific performance of the contract. *Held*, that it was proper to decree specific performance, upon the company fencing its track, and paying any damages incurred by the failure to do so. *Helmke* v. *New Jersey & N. Y. R. Co.*, 49 *N. Y. S. R.* 361, 66 *Hun* 632, *mem.*, 21 *N. Y. Supp.* 345; *affirmed in* 143 *N. Y.* 648, *mem.*, 60 *N. Y. S. R.* 874, *mem.*, 37 *N. E. Rep.* 824.

9. What contracts may be enforced, generally.*—Specific performance of an agreement, by a railway company, to construct and maintain a siding was decreed, although the owner of the land had previously entered into negotiations for compensation in respect of the breach of the agreement. *Greene* v. *West Cheshire R. Co.*, 25 *L. T.* 409, 20 *W. R.* 54.

The general rule that an agreement to submit a controversy to arbitration cannot be specifically enforced will not prevent the enforcement of a contract between two companies. A stipulation in the contract to submit controversies to referees for arbitration is not of the essence of the agreement, but relates merely to differences that may arise respecting the minor details of its execution, and does not preclude the specific enforcement of the contract. *Union Pac. R. Co.* v. *Chicago, R. I. & P. R. Co.*, 51 *Am. & Eng. R. Cas.* 162, 51 *Fed. Rep.* 309, 2 *C. C. A.* 174; *affirming* 47 *Am. & Eng. R. Cas.* 340, 47 *Fed. Rep.* 15.

A company may compel specific performance of a contract to convey a right of way, after complying with the conditions thereof itself, and may enjoin an assessment of damages under *ad quod damnum* proceedings. *Chicago & S. W. R. Co.* v. *Swinney*, 38 *Iowa* 182.

A railroad corporation may maintain a bill in equity for the specific performance of a contract to purchase of it land which it has purchased for the purpose of having gravel dug therefrom, and transported at a certain freight over its road, to be delivered to and used by a third party. *Old Colony R. Corp.* v. *Evans*, 6 *Gray* (*Mass.*) 25.—NOT FOLLOWING Jacobs *v.* Peterborough & S. R. Co., 8 Cush. 223.

A contract providing for the joint ownership and operation of the same line of road by several companies, each having an undivided interest therein, is capable of specific performance. *Louisville & N. R. Co.* v. *Mississippi & T. R. Co.*, 92 *Tenn.* 681, 22 *S. W. Rep.* 920.

Where a landowner contracts to grant a right of way through his farm, free from damages, and to make a deed upon demand, and the company has entered, constructed its road, and is operating it, a court will decree specific performance of the contract. *Ohio River R. Co.* v. *Sehon*, 33 *W. Va.* 559, 11 *S. E. Rep.* 18.

10. Because of no adequate remedy at law.—Where a railway company takes up a siding constructed by it from its line to a mill under an agreement to replace such siding when required by the mill owner, such agreement may be specifically enforced, damages being an insufficient remedy. *Todd* v. *Midland G. W. R. Co.*, 9 *L. R., Ir.* 85.

Where a lease of a railroad is only partly performed, and there are various parties, and a restraining order is sought against some of the defendants, and the interests are varied and complicated, and it appears that the parties could not have a full remedy at law, it is proper to apply to a court of equity for specific performance. *St. Louis, A. & T. H. R. Co.* v. *Indianapolis & St. L. R. Co.*, 9 *Biss.* (*U. S.*) 144.—QUOTING Chicago & N. W. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270.

Where plaintiff cannot be adequately compensated by damages, for a breach of

*Specific performance of contracts with railroads, see note, 43 AM. & ENG. R. CAS. 645.

Specific performance of contracts to afford express facilities, see note, 22 AM. & ENG. R. CAS. 274.

Contracts for right of way, see note, 29 AM. & ENG. R. CAS. 548. See also 43 *Id.* 587, *abstr.*

contract, and the things required by the contract are definite, a specific performance should be decreed. *Lawrence* v. *Saratoga Lake R. Co.*, 3 *N. Y. S. R.* 743.

11. Contracts to subscribe stock.—A. had agreed, conditionally with others, to subscribe a certain amount to the stock of a company, and B. and C. agreed with him in writing, if he would do so unconditionally, they would each take one fourth of such stock off his hands by subscribing for it in their own names, and A. afterwards made such subscription absolutely. *Held*, that equity would decree the specific performance of such agreement. *Austin & N. C. R. Co.* v. *Gillaspie*, 1 *Jones Eq.* (*N. Car.*) 261.

12. Contracts to build and maintain station.—Where a railroad company enters into a contract with a landowner, whereby it obtains a right of way, and agrees to construct a station at a certain place, "simultaneously with the construction of said road," the company upon taking possession of the land and constructing its road, should be compelled specifically to perform the contract. *Lawrence* v. *Saratoga Lake R. Co.*, 36 *Hun* (*N. Y.*) 467; *adhered to in* 3 *N. Y. S. R.* 743.—DISTINGUISHING Blanchard *v.* Detroit, L. & L. M. R. Co., 31 Mich. 43; Port Clinton R. Co. *v.* Cleveland & T. R. Co., 13 Ohio St. 544; McCann *v.* South Nashville St. R. Co., 2 Tenn. Ch. 773.

The agreement in such case provided that all regular trains should stop at the station provided for. *Held*, that a court could not compel the company to run trains upon its road, but it might properly enjoin it from running any regular trains which did not stop at such station. *Lawrence* v. *Saratoga Lake R. Co.*, 36 *Hun* (*N. Y.*) 467; *adhered to in* 3 *N. Y. S. R.* 743.

In consideration of a bonus granted by plaintiffs, a company covenanted "to erect and maintain a permanent freight and passenger station" at a certain place. Shortly afterwards the road was leased, with notice of this agreement, to the defendant, which discontinued the place as a regular station, merely stopping when there were passengers to be let down or taken up. *Held*, that the mere erection of station buildings was not a fulfilment of the covenant, and that the municipality was entitled to have it specifically performed. *Wallace Tp.* v. *Great Western R. Co.*, 3 *Ont. App.* 44; *affirming* 25 *Grant's Ch.* 86.

13. Contracts to construct crossings.—Plaintiff, who was the owner of a farm on the westerly shore of a river, conveyed to a railroad company the fee of a strip of land across his farm, which included a highway. The deed contained a clause that the company would reconstruct and restore the highway and "place the same along the westerly line and upon" the premises conveyed; also "to construct a good and convenient crossing over the railway premises to the highway reconstructed as aforesaid." The company constructed an embankment on the easterly side of the strip, from fourteen to twenty feet high, cutting off all approach over the highway to plaintiff's buildings from the south; it made an approach on the north side of the farm, enabling plaintiff to reach the highway in that direction. In constructing the embankment, the company obstructed the highway so as to prevent its use. The commissioner of highways threatened legal proceedings; he also objected to placing the highway on the strip sold. The company thereupon purchased of plaintiff a strip of ground for the highway on a hill above its road, over which it constructed the highway. Upon executing the second deed, plaintiff expressly refused to release the company from the obligation of the covenant in the first. In an action for specific performance of said covenant—*held*, that the company, by acceptance of the deed, became bound to perform the obligation recited therein, and upon its refusal so to do, the action was maintainable; that the claim that the obligation was void, as against public policy, because it provided for an abandonment of part of an existing road without the sanction of the commissioner of highways of the town was untenable, as his consent was not necessary; also that, for the same reason, the fact that he objected to the proposed change was not an excuse for non-performance of the undertaking. *Post* v. *West Shore R. Co.*, 47 *Am. & Eng. R. Cas.* 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

It seems that, assuming the company had no right, as between itself and the town, to locate the reconstructed highway as provided in the covenant, plaintiff was still entitled to enforce the contract so far as to give him a road as provided for, although it

would no longer continue a legal highway. *Post* v. *West Shore R. Co.*, 47 *Am. & Eng. R. Cas.* 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

The sale by plaintiff to the company of another strip of land for the highway, and its construction thereon, was not a waiver of the covenant. *Post* v. *West Shore R. Co.*, 47 *Am. & Eng. R. Cas.* 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

Plaintiff's evidence was to the effect that his damages for the non-performance of the covenant were in the aggregate $5000; the damage arising from the non-construction of the road and that from failure to build the crossing was not separately stated. By stipulation of the parties, the court, after the testimony was in, viewed the premises, and there was evidence showing the increased cost of carrying on the farm, because of the obstruction of the old highway. The court found that plaintiff's damages were $2500, and directed judgment for that amount; also that the company should construct a crossing under its road to enable plaintiff to reach the old highway. *Held*, no error. *Post* v. *West Shore R. Co.*, 47 *Am. & Eng. R. Cas.* 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

Subsequent to the commencement of the action, the company became insolvent; its property and franchises were sold on foreclosure and became the property of a new company, organized to operate the road, which company was brought in as a defendant. *Held*, that the new company, on becoming vested with said property and franchises, became bound by the covenant; but that it was not liable for the damages for depreciation in value of the use of the farm, which accrued prior thereto. *Post* v. *West Shore R. Co.*, 47 *Am. & Eng. R. Cas.* 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

14. Contracts to permit joint use of right of way. — Where two railroad companies have entered into an agreement each granting to the other certain privileges, such as making crossings, and one laying a track on the other's right of way, it is no objection to a specific performance of the agreement that it is not just and equitable in that it does not secure equal benefits to the two companies. *South & N. Ala. R. Co.* v. *Highland Ave. & B. R. Co.*, 98 *Ala.* 400, 13 *So. Rep.* 682.

Two railroad companies contracted with each other, *inter alia*, whereby one company bound itself to permit the other to construct and operate a track on a part of its right of way, and to make certain crossings, the other agreeing to permit the former to cross a strip of land whenever and wherever it might elect, binding itself to maintain proper crossings, but if it should fail after thirty days' notice to renew or repair such crossings, then the other company could do so at the expense of the company so agreeing. *Held*, that this was such a contract as a court of equity could specifically enforce. *South & N. Ala. R. Co.* v. *Highland Ave. & B. R. Co.*, 98 *Ala.* 400, 13 *So. Rep.* 682.—APPROVING Union Pac. R. Co. *v.* Chicago, R. I. & P. R. Co., 51 Fed. Rep. 309. RECONCILING Conger *v.* New York, W. S. & B. R. Co., 43 Am. & Eng. R. Cas. 643, 120 N. Y. 29; Texas & P. R. Co. *v.* Marshall, 136 U. S. 393. REVIEWING Lytton *v.* Great Northern R. Co., 2 Kay & J. 394; Sanderson *v* Cockermouth & W. R. Co., 11 Beav. 497; Joy *v.* St. Louis, 138 U. S. 1.

Where a company contracts that other companies may use its right of way, under "such reasonable regulations and terms as may be agreed upon," and thereafter refuses to allow another company to use such right of way upon any terms, a court of equity may enforce the contract, determine the amount of consideration, and decide upon the regulations. *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.*, 29 *Fed. Rep.* 546.—FOLLOWING St. Louis, I. M. & S. R. Co. *v.* Southern Exp. Co., 108 U. S. 24, 2 Sup. Ct. Rep. 6.

15. What contracts may not be enforced, generally.*—A court of equity will not decree specific performance of a contract to build a railroad, on the ground that the court would not undertake to superintend the construction, which would take a considerable time. *Ross* v. *Union Pac. R. Co., Woolw. (U. S.)* 26.—APPROVING Lucas *v.* Commerford, 3 Brown's Ch.

*Conveying a right of way with condition that it should revert if not used for railroad purposes at any time. Company may abandon, and action for specific performance will not lie, see 36 AM. & ENG. R. CAS. 428, *abstr.*

166, 1 Ves. Jr. 235. REVIEWING South Wales R. Co. *v.* Wythes, 1 Kay & J. 186, 5 De G., M. & G. 880; Storer *v.* Great Western R. Co., 2 Y. & C. 48.—APPROVED IN McCann *v.* South Nashville St. R. Co., 2 Tenn. Ch. 773. FOLLOWED IN Oregonian R. Co. *v.* Oregon R. & N. Co., 37 Fed. Rep. 733.—*Oregonian R. Co.* v. *Oregon R. & N. Co.*, 37 *Fed. Rep.* 733.—FOLLOWING Ross *v.* Union Pac. R. Co., Woolw. (U. S.) 26; Storer *v.* Great Western R. Co., 2 Y. & C. 48. REFERRING TO Pennsylvania R. Co. *v.* St. Louis, A. & T. H. R. Co., 118 U. S. 305, 6 Sup. Ct. Rep. 1094.—*Greenhill* v. *Isle of Wight* (*Newport Junction*) *R. Co.*, 23 *L. T.* 885, 19 *W. R.* 345.

Nor for building and equipping a long line of railroad, building stations, and freight and engine houses. *Danforth* v. *Philadelphia & C. M. S. L. R. Co.*, 30 *N. J. Eq.* 12, 18 *Am. Ry. Rep.* 66. *Wilson* v. *Northampton & B. J. R. Co.*, *L. R.* 9 *Ch.* 279, 43 *L. J. Ch.* 503, 22 *W. R.* 380, 30 *L. T.* 147.

Nor to construct or repair a railway. *Oregonian R. Co.* v. *Oregon R. & N. Co.*, 11 *Sawy.* (*U. S.*) 33.

Nor decree a conveyance of mineral lands to a railroad company, where it does not appear that it has the authority to acquire such lands. *Wilks* v. *Georgia Pac. R. Co.*, 79 *Ala.* 180.

Nor to build a railroad, to be paid for in the stock and bonds of the company, where the company is willing to perform the contract if it can lawfully do so, but where it appears that it has not complied with a supplement to the law regulating corporations, and that a failure to do so would work a forfeiture of its charter. *Danforth* v. *Philadelphia & C. M. S. L. R. Co.*, 30 *N. J. Eq.* 12, 18 *Am. Ry. Rep.* 66.

Nor to deliver government bonds, or certificates of shares of railroad stock, where they are marketable, public stocks, and liable to be sold every day in the market. *Ross* v. *Union Pac. R. Co.*, *Woolw.* (*U. S.*) 26.

A court of equity will not grant relief to let a party into the benefits of a contract on a bill filed to enforce what is claimed to be an oral agreement, whereby complainant was to furnish information to two others, who were to furnish funds and buy railroad bonds, in contemplation of subsequently buying the road at a foreclosure sale for the benefit of the three, where the evidence shows no written agreement whatever, and only desultory conversations, which failed to show a contract at all to the satisfaction of the court, but which might have been sufficient to have led complainant, under the circumstances, to believe that he was to be taken in as a partner. *Farley* v. *Hill*, 150 *U. S.* 572, 14 *Sup. Ct. Rep.* 186.

A mortgaged railroad company contracted with a bridge company for the use of its bridge across a certain river, which contract fixed the rate of tolls to be paid, and the railroad company and another guaranteed that these tolls should amount to a sum not less than $75,000 annually, and by its own terms the contract was to be perpetual. *Held*, that the court would not decree that the purchaser of the road at a foreclosure sale should carry out the contract. *Newport & C. Bridge Co.* v. *Douglass*, 12 *Bush* (*Ky.*) 673, 18 *Am. Ry. Rep.* 221.

An express company loaned a railroad company $20,000, and was to do the express business of the road, the sum to be paid back in carrying the express messengers and goods. The contract provided that it should cease in one year upon payment of the whole sum loaned. A receiver was appointed at the suit of bondholders to foreclose their mortgage, and refused to carry out the contract. *Held:* (1) that the receiver might pay the money as soon as a decree for specific performance was entered and thus render it a nullity; (2) the contract was not a lien on the road, and cannot be enforced against the receiver in such a suit. *Southern Exp. Co.* v. *Western N. C. R. Co.*, 99 *U. S.* 191.—FOLLOWED IN Central Trust Co. *v.* Marietta & N. G. R. Co., 51 Fed. Rep. 15; Union L. & T. Co. *v.* Southern Cal. Motor Road Co., 49 Fed. Rep. 267. QUOTED IN Brown *v.* Warner, 78 Tex. 543.

16. Because of an adequate remedy at law.*—A court of equity will not make a general decree that a railroad company shall at all times, in the future, ship the freight of the plaintiff, in accordance with a contract to that effect. Such relief is impracticable and the plaintiff has an adequate remedy at law. *Atlanta & W. P. R. Co.* v. *Speer*, 32 *Ga.* 550.—QUOTED IN Fargo *v.* New York & N. E. R. Co., 23 N. Y. Supp. 360, 3 Misc. 205, 52 N. Y. S. R. 205.—*Dickson* v. *Covert*, 17 *Grant's Ch.* (*U. C.*) 321.

* A contract to run trains to a depot is not enforceable. The remedy is for damages for breach of contract, see 25 AM. & ENG. R. CAS. 240, *abstr.*

Nor to enforce a contract by which a company agreed, in consideration of a right of way, to fence the road through the lands of plaintiff. *Cincinnati & C. R. Co.* v. *Washburn*, 25 *Ind.* 259.

Nor to enforce a covenant by a railroad company to maintain and keep in repair cattle-guards upon the land of plaintiff. *Columbus & S. R. Co.* v. *Watson*, 26 *Ind.* 50.

Nor a contract by a company in consideration of a donation of lands to it by a city to establish its terminus and machine shops in the city and not to remove them. (Brewer, J., dissents.) *Texas & P. R. Co.* v. *Marshall*, 42 *Am. & Eng. R. Cas.* 637, 136 *U. S.* 393, 10 *Sup. Ct. Rep.* 846.—DISTINGUISHED IN Joy *v.* St. Louis, 45 Am. & Eng. R. Cas. 655, 138 U. S. 1.

Nor to enforce a contract to build a road to, and run trains from, a certain place. *St. Thomas* v *Credit Valley R. Co.*, 12 *Ont. App.* 273.—DISTINGUISHING Attorney-General *v.* Mid-Kent R. Co., L. R. 3 Ch. 100. QUOTING Wilson *v.* Northampton & B. J. R. Co., L. R. 9 Ch. 279.

Nor to enforce a contract by a canal company to furnish water power for a mill, against a railroad company that had succeeded to the property. *United N. J. R. & C. Co.* v. *Hoppock*, 28 *N. J. Eq.* 261, 14 *Am. Ry. Rep.* 23 *reversing* 27 *N. J. Eq.* 286.

Nor to compel specific performance of an agreement by a company to repair the foundation of a building which has been injured by the construction of its road, after the owners themselves have made the necessary repairs, the bill also asking for damages for land taken. *Church of the Holy Communion* v. *Paterson Extension R. Co.*, 43 *Am. & Eng. R. Cas.* 654, 46 *N. J. Eq.* 372, 20 *Atl. Rep.* 169.

Nor to compel a railway company to restore switch connections between the railroad and coal and lumber yards of a vendor, it appearing that to restore the switch connections as before would be detrimental to the business of the roads and to the public interests, and that there was a track laid alongside of the yard, and a connection with it was offered. *Chicago, B. & Q. R. Co.* v. *Reno*, 113 *Ill.* 39.—REVIEWING Chicago & A. R. Co. *v.* Schoeneman, 90 Ill. 258.

Nor to compel certain individuals to grant a free right of way in consideration that the company would build its road to a certain city. *Chicago, M. & St. P. R. Co.* v. *Durant*, 46 *Am. & Eng. R. Cas.* 488, 44 *Minn.* 361, 46 *N. W. Rep.* 676.

Nor to enforce a contract between two companies by which one is to advance money to the other to pay interest, the sums to be advanced repayable on demand. *Bradford, E. & C. R. Co.* v. *New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 374, 123 *N. Y.* 316, 25 *N. E. Rep.* 499, 33 *N. Y. S. R.* 614; *reversing* 16 *N. Y. S. R.* 208, 1 *N. Y. Supp.* 363.

And assuming in case defendant advanced the money, it would not have the legal right to demand an immediate payment, as plaintiff could not repay said advances and as the security therefor proved to be entirely worthless, performance of the contract could not be enforced. *Bradford, E. & C. R. Co.* v. *New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 374, 123 *N. Y.* 316, 25 *N. E. Rep.* 499, 33 *N. Y. S. R.* 614; *reversing* 16 *N. Y. S. R.* 208, 1 *N. Y. Supp.* 363.

It was claimed, on the part of plaintiff, that the insolvency of the plaintiff company was a contingency contemplated by the contract. It appeared that, for the year prior to entering into the contract, said company had earned enough to pay operating expenses, interest on its bonds, and a dividend to its shareholders, leaving a surplus in its treasury. *Held*, that it could not be assumed that the parties contemplated that said plaintiff would permanently cease to earn enough to pay operating expenses; that it was to be assumed that the obligation to advance was founded upon the belief that a temporary contingency might arise by which a part payment of interest could not be made by plaintiff because of an insufficiency of net earnings, in which case defendant was bound to advance enough to make such payment. *Bradford, E. & C. R. Co.* v. *New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 374, 123 *N. Y.* 316, 25 *N. E. Rep.* 499, 33 *N. Y. S. R.* 614; *reversing* 16 *N. Y. S. R.* 208, 1 *N. Y. Supp.* 363.

The complaint asked for an accounting between the parties, which it claimed was necessary, and hence that a court of equity had jurisdiction, and having obtained it for one purpose could retain it for all, and give final relief. *Held*, untenable; that no accounting was necessary; that while it might be necessary, in order to show that there had been no net earnings, to examine plaintiff's books for the purpose of discovering what the gross earnings had been and how

they had been paid out, this involved no accounting between parties, within the meaning of the term as used in relation to the jurisdiction of a court of equity over matters of account. *Bradford, E. & C. R. Co.* v. *New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 374, 123 *N. Y.* 316, 25 *N. E. Rep.* 499, 33 *N. Y. S. R.* 614; *reversing* 16 *N. Y. S. R.* 208, 1 *N. Y. Supp.* 363.

If the action were to be regarded as one at law to recover damages for the violation of the agreement, it was not maintainable, as no facts were pleaded or proved showing damages sustained by the plaintiff company, because of defendant's alleged breach of its agreement. *Bradford, E. & C. R. Co.* v. *New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 374, 123 *N. Y.* 316, 25 *N. E. Rep.* 499, 33 *N. Y. S. R.* 614; *reversing* 16 *N. Y. S. R.* 208, 1 *N. Y. Supp.* 363.

A conveyance of land to a railroad with the condition that it should revert to the grantor, if it ceased to be used for railroad purposes, does not create a covenant that the company will build its road thereon, or continue it. But if such covenant existed, the remedy for a breach would be an action at law, and not a bill for specific performance. *Hoard* v. *Chesapeake & O. R. Co.*, 123 *U. S.* 222, 8 *Sup. Ct. Rep.* 74.

A conveyance of land to a railroad with the condition that it should revert to the grantor, if it ceased to be used for railroad purposes, provides its own remedy, and the grantor is not entitled to a decree to compel the company to build on the land and use it for railroad purposes. *Hoard* v. *Chesapeake & O. R. Co.*, 123 *U. S.* 222, 8 *Sup. Ct. Rep.* 74.

17. Because against public policy.—Equity will not enforce specific performance of a contract to locate passenger and freight depots at a particular point and at no other point in a town, the enforcement of such contract being regarded as against public policy. *Marsh* v. *Fairbury, P. & N. W. R. Co.*, 64 *Ill.* 414, 2 *Am. Ry. Rep.* 82.—DISTINGUISHED IN Snell *v.* Pells, 113 Ill. 145. QUOTED IN Florida C. &. P. R. Co. *v.* State ex rel., 31 Fla. 482; Holladay *v.* Patterson, 5 Oreg. 177; People ex rel. *v.* Chicago & A. R. Co., 35 Am. & Eng. R. Cas. 462, 130 Ill. 175, 22 N. E. Rep. 857.

Where a company covenanted with the owners of land to construct a drawbridge on its track at a certain point, so as to admit vessels from a river through a contemplated slip or canal, and it appeared that owing to an agreement made by certain owners of the land afterwards, the slip or canal to the river could not be made continuous, so as to be of avail for canal purposes to complainants who had succeeded to a part of the land, and the effect of enforcing the agreement would be seriously to embarrass the company in its business, delay trains and endanger their safety, and would be a serious public detriment, a decree of specific performance against the company was refused. *Chicago & A. R. Co.* v. *Schoeneman*, 90 *Ill.* 258.—QUOTED IN State *v.* Des Moines & Ft. D. R. Co., 49 Am. & Eng. R. Cas. 186, 84 Iowa, 419, 51 N. W. Rep. 38. REVIEWED IN Chicago, B. & Q. R. Co. *v.* Reno, 113 Ill. 39.

18. Illegal and void contracts.—In 1865 plaintiff company was seized in fee simple of certain land which was no longer required for the purposes of its railway; it conveyed the land to an individual in fee for £100, and he covenanted that he, his heirs or assigns, would at any time thereafter whenever the land might be required for the railway or works of the company, and whenever requested, upon receiving £100, reconvey the land to the company. In 1879 defendant purchased the land from the grantee's heir, with notice of the above covenant. In 1880 the company gave defendant notice to reconvey the land, and upon his refusal to do so this action was brought for specific performance of the covenant. The company had power in 1865 to purchase land by agreement, though not compulsorily, and that power was extended to the present time by subsequent acts. *Held*, by Kay, J.: (1) That the transaction of 1865 was not *ultra vires* the company; that as there was at that time a strong probability that the land would be required for the purpose of the company, it was within its power to enter into a prospective contract to purchase it; and that the sale was not a conditional sale, but an absolute sale with a personal contract by the purchaser to resell. (2) That an executory interest in property to arise on a future event which may not happen within the limits of the rule against perpetuities is void, though it be limited to an ascertained person who can release it at any time. (3) That in the present case the covenant did not create any estate or interest in land, and therefore was not obnoxious to the rule against perpetuities, and that spe-

cific performance must be decreed. *Held*, by the court of appeal, reversing Kay, J.: (1) That the covenant in the deed of 1865 reserved to the company an interest in the land, and that the sale was *ultra vires* and void, for that under the Lands Clauses Consolidation Act, 1845, § 127, land sold by a company as superfluous land must be sold absolutely without reserving any interest to the company. (2) That as the covenant gave to the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness. *London & S. W. R. Co.* v. *Gomm*, 11 *Am. & Eng. R. Cas.* 385, *L. R.* 20 *Ch. D.* 562.—DISAPPROVING Gilbertson *v.* Richards, 4 H. & N. 277; Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421. EXPLAINING Tulk *v.* Moxhay, 2 Phillips 774.

A railroad company contracted with the government to complete its road by a certain date, the government reserving the right to terminate the contract on six months' notice, if it appeared that the work was not progressing so as to be completed within the time. After the notice to terminate the contract had been given, and after the full time for the completion of the road, the company contracted with another road for the privilege of connecting and running trains for a distance over its road, and for other privileges. *Held*, that the contract was *ultra vires* and void, and a court of equity would not lend its aid in enforcing it, upon a bill filed by the former road asking for specific performance against the other company. *Carleton Branch R. Co.* v. *Grand Southern R. Co.*, 21 *New Brun.* 339.

Defendant railway company granted to plaintiff company the privilege of connecting with defendant's track and running trains over part of its track, with the privilege of building another track alongside of defendant's, and also demised certain lots for depot and other purposes. One entire rent was reserved at a fixed annual sum. It was decided that the demise was illegal as in excess of the powers of the plaintiff. *Held*, that no part of the contract could be enforced. The consideration being illegal in part, and entire, vitiated the entire contract. *Carleton Branch R. Co.* v. *Grand Southern R. Co.*, 21 *New Brun.* 339.

19. Contracts for personal services—Trespass on land.—If, in any case, it would be competent for a court to decree the specific performance of a contract to operate a railroad, requiring, as it would, personal acts, involving the continuous exercise of skill and judgment under varying circumstances and emergencies, it could only be in a case where the demand for the exercise of such a power was stringent, and the circumstances such as to authorize the court in making an order to limit its duration as to time, and to define, to some proper and reasonable extent, the mode and manner in which it should be obeyed. *Port Clinton R. Co.* v. *Cleveland & T. R. Co.*, 13 *Ohio St.* 544.—APPROVED IN McCann *v.* South Nashville St. R. Co., 2 Tenn. Ch. 773. DISTINGUISHED IN Lawrence *v.* Saratoga Lake R. Co., 36 Hun (N. Y.) 467.

A court of chancery will not enforce the specific performance of continuous duties which involve personal labor and care; as, for example, the running of the cars of a street railroad along a particular street, daily, "at such regular intervals as may be right and proper," whether the obligation of the railroad company be rested on contract or the provisions of its charter. *McCann* v. *South Nashville St. R. Co.*, 2 *Tenn. Ch.* 773.—APPROVING Heathcote *v.* North Staffordshire R. Co., 14 Jur. 859; Ross *v.* Union Pac. R. Co., Woolw. (U. S.) 26; Fallon *v.* Missouri & M. R. Co., 1 Dill. (U. S.) 121; Port Clinton R. Co. *v.* Cleveland & T. R. Co., 13 Ohio St. 544. REVIEWING Powell Duffryn Steam Coal Co. *v.* Taff Vale R. Co., L. R. 9 Ch. [illegible] DISTINGUISHED IN Lawrence *v.* Sar[illegible] Lake R. Co., 36 Hun (N. Y.) 467.

The remedy for the enforcement of a duty imposed upon a corporation by its charter is by mandamus, or by proceedings, in the name of the state, for a forfeiture of the charter. *McCann* v. *South Nashville St. R. Co.*, 2 *Tenn. Ch.* 773.—APPROVING Union Pac. R. Co. *v.* Hall, 91 U. S. 343; People *v.* Albany & V. R. Co., 24 N. Y. 267.

Defendant purchased a strip of land through plaintiffs' property, and agreed to put in a passage-way under the track at a certain place, and it afterwards appeared that the road leading to the proposed passage-way was cut off and that a passage-way at that point would be flooded by tide water, and defendant therefore failed to perform its agreement, and plaintiffs brought suit for specific performance; and it also appeared that the subcontractors who con-

structed defendant's road had trespassed upon and wasted the land of plaintiffs adjacent to the strip purchased, and plaintiffs also joined claims of damages therefor. *Held*, that if plaintiffs stood by and permitted defendant's contractors to enter upon and waste the soil adjacent to the right of way without objection, a court of equity may refuse to award them damages therefor. *Murtfeldt* v. *New York, W. S. & B. R. Co.*, 25 *Am. & Eng. R. Cas.* 144, 102 *N. Y.* 703, *mem.*, 1 *Silv. App.* 93, 7 *N. E. Rep.* 404, 2 *N. Y. S. R.* 444; *affirming* 34 *Hun* 632.

20. Performance working hardship and conferring no benefit.—Specific performance of an agreement by a railroad company to construct a passageway under its track will not be decreed, where the evidence shows that the construction of the passage would be difficult, and comparatively useless to the plaintiff when constructed; but the court will leave the parties to their remedy at law for damages. *Murtfeldt* v. *New York, W. S. & B. R. Co.*, 25 *Am. & Eng. R. Cas.* 144, 1 *Silv. App.* 93, 102 *N. Y.* 703, *mem.*, 7 *N. E. Rep.* 404, 2 *N. Y. S. R.* 444; *affirming* 34 *Hun* 632, *mem.*

The doctrine that specific performance of a contract will not be decreed where it will result in great hardship and injustice, or in a case where the public interests would be prejudiced thereby, applied to a case where a landowner, who had conveyed to a railroad company a right of way, sought to enforce the specific performance of a contract to build a station upon the side of a steep mountain in a sparsely settled district, where the public travel would be greatly delayed by the stoppage of trains. *Conger* v. *New York, W. S. & B. R. Co.*, 43 *Am. & Eng. R. Cas.* 643, 120 *N. Y.* 29, 23 *N. E. Rep.* 983, 30 *N. Y. S. R.* 124; *affirming* 45 *Hun* 296, 10 *N. Y. S. R.* 392.

Equity will not compel specific performance, where the benefits of the contract cannot be realized in accordance with its terms. Hence, where a railroad company, having a line of telegraph, grants the use of its poles to a telegraph company on certain conditions and stipulations in favor of the grantor, which are *ultra vires*, an injunction will not be granted whereby the grantor will be required to perform other stipulations made in consideration of such void stipulations. *Marietta & C. R. Co.* v. *Western Union Tel. Co.*, 10 *Am. & Eng. R. Cas.* 387, 38 *Ohio St.* 24.

II. PROCEDURE.

21. Jurisdiction.*—A court of equity has jurisdiction to enforce specific execution of an award concerning real estate, or of an agreement for the purchase or sale of real estate, notwithstanding it involves the enforcement of an award to pay money. *Memphis & C. R. Co.* v. *Scruggs*, 50 *Miss.* 284.

22. Pleading.—On demurrer to a bill for the specific performance of a contract, whereby defendant, among other things, agreed to convey to a railroad corporation (whose legitimate successor is the complainant) the right of way for its railroad, one hundred feet in width, over his lands, and the company, for itself and its successors, covenanted that its railroad should be located and built on the line then already agreed upon by him and the engineer of the company, and designated in the agreement by a reference to a map—*held*, that an averment, on "information and belief," that the railroad had been constructed on the line mentioned in the agreement, but whether so or not that it was constructed on a line agreed upon by the defendant as satisfactory, and had been operated ever since on said line, without objection or complaint by defendant, "so far as complainant knows, and as it believes," lacks certainty and explicitness as to the location of the line of the railroad, and as to the description of the premises claimed to be included in the contract. *New York, S. & W. R. Co.* v. *Lawton*, 11 *Am. & Eng. R. Cas.* 406, 35 *N. J. Eq.* 386.

The complaint alleged that plaintiff contributed $10,000 towards securing a franchise for defendant corporation, upon the agreement that he should receive the same amount of money and stock as the original promoters. He, in fact, received $10,000 in the stock of the company, and a writing stating that he was entitled to $10,000 of first mortgage bonds of another corporation. There was no allegation that the original promoters received any stock or money over and above what plaintiff had received, or that they had received anything at all. No allegation of a breach by defendants, or either of them, of the agreement sued on was alleged, nor was there any allegation that what plaintiff received was not equal

* Specific performance of negative contracts by injunction, see note, 22 AM. & ENG. R. CAS. 276.

to whatever the original promoters received. *Held*, on demurrer, that the complaint failed to state a cause of action. *DeLacy* v. *Walcott*, 21 *N. Y. Supp.* 619, 2 *Misc.* 132, 50 *N. Y. S. R.* 527.

23. Parties. — An express company loaned a railroad company money to repair and equip its road, in consideration that the latter grant the former the privilege of doing express business over the road, the compensation due the latter for such privilege to be applied in payment of the loan. The road went into the hands of a receiver who refused to carry out the contract. Thereupon the express company filed a bill for specific performance. *Held*, that the receiver was the only necessary defendant. *Southern Exp. Co.* v. *Western N. C. R. Co.*, 99 *U. S.* 191.

Where a bond is made payable to the projectors of a railroad by name, "their associates and successors," and is duly assigned by them to a corporation, by which the road was built as stipulated, that corporation may maintain a bill for the specific performance of the contract. *Wilks* v. *Georgia Pac. R. Co.*, 79 *Ala.* 180.

Where an action is brought for the specific performance of a written contract to convey real estate, and prior to the commencement of the action the vendor has sold and conveyed the legal title to a subsequent purchaser, such purchaser is a necessary party to the action, and a decree for a specific performance against the vendor without making such a purchaser a party, is erroneous. *Atchison, T. & S. F. R. Co.* v. *Benton*, 42 *Kan.* 698, 22 *Pac. Rep.* 698.— QUOTING Hare *v.* London & N. W. R. Co., 1 Johns. & H. 252.

A landowner refused to sell the portion of his land required for railroad purposes, but offered to sell all of it. The company, being prohibited by its charter from purchasing land not necessary for its road, engaged a third party to buy the whole tract, and advanced the money for that purpose, under an agreement that the portion required by the company was to be conveyed to it, and the remainder to a certain other party. An oral agreement was entered into for the purchase of the whole farm, and a written agreement was to be signed and a deed delivered in a few days. Such third person took possession of the land, and delivered to the company the portion it needed, but afterwards the landowner refused to convey, and the company filed a bill for specific performance. *Held*, that the third person who made the agreement was a necessary party, but the other person to whom he was to convey a portion of the land was not. *Pennsylvania & N. E. R. Co.* v. *Ryerson*, 36 *N. J. Eq.* 112.

24. Matters of defense, generally. —In an action against a railroad for specific performance of a contract whereby it agreed to convey land, the company cannot set up a mortgage executed by it upon the land as a reason for not conveying. *Union Pac. R. Co.* v. *McAlpine*, 129 *U. S.* 305, 9 *Sup. Ct. Rep.* 286; *affirming* 23 *Fed. Rep.* 168.

Specific performance of a contract to convey land will not be decreed, where the value of the land is to be fixed by an arbitrator, unless his award is made within a reasonable time. A delay of six months, where the property is in or near a growing city, and where the price of real estate may be expected to increase rapidly—*held*, to be unreasonable. *Chicago, M. & St. P. R. Co.* v. *Stewart*, 19 *Fed. Rep.* 5.

The specific performance of a contract between two railroad companies, whereby one of them lets the other into the joint use of its bridge and terminals, will not be refused because the acts to be performed are to extend through a long term of years and are numerous and complicated. *Union Pac. R. Co.* v. *Chicago, R. I. & P. R. Co.*, 51 *Am. & Eng. R. Cas.* 162, 51 *Fed. Rep.* 309, 2 *C. C. A.* 174; *affirming* 47 *Am. & Eng. R. Cas.* 340, 47 *Fed. Rep.* 15.

Since railroads may be built by private enterprise, without the aid of corporate powers, it is no objection to a specific performance of a contract that the projectors of the road had not been incorporated when the contract was made. *Wilks* v. *Georgia Pac. R. Co.*, 79 *Ala.* 180.

The holder of a contract for a conveyance of land made a contract with a railway company, whereby he agreed to convey to the latter a right of way over the land, on conditions fully performed. He paid all the purchase money except $70, and then assigned his contract of purchase to his wife, she paying nothing therefor, except the $70 to the vendor, and received a deed for the land. It appeared that the land outside of the right of way was worth more than the sum paid by the wife. *Held*, on bill by the company for a specific performance of the contract of the husband, that

the wife stood in no better position than t' c husband would, in regard to the rights of the company. *Chicago & E. I. R. Co.* v. *Hay*, 119 *Ill.* 507, 10 *N. E. Rep.* 34.

Where a man has stipulated to permit a company to construct a road over his land, by any one of two or more routes, at its option, he cannot resist the performance of his agreement by showing that he was induced to believe, by his own notions, or by the representations of others, that a particular route would be adopted which was not finally adopted; nor by showing that the company, or its agents, had made such representations. *Western R. Co.* v. *Babcock*, 6 *Metc.* (*Mass.*) 346.—DISTINGUISHED IN Boston & M. R. Co. *v.* Bartlett, 10 Gray (Mass.) 384.

25. Inadequate consideration.—Where railroad companies enter into a contract to bridge a river, for the purpose of making through connections, specific performance of the contract will not be refused on the ground of inadequacy of consideration, where it appears that the contract was entered into by experienced railroad men, for the purpose of preventing a rival bridge, and where plaintiff has expended over $1,000,000 in constructing a connecting line. *Union Pac. R. Co.* v. *Chicago, R. I. & P. R. Co.*, 51 *Am. & Eng. R. Cas.* 162, 51 *Fed. Rep.* 309, 2 *C. C. A.* 174; *affirming* 47 *Am. & Eng. R. Cas.* 340, 47 *Fed. Rep.* 15.

Where a contract for the conveyance of a right of way recites two considerations, one in money, but less than the value of the right of way, and the other, the benefits to be derived from the construction of the road, specific performance cannot be avoided on the ground of inadequacy of considerations. *Ottumwa, C. F. & St. P. R. Co.* v. *McWilliams*, 29 *Am. & Eng. R. Cas.* 544, 71 *Iowa* 164, 32 *N. W. Rep.* 315.

Where defendant contracts with the crown to convey certain land for a railroad company for $1250, *quære*, whether the crown can maintain an action for specific performance when the damages appear to be greater than that amount, and defendant refuses to carry out his agreement. *Queen* v. *McKenzie*, 2 *Can. Exch.* 198.

26. Delay — Laches.—The owner of land entered into an agreement with a company, to convey a strip over the same for a main and side track, in consideration of the location of a station on the premises. During the same year the company entered into possession, with the consent of the owner, and fully performed its part of the contract, and continued such occupancy, by itself and successors, without objection, for about thirteen years, when its successor filed a bill for the specific performance of the contract. *Held*, that the doctrine of *laches* had no application, and presented no defense. *Chicago & E. I. R. Co.* v. *Hay*, 119 *Ill.* 493, 10 *N. E. Rep.* 29. —FOLLOWED IN Chicago & E. I. R. Co. *v.* Hay, 119 Ill. 507.

Specific performance of an agreement to convey land to a railroad corporation will not be decreed on a bill, filed by it more than three years after the other party has refused to perform, and after it has located its road over other land including but a small portion of this, and after this land has greatly increased in value, without any steps taken by the corporation meantime, to enforce the agreement. *Boston & M. R. Co.* v. *Bartlett*, 10 *Gray* (*Mass.*) 384.—DISTINGUISHING Western R. Corp. *v.* Babcock, 6 Metc. 346.

Where a party agrees under seal to permit a railroad corporation to construct a road over his land, and to convey the land for a certain sum, after the road is definitely located, with a condition in the deed of conveyance that it shall be void when the road shall cease or be discontinued, specific performance of such agreement may be decreed, after the road is constructed, although the corporation did not expressly bind itself to take or to pay for the land. And where the corporation takes the land, constructs a road over it, and is, for three or four years, in full, actual possession, and then files a bill for specific performance, the bill will not be dismissed on the ground of unreasonable delay in filing it. *Western R. Corp.* v. *Babcock*, 6 *Metc.* (*Mass.*) 346.

27. Mutual mistake. — Mutual mistake as to the quality of land, from which one party has agreed to dig gravel for the benefit of the other, is no ground for dismissing a bill in equity by the latter, for the specific performance of a subsequent written agreement by which other land was substituted by the parties, after the discovery of the mistake, and the former agreed to pay for the first land. *Old Colony R. Corp.* v. *Evans*, 6 *Gray* (*Mass.*) 25.

28. Relief granted — Decree. — Although the vendor of land for a railroad

depot is not shown to have been entitled to a railroad pass for himself and family, yet if the successor of the company with whom the contract is made, by its bill, offers such a pass, a decree for specific performance predicated on such offer, and making provisions for its enforcement in the future, is proper. *Hall* v. *Peoria & E. R. Co.*, 143 *Ill.* 163, 32 *N. E. Rep.* 598.

Though the parties have stipulated for the conveyance of a right of way by a deed in fee simple, yet where it appears that a right of way only is desired, that is all that the court will decree shall be conveyed. *Ottumwa, C. F. & St. P. R. Co.* v. *McWilliams*, 29 *Am. & Eng. R. Cas.* 544, 71 *Iowa* 164, 32 *N. W. Rep.* 315.

Where a contract for the purchase of land, by a company, provides that the purchase money is to be "paid in eight per cent. preferred stock" of the company; and the court decrees that the company issue and deliver in payment of the purchase money, its stock guaranteed to pay eight per cent. thereon, it is error. *Dickinson* v. *Chesapeake & O. R. Co.*, 7 *W. Va.* 390.

29. Damages.—A court of equity will not give damages for failure of a railroad to ship plaintiff's freight in accordance with a contract to such effect, where specific performance of the contract is impracticable. *Atlanta & W. P. R. Co.* v. *Speer*, 32 *Ga.* 550.

On a breach of an agreement to give land for stock, if a specific performance cannot be decreed, compensation in damages will be awarded—not measured, necessarily, by the nominal value of the stock, but by reference to the land which ought to have been conveyed, and such damages as may have resulted from delay in the performance. *Dayton & C. R. Co.* v. *Hatch*, 1 *Disney* (*Ohio*) 84.

SPECULATIVE DAMAGES.

Generally, see DAMAGES, **43-45.**
In actions for injuries to children, see CHILDREN, INJURIES TO, **186.**
— condemnation proceedings, see EMINENT DOMAIN, **671.**
Under English compulsory purchase acts, see EMINENT DOMAIN, **1198.**

SPEED.

Admissibility of evidence as to rate of, see DEATH BY WRONGFUL ACT, **227.**
Allegation of unlawful rate, see ANIMALS, INJURIES TO, **345.**
Assumption of risk from running at high rate of, see EMPLOYÉS, INJURIES TO, **200.**
At crossings, instructions as to excessive, see CROSSINGS, INJURIES, ETC., AT, **356.**
— farm crossings, see FARM CROSSINGS, **12.**
Burden of proof to show undue, see ANIMALS, INJURIES TO, **502.**
City ordinances regulating rate of, see STREETS AND HIGHWAYS, **317-331.**
Competency of evidence as to, see EVIDENCE, **31.**
Construction of charter as to rate of, see STREET RAILWAYS, **71.**
Contributory negligence in crossing track where train is running at unlawful, see CROSSINGS, INJURIES, ETC., AT, **320.**
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I. ALABAMA.

1. Validity and construction of statutes.—Ala. Act of Feb. 14, 1856, "for the further security and protection of the state in railroad loans," applies to the extension of the loan to the Mobile & Ohio railroad company under the previous act of Jan. 12, 1856. The provision of said act which requires a railroad company, applying for a loan or extension of a debt, to consent to a forfeiture of its charter in the event of its failure to make payment according to the terms of its loan is independent of the other provisions, which require its consent to a declaration of a forfeiture of its charter by the legislature, and that the forfeiture so declared shall be complete and effectual for all purposes whatever without any judicial proceedings; is not obnoxious to the constitutional objections that it requires the company to consent to the exercise of judicial power by the legislature, and impairs the obligation of contracts; and must be complied with by any railroad company applying for a loan or extension of a debt, however difficult such compliance may be. *Mobile & O. R. Co.* v. *State*, 29 *Ala.* 573.

Alabama Act of Feb. 17, 1854, to grant aid to plaintiff company, having been accepted and acted on by the company, became binding, and it was not competent for the legislature, by the subsequent act of Feb. 24, 1860, to impose additional limitations on the loan authorized by the former act; nor can the latter act operate as a revocation of the authority conferred on the governor by the former. Therefore, the company was entitled to receive from the public treasurer the sums loaned by the former act. *Tennessee & C. R. Co.* v. *Moore*, 36 *Ala.* 371.

Ala. Internal Improvement Law of 1869–70, while providing that the state shall have a first and permanent lien for its protection, when it has indorsed bonds under that act, does not forbid railroad corporations from creating other liens of the state; especially a lien to secure the bonds indorsed. *Kelly* v. *Alabama & C. R. Co.*, 58 *Ala.* 489, 21 *Am. Ry. Rep.* 138.

Ala. Act approved February 23, 1876, authorizing the retirement of bonds of the Alabama & Chattanooga R. Co., which had been indorsed by the governor in the name of the state, and the substitution of new bonds in their stead, embraces and applies to all the indorsed bonds bearing date in 1869, and makes no distinction between those regularly issued and those reported by the "state debt commissioners" as "overissue." *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

2. Application for loan.—When it appears that any of the railroad companies to which loans and appropriations of the "three per cent. fund" are granted by the second section of the act of Feb. 18, 1860, applied for the same within six months after the passage of said act, and in the manner prescribed therein, and that such loan and appropriation was postponed by the governor, a subsequent application may be made in renewal and continuation of the first application, which was so postponed. Such postponement does not forfeit the right to the loan and appropriation granted under the act. *Ex parte Selma & G. R. Co.*, 46 *Ala.* 423.

And an application so made in renewal and continuation of such first application, made within the six months after the passage of said act, and postponed, does not come too late, if made to the governor, elected and inducted into office under the present constitution. *Ex parte Selma & G. R. Co.*, 46 *Ala.* 423.

3. Indorsement of bonds by state—Performance of condition by company.—Bonds of a railroad were indorsed by a state with the requirement that the money arising from their sale should be used exclusively for building the road. *Held*, that the obligation of the company was satisfied when the road was completed at a cost equal to or greater than the amount of the bonds, by whatever fund done. *Alabama* v. *Burr*, 115 *U. S.* 413, 6 *Sup. Ct. Rep.* 81.

4. Effect of invalid indorsement on company's liability on the bonds—Negotiability of bonds.—Where the legislature passes a law authorizing the state to indorse the bonds of a railroad company, the fact that the indorsement is procured in fraud of the internal improvement law, and the indorsement, therefore, is void, will not release the company from liability on the bonds which it has secured by a deed of trust on its property. *Kelly* v. *Alabama & C. R. Co.*, 58 *Ala.* 489, 21 *Am. Ry. Rep.* 138.

Railroad bonds indorsed by the state pay-

able to A. B. or bearer have all the incidents of commercial paper. *Reid* v. *Bank of Mobile*, 14 *Am. & Eng. R. Cas.*, 554, 70 *Ala.* 199.—DISTINGUISHING Blackman *v.* Lehman, 63 Ala. 547.

5. Liability of stockholders and managers for fraud or misappropriation of funds.—Where a state has indorsed the bonds of a railroad, and afterwards sues the stockholders and managers of the road for fraud in procuring indorsements, and for a misappropriation of funds, as the liability of defendants is purely statutory, there can be no recovery unless the declaration states facts that bring them within the penalties of the statutes authorizing the bonds and indorsements. *Alabama* v. *Burr*, 115 *U. S.* 413, 6 *Sup. Ct. Rep.* 81.

A state indorsed bonds of a railroad under a law which provided, among other things, that individual stockholders should be liable to pay such bonds as were indorsed through the fraud of the company. *Held*, that the stockholders were liable only in a suit to collect the amount of the bonds, and not liable for losses falling on the state by reason of the indorsement. *Alabama* v. *Burr*, 115 *U. S.* 413, 6 *Sup. Ct. Rep.* 81.

Where a state lost large sums by reason of having indorsed certain railroad bonds, and, under the statute, sues stockholders for fraud in procuring its indorsement, and for a misappropriation of funds, it is not enough to show that the loss was by reason of the indorsement. It must show that the loss was by reason of the fraud. *Alabama* v. *Burr*, 115 *U. S.* 413, 6 *Sup. Ct. Rep.* 81.

6. Liability of state in cases of fraud, mistake, or overissue.—Under the provisions of the act approved Nov. 17, 1868, relating to the Wills Valley R. Co. and the Northeast and Southwest R. Co., it was made the duty of the governor to indorse, in the name of the state, the bonds of the company owning the franchises of the corporation last named, whenever it should appear to him, "by satisfactory proof," that particular sections of the road had been finished, completed, and equipped; and he was required by the act approved Feb. 19, 1867, to make such indorsements on bonds, on the affidavits of the president and chief engineer, and a resolution of the board of directors, showing and promising compliance with the conditions of the act. Under these statutory provisions, if satisfactory proof was made to the governor of the completion and equipment of a specified number of miles of the road, and the affidavits and resolution required by the statute were made and presented to him, it was his duty, not having reason to doubt the truth of the facts as stated and certified, to indorse the bonds of the company to the amount thereby shown to be proper; and such indorsements would be a valid exercise of his statutory power, and would be binding on the state, although it might be made to appear, in a subsequent controversy between individual bondholders, that the affidavits were false, and that he had in fact indorsed more bonds than the company was entitled to receive. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

The statute itself contains provisions intended to protect the state against indorsements obtained by fraud or mistake, or bonds sold by the company at less than ninety cents on the dollar; and exact conformity between the amount of bonds indorsed and the actual length of the road, at the rate of $16,000 per mile, is not a "term, condition, or requirement of the statute," on which depended the power and duty of the governor to make the indorsements. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

The object and purpose of the indorsement of the bonds by the state, under the statutes above mentioned, was to improve their credit and facilitate their currency. On their face, they are negotiable instruments by the general commercial law, which must be presumed to be of force in Boston, where they are made payable, and are capable of transfer by delivery; and the state is liable as the indorser of such paper. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

The bonds being negotiable, regular on their face, and reciting in the indorsement a compliance by the company with the conditions of the statute, an innocent holder for value is not affected by any fraud or mistake in their overissue; and the dishonor of the unpaid interest coupons would not charge him with notice of any defect in them. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

The statutes do not require that the bonds shall be numbered, nor that they shall be indorsed in commercial order, nor

that they shall be sold or negotiated by the company in any particular order; and the numbers on the several bonds do not indicate anything as to the time when they were issued or negotiated. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

The act of the governor in 1871, in refusing to pay interest on the bonds numbered above 4720, if held to be the act of the state, was strictly *ex parte*, and cannot affect the rights of the holders of those bonds. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

7. Liability of state where indorsed bonds are misappropriated.—By the act of Feb. 1, 1870, providing for loaning the credit of the state in aid of railroads, it was enacted that after the completion of the first twenty miles of a road, the state should indorse its bonds, the proceeds of which should be applied to the further construction of the road. *Held*, that the state was in the nature of an accommodation indorser, and was not liable where the money was used for constructing the first twenty miles of the road, except as to a *bona fide* holder of the bonds for value. *Gilman* v. *New Orleans & S. R. Co.*, 72 *Ala.* 566.—FOLLOWED IN Morton *v.* New Orleans & S. R. Co., 79 Ala. 590.—*Morton* v. *New Orleans & S. R. Co.*, 79 *Ala.* 590.—FOLLOWING Gilman *v.* New Orleans & S. R. Co., 72 Ala. 566.

The company having transferred its bonds to the contractors engaged in the construction of the first twenty miles of the road, and after procuring the state's indorsement on the completion of the said twenty miles of road, again delivered to him in payment of the company's debt to him; such use of them being unauthorized, and fraudulent against the state, no liability rested on it by virtue of its indorsements, while the bonds remained in the hands of said directors, or were in the hands of any other person chargeable with knowledge of the misapplication. *Gilman* v. *New Orleans & S. R. Co.*, 72 *Ala.* 566.

But, such indorsed bonds being negotiable instruments, and governed by the same rules as all other commercial paper, the state would become liable, as an accommodation indorser, to any *bona fide* holder who acquired them for value, in the usual course of business, without knowledge or notice, actual or constructive, of the misapplication by the company or its immediate transferee. *Gilman* v. *New Orleans & S. R. Co.*, 72 *Ala.* 566. *Morton* v. *New Orleans & S. R. Co.*, 79 *Ala.* 590.

When a subsequent holder of such bonds seeks to enforce the state's liability, as indorser, the original misappropriation of them being shown, the law casts on him the burden of proving that he acquired them in good faith, for value, and in the usual course of business. *Gilman* v. *New Orleans & S. R. Co.*, 72 *Ala.* 566.

One who has exchanged such bonds for bonds in another company is a holder for value, without regard to the market value of the bonds of either company. *Gilman* v. *New Orleans & S. R. Co.*, 72 *Ala.* 566.

In such case the presumption is of a want of notice, since it is not probable, though possible, that notice of the original fraud or illegality would be communicated to a subsequent holder, thereby defeating the transfer; and the burden of proving notice resting on the party who assails the title of the holder, it is not enough to show only that he acquired the bonds under circumstances which would have excited, in the mind of a prudent man, suspicion as to the title of the party from whom he purchased. *Gilman* v. *New Orleans & S. R. Co.*, 72 *Ala.* 566.

Of the holders of the 320 indorsed bonds issued by the railroad company, only those who are purchasers for value without notice are entitled to be subrogated to the statutory lien and priority of the state; but, as against the railroad company, which has waived the defense of a partial failure of consideration, and as against the complainant in the original bill, a subsequent judgment creditor of the railroad company, all are entitled to share in the security afforded by the deed of trust, and to have it enforced for their benefit. *Morton* v. *New Orleans & S. R. Co.*, 79 *Ala.* 590.

Negotiable bonds not due, with attached coupons past due and unpaid, do not thereby appear dishonored on their face; but the presence of such unpaid coupons is a material circumstance bearing on the question whether the purchaser acquired them in good faith and without notice. *Morton* v. *New Orleans & S. R. Co.*, 79 *Ala.* 590.

The bonds in this case referring on their face to the deed of trust executed by the railroad company for their security, which deed expressly provided that the entire debt, principal and interest, should become

due and payable within ninety days after refusal to pay the semi-annual interest due by the coupons, on demand made at the agency of the corporation in the city of New York, a purchaser having knowledge of such demand and refusal, at the time he acquired the bonds, cannot claim to be an innocent purchaser without notice; but when he has proved the payment of value, the *onus* of proving knowledge or notice of such extrinsic fact is on the party who seeks to impeach his title. *Morton* v. *New Orleans & S. R. Co.*, 79 *Ala.* 590.

The statute of Feb. 21, 1870, under which these bonds were indorsed and provision made for their payment, and the repealing statute of March 17, 1875, being public statutes, every purchaser and holder of the bonds is chargeable with knowledge of their provisions; and although the repealing statute may not amount to any open repudiation by the state of its liability as indorser (a point not decided), "it is sufficient to put a subsequent purchaser on inquiry, and to charge him with notice of the fact that there was something wrong about the bonds, especially when taken in connection with the other fact that, at the time of such repeal, the coupons for several years past due and unpaid were attached to them." *Morton* v. *New Orleans & S. R. Co.*, 79 *Ala.* 590.

8. Extent of the statutory lien of the state.—Under the act of Feb. 21, 1870, authorizing the indorsement by the governor, in the name of the state, of the bonds of railroad companies, although no indorsement could be made until twenty continuous miles of road had been finished, completed, and equipped, and subsequent indorsements were authorized only as sections of five continuous miles were finished, completed, and equipped, yet the statutory lien given to the state, on account of such indorsements, was not limited or restricted to the portions of the road then finished, nor to the property then owned by the railroad company, but extended to the entire road, its franchises, and all property then belonging to it, or afterwards acquired; and this lien, by the express words of the statute, was declared prior and superior to all liens or encumbrances, created by the railroad company, and all other claims existing or to exist against it. *Colt* v. *Barnes*, 7 *Am. & Eng. R. Cas.* 129, 64 *Ala.* 108.

Prior to the execution of a conveyance of a railroad, the purchasing company, being engaged in the construction of its road and contemplating obtaining the state's indorsement of its bonds, under the statute providing for furnishing the aid and credit of the state to railroads, had, by deed of trust, conveyed to trustees its property then owned and thereafter to be acquired as indemnity to the state against liability to be incurred by the indorsement; and after the purchase the purchasing company, having finished twenty miles of its original line of road, and also five miles of the line of the road purchased by and conveyed to it, obtained the state's indorsement of its bonds, under the statute, for the number of miles so finished by it. *Held*, that the lien of the state under the statute, and the lien created by the deed of trust, were not paramount, but subordinate to the interest and claim of the selling company, reserved by its deed, on the property covered thereby. *Tennessee & C. R. Co.* v. *East Ala. R. Co.*, 73 *Ala.* 426.

Nor were the rights of the selling company in the property covered by the said deed impaired or otherwise affected by a decree, obtained on bill in equity filed by the trustees, to which the selling company was not a party, foreclosing the deed of trust and declaring that the bonds indorsed by the state constituted a prior lien on the railroad, franchises, and property of the purchasing company, and that the holders of the bonds were subrogated to the lien and right of the state, and should first be paid out of the proceeds of the sale, or by a sale made under the decree, and a conveyance executed to the purchaser. *Tennessee & C. R. Co.* v. *East Ala. R. Co.*, 73 *Ala.* 426.

9. Paramount lien of state enforceable by state only.—The remedies given by Ala. Act of 1869, p. 70, giving the state a paramount lien on railroads when it has indorsed bonds, are enforceable by the state alone. They cannot be set up by the purchasers of the railroad, in a contest between them and the holders of indorsed bonds, secured also by the corporation's mortgage, to defeat the latter in foreclosing such mortgage, whatever might be their effect if the state were a party, and the holders of indorsed bonds, secured also by the corporation's mortgage, should seek to set up rights under the mortgage to embarrass the state in pursuing its remedies. *Kelly* v. *Alabama & C. R. Co.*, 58 *Ala.* 489, 21 *Am. Ry. Rep.* 138.

10. Rights of bondholders—Constructive notice.—Ala. Act of Feb. 19, 1867, authorized the governor to indorse, in behalf of the state, the first mortgage bonds of a railroad company, bearing interest at eight per cent. The governor did so, and referred to the act in his indorsement as the authority therefor. *Held:* (1) that he was authorized to indorse bonds bearing interest at eight per cent. in gold; (2) that *bona fide* holders for value, of bonds thus indorsed, were not chargeable with constructive notice of the fact that the bonds were not first mortgage bonds. *Young* v. *Montgomery & E. R. Co.*, 2 *Woods* (*U. S.*) 606.

A subsequent act (Ala. Acts 1866-67, p. 680) gave the governor authority to indorse bonds, notwithstanding there was a prior lien on the railroad; but it was claimed that this law was not legally passed, and was therefore null and void. *Held*, that if valid, it cured any defect in the authority of the governor to indorse the bonds. If not valid, it was not constructive notice to anybody of anything. *Young* v. *Montgomery & E. R. Co.*, 2 *Woods* (*U. S.*) 606.

11. Subrogation of bondholders to statutory lien of state.—This statutory lien is declared to be "for the payment by said company of said bonds, with the interest thereon, as the same becomes due"; and a railroad company having executed a mortgage, or deed of trust, for the benefit of all its bondholders, and afterwards made default and become bankrupt, the holders of the indorsed bonds are entitled to be subrogated to the statutory lien of the state, on bill filed by the trustees to foreclose the deed of trust, and are entitled to be first paid out of the proceeds of sale of the property. *Colt* v. *Barnes*, 7 *Am. & Eng. R. Cas.* 129, 64 *Ala.* 108.

Under a bill to foreclose a mortgage or deed of trust, executed by a railroad company for the benefit of all its bondholders, filed by the trustees, against the purchasers of the equity of redemption at a sale in bankruptcy, all the bondholders having come in and proved their claims before the register under a reference, and his report disclosing the fact that some of the bonds had been indorsed by the state under the provisions of the act of February 21, 1870, the chancellor must of necessity determine the order in which the claims shall be paid; and since no motion or petition is necessary for that purpose, it is immaterial that the holders of the indorsed bonds asserted their right of priority by petition, and that the chancellor acted on it without notice. *Colt* v. *Barnes*, 7 *Am. & Eng. R. Cas.* 129, 64 *Ala.* 108.

A creditor is entitled to the benefit of all securities or pledges which the surety may receive from the principal debtor, either for the payment of the common debt or indemnity of the surety against loss by reason of his liability. Such securities are regarded as a trust created for the protection of the debt, and a court of equity will compel the execution of the trust. *Forrest* v. *Luddington*, 12 *Am. & Eng. R. Cas.* 330, 68 *Ala.* 1.

This principle applies to the statutory lien declared by the statute of Feb. 19, 1867, as amended Sept. 22, 1868, which authorizes the indorsement by the state of railroad bonds to the extent of $16,000 per mile. This lien, by the terms of the statute creating it, is a security for the payment of the indorsed bonds, and operates as a specific appropriation of the property and franchises of the railroad corporation to their payment, whenever default shall be made by the corporation in the payment of the principal or interest. *Forrest* v. *Luddington*, 12 *Am. & Eng. R. Cas.* 330, 68 *Ala.* 1.

Persons holding a mortgage on the property of a railroad, executed after the indorsement of the railroad company's bonds by the state, are junior encumbrancers, and although they may be proper, they are not indispensable parties to a bill by the holders of the state-indorsed bonds. *Forrest* v. *Luddington*, 12 *Am. & Eng. R. Cas.* 330, 68 *Ala.* 1.

The lien created and declared by the statute may be enforced by the bondholders whenever default is made in the payment of the interest on such indorsed bonds, although the governor is directed by the statute to file a bill for foreclosure on default of the payment of the bonds. *Forrest* v. *Luddington*, 12 *Am. & Eng. R. Cas.* 330, 68 *Ala.* 1.

12. Such subrogation not prevented by inability to sue the state.—A state indorsed the bonds of a railroad company, and took a statutory indemnity mortgage on the railroad. *Held*, that the fact that the state cannot be sued was no reason why the holders of bonds should not be subrogated to the rights of the state, and have the benefit of the security. *Young*

v. *Monigomery & E. R. Co.*, 2 *Woods* (*U. S.*) 606.

The powers and summary remedies conferred on the state by the statute for the enforcement of this lien, can only be exercised by the state, but the state, having failed to exercise them, and disclaimed its liability for the indorsed bonds, they afford no obstacle to a resort to a court of equity by the holders of the bonds for the enforcement of the statutory lien for their benefit; and the fact that the state cannot be made a party to the suit, no relief being asked against it, does not affect the jurisdiction of the court, or the equity of the bill. *Forrest* v. *Luddington*, 12 *Am. & Eng. R. Cas.* 330, 68 *Ala.* 1.

The holders of such indorsed bonds who have acquired them in good faith, for valuable consideration and in the usual course of business, are entitled to be subrogated to the statutory lien and priority of the state, on the company becoming insolvent, and making default in the payment of the bonds according to their terms; and this subrogation may be declared in a suit between the holders of such bonds, some of whom are not entitled to share in the protection given to the others, and although the state is not a party and cannot be sued. *Gilman* v. *New Orleans & S. R. Co.*, 72 *Ala.* 566.—REVIEWING Branch *v.* Macon & B. R. Co., 2 Woods (U. S.) 385.

II. ARKANSAS; CALIFORNIA; DELAWARE.

13. Arkansas. — Bonds issued in the name of the state in aid of a railroad are void, even in the hands of innocent holders, where the act of the legislature authorizes them only on a vote of the people, and the election is held before the act takes effect. *State* v. *Little Rock, M. R. & T. R. Co.*, 31 *Ark.* 701.—QUOTING Marsh *v.* Fulton County, 10 Wall. (U. S.) 676.

When a loan is made by the state and a mortgage taken to secure it in pursuance of the provisions of a public statute, all persons are chargeable with notice of it, and the state will not be prejudiced by the neglect of her agents to have the mortgage recorded. *Memphis & L. R. R. Co.* v. *State*, 12 *Am. & Eng. R. Cas.* 322, 37 *Ark.* 632.

Bonds issued by the state under the Ark. Acts of July 21, 1868, and April 10, 1869, to the stock of railroads, are in violation of the state constitution, and the state has no lien on the roads, or their income which will be good in the hands of a purchaser of the bonds, as against purchasers of the road. *Tompkins* v. *Little Rock & Ft. S. R. Co.*, 125 *U. S.* 109, 8 *Sup. Ct. Rep.* 762.

The purchasers of such road at a foreclosure sale took it freed of any lien or encumbrance in favor of the state by reason of such aid, and neither the state, nor the holders of its bonds, can sequester the income of the road. *Tompkins* v. *Little Rock & Ft. S. R. Co.*, 125 *U. S.* 109, 8 *Sup. Ct. Rep.* 762.

Where a state makes a loan of its credit to a railroad company by an issue of its bonds, conditions in the law authorizing such bonds, providing for a tax upon the company, equal to the annual interest, and an additional special tax, until the bonds shall be fully paid off, and providing that in case of a failure of the company to pay such tax the state treasurer might sequester the road, appoint a receiver, and apply the net income to the payment of any amount in default, taken together does not create a lien on the railroad property, and neither the state nor the bondholders are entitled to sequestration of the income or profits of the road in the hands of purchasers at a foreclosure sale. *McKittrick* v. *Arkansas C. R. Co.*, 152 *U. S.* 473, 14 *Sup. Ct. Rep.* 661.—FOLLOWING Tompkins *v.* Little Rock & Ft. S. R. Co., 125 U. S. 109.

Where a state loans its credit to a railroad company by issuing its bonds, indorsing the bonds by the company, as a guarantee of payment by the state, does not create a lien on the railroad property so as to prevent a mortgage of the road to secure bonds issued by the company. *McKittrick* v. *Arkansas C. R. Co.*, 152 *U. S.* 473, 14 *Sup. Ct. Rep.* 661.

A state loaned its credit to a railroad company by issuing its bonds, retaining the right of sequestration, if the company failed to pay interest on the bonds, and a further special tax to pay principal, but retained no further lien on the road. The company mortgaged its road, which was foreclosed, and certain bondholders brought suit against the company and the purchasers, seeking to charge the road in the hands of the purchasers. *Held*, that allegations that the president "brought about" the foreclosure, and that the purchasers pretended to have purchased as trustees for him, are not sufficient to impeach the validity of the sale; neither will a charge that the president of

the company at the time of the sale was interested in the purchase as a holder of receiver's certificates, which were a first lien on the property, establish fraud, where it does not appear that anything would have been left for the mortgage creditors, if there had been no such certificates. *McKittrick* v. *Arkansas C. R. Co.*, 152 *U. S.* 473, 14 *Sup. Ct. Rep.* 661.

Under the acts of 1868 and 1869 creating a statutory mortgage on the road and its income, revenues, and earnings—*held*, that the lien took effect from the date of the award of the loan by the railroad commissioners; that the governor's duty in issuing the bonds was ministerial; that all persons were bound to take notice of the existence of the lien and of when it attached; that the lien was primarily a security for the holders of the bonds; that as between the state and the company, the company was the principal debtor, the position of the state being like that of an accommodation indorser; and that whether the bonds were or were not valid obligations as against the state, the company, having indorsed and negotiated them, was bound upon them to *bona fide* holders, who could avail themselves of the liens. *Tompkins* v. *Little Rock & Ft. S. R. Co.*, 15 *Fed. Rep.* 6.

The state issued its bonds in aid of a railroad. The company transferred them without indorsement. There was nothing in the recitals of the bonds from which a lien upon the road could be implied, nor in the recitals of the act of July 21, 1868, under which they were issued. *Held*, that the holders could not claim a lien. (Caldwell, J., dissenting.) *Tompkins* v. *Little Rock & Ft. S. R. Co.*, 21 *Fed. Rep.* 370, 5 *McCrary* 597, 18 *Fed. Rep.* 344; *reversed in* 120 *U. S.* 160, 7 *Sup. Ct. Rep.* 469.—FOLLOWING Florida C. R. Co. *v.* Schutte, 103 U. S. 118. QUOTING United States *v.* Union Pac. R. Co., 91 U. S. 79. REVIEWING Chamberlain *v.* St. Paul & S. C. R. Co., 92 U. S. 299.

14. California.—The state Const. art. 11, § 10, prohibiting the state from giving or loaning its credit to or in aid of a corporation, does not prohibit it from appropriating its funds, in time of war, to aid a corporation in the construction of a railroad to be used by the state for military purposes. *People ex rel.* v. *Pacheco*, 27 *Cal.* 175.

The imposition of a special tax, and an appropriation of the proceeds of the same to be paid, when collected, to a railroad company, or its creditors, to aid in building the railroad, in consideration of valuable services to be rendered thereafter to the state by the corporation, is not a gift or loan of the credit of the state to or in aid of a corporation, within the meaning of the above section. *People ex rel.* v. *Pacheco*, 27 *Cal.* 175.

The bonds issued by the Central Pac. R. Co., under the act of April 4, 1864, are valid, and the state is liable upon the interest coupons issued in accordance with the provisions of the act. *Bank of California* v. *Dunn*, 66 *Cal.* 38, 4 *Pac. Rep.* 916.

The interest paid by the state on bonds issued under act of April 4, 1864, to aid defendant company, is not a loan by the state to the company; nor does the act, or the agreement executed by the company in pursuance thereof, give the company any alternative right to perform the conditions of the agreement, or, at its option, to pay the amount paid by the state as interest on the bonds. The amount mentioned in the act to be paid by the company upon its failure to perform any of the conditions imposed upon it by the act is to be treated as a penalty, and not as liquidated damages. *People* v. *Central Pac. R. Co.*, 76 *Cal.* 29, 18 *Pac. Rep.* 90.

15. Delaware. — Under the act of March 14, 1865, authorizing a loan of state bonds to a railroad on its mortgage, without interest for two years from date, and $48,000 of the bonds to be retained and sold by the state treasurer to pay the interest for the two years, which, however, were not sold, he having paid the same out of the current revenue of the state—*held*, that the state was not entitled to interest for the two years. *Junction & B. R. Co.* v. *Davis*, 5 *Houst.* (*Del.*) 90.

III. FLORIDA; GEORGIA; KENTUCKY.

16. Florida. — (1) *State decisions.* — Where a state constitution prescribes the subjects for which the legislature may authorize the issue of state bonds, the power of the legislature is limited to the subjects specified; and the limitation need not be in express terms. *Holland* v. *State*, 15 *Fla.* 455.

Under the act authorizing an exchange of state bonds with certain railroad companies, the state was to occupy two relations to those who bought its bonds from the company. The first was that of a debtor to the

holder, and the second was that of a trustee holding the bond of the company and the lien created by the act to secure payment to the party who advanced money to the company. The legislature had no authority to create the first relation. It did have power to enact the second. *Holland* v. *State*, 15 *Fla.* 455.—FOLLOWED IN State *v.* Jacksonville, P. & M. R. Co., 16 Fla. 708.—*State* v. *Jacksonville, P. & M. R. Co.*, 16 *Fla.* 708.—APPLIED IN North Carolina R. Co. *v.* Drew, 3 Woods (U. S.) 691.

The state is prohibited by the constitution from becoming "a joint owner or stockholder in any company, association, or corporation." The state may grant such franchises to others. She cannot herself purchase, own, or operate a railway. *Holland* v. *State*, 15 *Fla.* 455.

Under the legislation of the state, the Florida Central R. Co. had the power to execute a bond which was to be a mortgage, by virtue of the statute, and without the execution of an additional mortgage to secure it. To such bond, when executed, attached the lien, power, and duty of the state as trustee under the statute. *State* v. *Florida C. R. Co.*, 15 *Fla.* 690.—APPLIED IN North Carolina R. Co. *v.* Drew, 3 Woods (U. S.) 691. FOLLOWED IN State *v.* Jacksonville, P. & M. R. Co., 16 Fla. 708.

A corporation having power to issue its bonds to another corporation for the purpose of enabling it to exchange them for bonds of the state, may, by subsequent act of its stockholders, ratify and affirm a former irregular issue and exchange of its bonds, done by officers or stockholders of the company. *State* v. *Florida C. R. Co.*, 15 *Fla.* 690.

Bonds issued by railroad companies under the act of Jan. 10, 1855, were, under the statute, a first lien or mortgage on the roads, equipments, and franchises of the companies issuing them. A sale by the trustees named in the act having been had and a balance of purchase money being due, an equitable lien for such balance resulted primarily to the trustees as the vendors in the sale. A balance of purchase money being due upon the sale of each road, the right of the vendors is to a sale of each road separately. A sale of both estates for the payment of the aggregate amount of the liens cannot be had. *State* v. *Jacksonville, P. & M. R. Co.*, 16 *Fla.* 708.

And upon a sale made under the above statute the lien of the trustees of the Internal Improvement Fund is prior to the lien of the state. *State* v. *Jacksonville, P. & M. R. Co.*, 16 *Fla.* 708.

(2) *Federal decisions.*—The state of Florida held $4,000,000 bonds of a railroad which were made a statutory lien on the road. The "Internal Improvement Fund of the state" which held in trust a large amount of land to aid railroads and other improvements, had guaranteed a large issue of the company's bonds. *Held*, that the state had such interest as to allow it to file a bill in the United States supreme court against citizens of another state to enforce its lien. *Florida* v. *Anderson*, 91 *U. S.* 667.—QUOTED IN Union Trust Co. *v.* Southern Inland N. & I. Co., 130 U. S. 565.

Where a state files an original bill in the United States supreme court to determine its rights touching a railroad whose bonds it has indorsed, and a receiver is appointed, when the court has adjudicated the rights of the state, and determined to turn the road over to the state, it will also turn over any funds in the receiver's hands. *Florida* v. *Anderson*, 91 *U. S.* 667.

A railroad in Florida issued bonds the interest of which was guaranteed by the state through its "Internal Improvement Fund," and the bonds were made by statute a first lien on the road. The property was afterwards sold under this lien, but the purchasers failed to pay all the purchase money. *Held*, that a vendor's lien attached for the balance of the purchase money, in which the lien of bonds remaining unpaid was merged; that the trustees of the improvement fund could enforce said vendor's lien, together with that of the state, and apply the money to the discharge of such bonds when due, but an injunction would lie to restrain the bondholders from selling, taking possession of, or interfering with the property. *Florida* v. *Anderson*, 91 *U. S.* 667.

A Florida railroad was sold and the proceeds applied to payment of the bonds of the road. *Held*, that the purchaser thereafter was only required to pay to the receiver of the "Internal Improvement Fund" of the state one half of one per cent. of the amount of such bonds as were still outstanding, and not the whole amount issued, under the Florida Act of Jan. 6, 1855, providing a system of internal improvements for the state. *Doggett* v. *Florida R. Co.*, 99 *U. S.* 72.

A state, by the terms of a statute, having a lien on the property of a railroad as trustee for the holders of the bonds, it does not follow, because the provisions of the statute in respect to the execution and exchange of the state bonds is unconstitutional, that the statutory lien is void also. The unconstitutional part of the statute may be stricken out, and the statutory mortgage left in full force. *Florida C. R. Co.* v. *Schutte*, 3 *Am. & Eng. R. Cas.* 1, 103 *U. S.* 118; *affirming* 3 *Woods* (*U. S.*) 692.

The trustees of the Internal Improvement Fund of the state of Florida having sold certain railroads for the purpose of taking up a state indebtedness with the purchase money, and such purchase money not being thereafter paid, any of the state bonds sought to be canceled which remain in the hands of the purchasers are under the control of the trustees rather than the holders. *Littlefield* v. *Internal Imp. Fund*, 24 *Am. & Eng. R. Cas.* 208, 117 *U. S.* 419, 6 *Sup. Ct. Rep.* 793.

State bonds issued in aid of a railroad that had been running ten years, but no interest ever paid, carry presumptive evidence of their dishonor, of which a purchaser at auction is charged with notice. *Trask* v. *Jacksonville, P. & M. R. Co.*, 124 *U. S.* 515, 8 *Sup. Ct. Rep.* 574.—QUOTED IN Smith *v.* Florida C. & W. R. Co., 43 Fed. Rep. 731.

A state was authorized to exchange its bonds for railroad bonds, and the statute created a mortgage in favor of the state to secure the bonds. After such bonds had been issued and exchanged the supreme court of the state decided that the state bonds were issued in violation of the constitution. *Held*, that the holders of state bonds had a right to enforce the statutory mortgage for their own benefit. *North Carolina R. Co.* v. *Drew*, 3 *Woods* (*U. S.*) 691; *affirmed in* 3 *Am. & Eng. R. Cas.* 1, 103 *U. S.* 118.—APPLYING State *v.* Florida C. R. Co., 15 Fla. 690; State *v.* Jacksonville, P. & M. R. Co., 16 Fla. 708.

And the fact that the proceeds of the state bonds were used for the private advantage of the stockholders of the railroad company, in violation of the statute, is no defense, when the railroad bonds are sued on by *bona fide* holders. *North Carolina R. Co.* v. *Drew*, 3 *Woods* (*U. S.*) 691; *affirmed in* 3 *Am. & Eng. R. Cas.* 1, 103 *U. S.* 118.

17. Georgia.—(1) *State decisions.*—The act of Sept. 21, 1868, providing for loaning the credit of the state to a railroad company, prohibited the sale of the state bonds below a certain price, and provided that upon an attempt to do so, any citizen might appeal to the courts, in his own name, to restrain such illegal use of the bonds. *Held*, that the action should be limited to a simple discovery of an attempt to make a prohibited sale, and should not be extended to an action to investigate the dealings of the railroad company generally, or an attempt to annul construction contracts. *Jones* v. *Macon & B. R. Co.*, 39 *Ga.* 138.

Where an indorsement by the state of the bonds of a railroad has been repudiated by the state, there is nevertheless an equity that bondholders who have relied upon such apparent indorsement should be subrogated to the security given by the company to the state to secure such indorsement. But bondholders, whose bonds do not bear such indorsement will not be so subrogated. *Clews* v. *Brunswick & A. R. Co.*, 54 *Ga.* 315.

In a bill brought by the state to preserve the property of a railroad until it can be ascertained whether the state is liable upon her indorsement of bonds of the road, though a receiver has been appointed, it is not error in the chancellor to dismiss the state, on its own motion, as party plaintiff, after the legislature has declared such indorsement void. *Brunswick & A. R. Co.* v. *State*, 48 *Ga.* 415.

The proceeds of a subscription to stock of a railroad which has been seized by the governor, belong to the state, after the deduction of attorney's fees. *Mullins* v. *North & S. R. Co.*, 54 *Ga.* 580.

The act of 1874, repealing all charter provisions for state aid to railroad companies, and providing that, should any such company claiming such aid as a vested right apply to the governor therefor, any citizen may interpose by bill to restrain such application, is unconstitutional, as impairing the right secured by the constitution of appealing to the courts. The second section of the act is also invalid for containing matter not expressed in its title. *Northeastern R. Co.* v. *Morris*, 59 *Ga.* 364.

(2) *Federal decisions.*—A state indorsed at different times two series of railroad bonds, and took as security a first lien on the road. Afterwards the lien was foreclosed, and the state bought the road, and took up all of the first series of bonds. A

holder of the second series filed a bill to set aside the sale, making the governor, state treasurer, and the railroad company defendants. *Held*, that the suit to all intents and purposes was a suit against the state, and the making the officers defendants was as objectionable as if the state had been sued directly, which cannot be done, and the court had no jurisdiction. *Cunningham* v. *Macon & B. R. Co.*, 14 *Am. & Eng. R. Cas.* 567, 109 *U. S.* 446, 3 *Sup. Ct. Rep.* 292.—DISTINGUISHED IN Hagood *v.* Southern, 117 U. S. 52. FOLLOWED IN Christian *v.* Atlantic & N. C. R. Co., 133 U. S. 233, 10 Sup. Ct. Rep. 260; North Carolina *v.* Temple, 134 U. S. 22.

A state indorsed two issues of railroad bonds upon the condition that the state should have title to all property purchased with the proceeds of the bonds, and a first lien on all other property of the company, and upon a failure to pay interest or principal the governor might take possession and sell the property; but the legislature declared that the second indorsement was not valid. The governor took possession of the property, when a holder of bonds of the second issue brought suit to restrain the governor from selling. *Held*, that the injunction should be refused, on the ground that the relief asked for could not be granted without adjudicating the rights of the state, and it was not a party. *Branch* v. *Macon & B. R. Co.*, 2 *Woods* (*U. S.*) 385.—APPROVING Printup *v.* Cherokee R. Co., 45 Ga. 365.—REVIEWED IN Gilman *v.* New Orleans & S. R. Co., 72 Ala. 566.

18. Kentucky.—The state waived its lien on the Louisville & Frankfort railroad, if any was retained in the act of March 1, 1847, transferring its interest in the road to the L. & F. R. Co., as to subsequent mortgagees, by authorizing the company to issue bonds and secure them by mortgages on the road, by enabling acts passed by the legislature containing no intimation that such liens were to be subject to the prior lien of the state. *Newport & C. Bridge Co.* v. *Douglass*, 12 *Bush* (*Ky.*) 673, 18 *Am. Ry. Rep.* 221.

IV. LOUISIANA.

19. Constitutional questions.—The Louisiana Act of April 20, 1871, authorizing an issue of state bonds in aid of a railroad is in conflict with the amended constitution of 1870, limiting the state debt to twenty-five millions of dollars prior to 1890. *Durkee* v. *Board of Liquidation*, 3 *Am. & Eng. R. Cas.* 135, 103 *U. S.* 646.—FOLLOWING Williams *v.* Louisiana, 103 U. S. 637.

The state could not revive by ratification or otherwise the obligation that had lapsed by the failure of the New Orleans, Mobile & Chattanooga railroad company to comply with the stipulation of the act of 1869, because at the date of the alleged acquiescence the constitutional amendment was in force. Hence said bonds are not valid obligations of the state, and cannot be funded. *State ex rel.* v. *Funding Board*, 28 *La. Ann.* 249.

The above act created a conditional obligation on the part of the state to guarantee the second mortgage bonds of the company; but before the condition happened the constitutional amendment of Nov., 1870, had been adopted, prohibiting an increase of the state indebtedness beyond $25,000,000, and, as this limitation had been reached, the guaranty was prohibited. *State ex rel.* v. *Funding Board*, 28 *La. Ann.* 249.

Notwithstanding the above constitutional limitation, the general assembly passed, April 20, 1871, an act which provides that the governor is authorized to subscribe for 25,000 shares of $1000 each of the capital stock of said corporation on behalf of the state, and to receive the certificate of stock therefor as payment shall be made, and further declares that the subscription and the issue of the bonds are intended to extinguish the obligation of the state to indorse or guarantee the second mortgage bonds of said corporation under the act of Feb. 21, 1870, and as a discharge of either party from all obligations for the issue, indorsement, guarantee, and security of said mortgage notes, as provided for in the fourth section of said act; it is provided that the said corporation shall comply with certain conditions, formalities, and stipulations, and shall obligate itself to commence that part of its railroad from Vermilionville to Shreveport within six months, and to complete the same within the time limited. *State* v. *Clinton*, 28 *La. Ann.* 393.

The obligation of the state to guarantee the second mortgage bonds of the company had lapsed, because it failed to complete the first section of forty miles of the main line by Jan. 18, 1871, and failed to achieve other works and fulfil other obligations according to the act of 1870. Under these circumstances the act of April 20, 1871, and

the issue thereunder by the governor of bonds to the amount of $2,500,000 was the creation of a debt in contravention of the constitutional limitation of 1870. *State* v. *Clinton*, 28 *La. Ann.* 393.

As these bonds bear date subsequent to the adoption of the constitutional amendment, all persons acquiring them are charged with notice of the existence and effect of that amendment. They were charged with notice that in 1871 it was not in the power of the general assembly and the governor to bind the state by the issue of the bonds as a substitute for the obligation to indorse the second mortgage bonds of the above company, because said obligation was conditional, and it could only become binding on the state on the happening of the conditions precedent, and they might never happen. *State* v. *Clinton*, 28 *La. Ann.* 393.

The issue of these bonds as a substitute for a debt that did not exist, and that might never exist, was to all intents and purposes the creation of a debt in 1871, in contravention of the constitutional amendment. *State* v. *Clinton*, 28 *La. Ann.* 393.

The constitutional amendment of 1874, limiting the debt of the state to $15,000,000, only restrains the legislature from increasing the actual or present debt of the state beyond that sum. It does not inhibit any increase of the contingent liability of the state. Until the actual debt of the state has reached the limit of $15,000,000, it is competent for the legislature to provide for the issuing of bonds as a loan to such enterprises as fall within its constitutional power, provided that in the act creating the debt adequate ways and means are provided for the payment of the current interest, and of the principal when it shall become due. (Eagan and De Blanc, JJ., dissenting.) *State ex rel.* v. *Nicholls*, 30 *La. Ann.* 980.

The act of March 11, 1878, authorizing the issuance of state bonds in aid of the New Orleans Pacific railway company, does not contravene the constitutional prohibition of aid to a private purpose. *State ex rel.* v. *Nicholls*, 30 *La. Ann.* 980.

20. Interpreting the statutes.—The funding act of Jan. 24, 1874, embraced only the actual debt of the state. It excluded the contingent liability of the state embodied in the bonds loaned to the Citizens' Bank, and the Consolidated Planters' Association. (Eagan and De Blanc, JJ., dissenting.) *State ex rel.* v. *Nicholls*, 30 *La. Ann.* 980.

Where a law authorizes bonds of the state to be issued and loaned to a corporation, on condition that it shall pledge certain of its own mortgage bonds, payable forty years after their execution, to secure the state, the tender of bonds by the corporation, the payment of all of which is made exigible whenever there shall be a six-months' default in the payment of the interest on any of said bonds, is not such a compliance with the law as will authorize the corporation to demand the issue of the state bonds. The fact that the bonds of the corporation, tendered as a pledge, are dated before the passage of the law authorizing the loan, and that they are made payable, at the holder's option, at another place in addition to that prescribed in the act, is immaterial. *State ex rel.* v. *Nicholls*, 30 *La. Ann.* 1217.

Where a statute, authorizing a loan of the state's credit on the security of a certain mortgage, is silent as to the question of the appraisement of the property covered by the mortgage, in case of its forced sale, it will be assumed that the legislature designed that such a forced sale should only take place after the usual appraisement provided for by law. *State ex rel.* v. *Nicholls*, 30 *La. Ann.* 1217.

21. Right of state to withhold aid once granted.—The act of Feb. 21, 1870, extending the aid of the state to the New Orleans & Texas railroad company, is a contract between the state and the company. In granting state aid to this company to enable it to construct the road through her limits, the legislature was evidently influenced from motives of public policy, and the aid given cannot, therefore, be regarded as a simple donation to a private company. *State ex rel.* v. *Graham*, 23 *La. Ann.* 622.

The above grant being a contract with the company which was made before the amendment to the constitution was adopted prohibiting the increase of the state debt above $25,000,000 and being made in the public interest, the aid cannot now be withheld by the state, notwithstanding its indebtedness has reached the limit imposed by the constitution. *State ex rel.* v. *Graham*, 23 *La. Ann.* 622.

22. When the state is estopped.—The state having by statute authorized a railroad corporation, as donee and grantee of lands from the general government, and franchises which she bestowed upon it, to execute a mortgage thereon is estopped

from impeaching the same. Rights acquired through the enforcement, judicially, of such mortgage cannot be destroyed by subsequent legislative action by the state. *Mower* v. *Kemp*, 46 *Am. & Eng. R. Cas.* 480, 42 *La. Ann.* 1007, 8 *So. Rep.* 830.

The corporation acquires an apparent legal title to the lands and franchises which are adjudicated to it under such judicial foreclosure of a mortgage, and the state, as trustee, is estopped from disputing its validity, or setting up adverse right or title in herself. Only the United States, as grantor, can in such case take advantage of the grantee's non-performance of a condition subsequent which is attached to the grant, and this must be done by act of congress or judicial proceedings and decree. *Mower* v. *Kemp*, 46 *Am. & Eng. R. Cas.* 480, 42 *La. Ann.* 1007, 8 *So. Rep.* 830.

V. MARYLAND; MINNESOTA; MISSISSIPPI.

23. Maryland.—A company executed a mortgage of its road to the state, under the act of 1854, ch. 260, which contained a covenant to pay the state an annuity of $90,000, payable in quarterly instalments, commencing from the date of the mortgage, in the manner required by the act. The mortgage also contained a proviso, that until default is made in the payment of said annuity or some part thereof, "and until three months subsequent to a default of the company to pay the whole amount of said annuity which may fall due in any one year," the company shall quietly enjoy the road, "without any lawful let, suit, interruption, disturbance, claim, or demand whatsoever," by the state or any one lawfully claiming under it. *Held*, that the failure to pay any quarterly instalment is a breach of the covenant, which gives the state an immediate right of action, unless that right is limited or controlled by the subsequent proviso, and that by the mortgage itself, construing its terms according to their fair and reasonable import, the default in paying the whole amount is equivalent to saying, if the whole amount be not paid in any one year, and does not import that a whole year's annuity must be in arrear for three months before the state can sue. *Northern C. R. Co.* v. *State*, 17 *Md.* 8.

After a state had subscribed to the stock of a railroad, under an agreement that the company should pay six per cent. per annum on the amount of the subscription, the state amended the charter so as to allow an extension of the road, and an issue of bonds secured by a mortgage on the company's property. *Held*, that, by virtue of the amendment, the state subordinated its rights to the rights acquired under the mortgage. *Brown* v. *State*, 62 *Md.* 439.

The state, in 1836, passed a law directing a subscription of $3,000,000 to the capital stock of defendant company, with the proviso, "that if the said company shall not locate the said road in the manner provided for in this act, then, and in that case, they shall forfeit $1,000,000 to the state of Maryland for the use of Washington county." In March, 1841, the state passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same. *Held*, that the proviso was a measure of a state policy, which it had a right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners nor the county, nor any of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice. It was a penalty, inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter is not sufficient to deprive it of the character of a penalty. *Maryland* v. *Baltimore & O. R. Co.*, 3 *How.* (*U. S.*) 534.—DISTINGUISHED IN Nevitt *v.* Bank of Port Gibson, 14 Miss. 513.

Under the Md. Acts of June 4, 1836, and April 5, 1839, that state subscribed for a large amount of stock in a railroad, and issued its bonds in payment, payable in London. As a condition precedent the company was to guarantee to the state payment of the semi-annual interest "out of the profits of the road." After the "Legal Tender Act" the company refused to pay interest in London, but paid to the state treasurer six per cent. in currency. The state contended that as the bonds were payable in London it raised an implied contract to pay in gold. *Held*, that a contract to pay in gold must be found in the language of the contract, and not being so provided, the company could pay in currency. *Maryland* v. *Baltimore & O. R. Co.*, 22 *Wall.* (*U. S.*) 105; *affirming* 36 *Md.* 519.

24. Minnesota.—Where land is conveyed to a state by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the state, and her grantees take the property discharged of any claim of the bondholders. *Chamberlain* v. *St. Paul & S. C. R. Co.*, 92 *U. S.* 299.—REVIEWED IN Tompkins *v.* Little Rock & Ft. S. R. Co., 21 Fed. Rep. 370, 120 U. S. 160, 7 Sup. Ct. Rep. 469, 5 McCrary 597, 18 Fed. Rep. 344; Stevens *v.* Louisville & N. R. Co., 2 Flipp. (U. S.) 715, 3 Fed. Rep. 673.

Under Minn. Const. art. 9, § 10, as amended April 15, 1858, the deed of trust, to secure the bonds to be deposited with the state treasurer, by the several companies, as security for the state bonds to be issued to such companies, need not give the state a priority of lien. *Minnesota & P. R. Co.* v. *Sibley*, 2 *Minn.* 13 (*Gil.* 1).

The mortgage required by the above amendment to the constitution, to be given by any company accepting the benefit of the amendment was to cover its corporate franchise, or the right to be a corporation. *First Div. St. P. & P. R. Co.* v. *Parcher*, 14 *Minn.* 297 (*Gil.* 224).

By section 20 of its charter, as well as by the above amendment, the Minnesota & Pacific railroad company had power to mortgage its franchise. *First Div. St. P. & P. R. Co.* v. *Parcher*, 14 *Minn.* 297 (*Gil.* 224).

By the foreclosure of the mortgage given by the company under the above amendment, the franchise passed to the state, as purchaser. The forfeiture to the state accruing under the act of March 8, 1861, entitled "An act to facilitate the construction of the Minnesota & Pacific Railroad," would have had the same effect. *First Div. St. P. & P. R. Co.* v. *Parcher*, 14 *Minn.* 297 (*Gil.* 224).

25. Mississippi.— The act of March 16, 1852, does not make an absolute grant of the three per cent. fund then in the state treasury to the several counties of the state; but the power is delegated to the counties to expend the fund in execution of the internal improvement trust imposed by the act of congress upon the state, and is, therefore, subject to be resumed at the pleasure of the state at any time before the money is actually appropriated by the counties. *McAfee* v. *Southern R. Co.*, 36 *Miss.* 669.

By the act of Nov. 18, 1857, all of the above fund then in the treasury was granted to five railroad companies, without any direct reference to the act of 1852. A large part of the sum which was in the treasury at the date of the first act was never distributed to the counties, but remained in the treasury when the act of 1857 was passed, together with a large sum which had been received as a part of the same fund since 1852. *Held*, that as there was no express repeal of the act of 1852, the general words of the act of 1857 did not divest the counties of the rights acquired under the act of 1852; and, therefore, the act of 1857 did not embrace any of the funds granted to the counties by the former act. *McAfee* v. *Southern R. Co.*, 36 *Miss.* 669.

The above act of 1857 provided that the companies should make application to the auditor within ninety days from its date for the fund, and if any of said companies should "fail or refuse for ninety days to make application for their distributive share, then the share or shares so neglected or refused to be applied for" should be distributed by the auditor to the other roads applying within the ninety days "share and share alike." All the companies applied and received their share of the sum shown by the auditor's books, and recognized by him as belonging to the three per cent. fund. Defendant company, just before the expiration of the ninety days, applied for a further sum, which, upon investigation, was found to belong to the fund. *Held*, that the failure of the other companies to apply within the ninety days was not a forfeiture of their right, as such failure was without fault on their part, and caused by the mistake of the auditor. *McAfee* v. *Southern R. Co.*, 36 *Miss.* 669.

The application required by the act of Nov. 18, 1857, to be made within ninety days after its passage by the several railroad companies therein named, for a loan of the three per cent. fund, must be made to the auditor of public accounts, a deposit of bond with the treasurer within that time, and an application afterwards to the auditor for his warrant will not do. *McAfee* v. *Southern R. Co.*, 36 *Miss.* 669.

By the act of April 18, 1873, certain funds were appropriated to aid the construction of defendant's road. $8000 per mile to be paid as designated sections of the road should be completed, to be paid by the

treasurer on the order of the governor, upon notes of the company and secured by a first mortgage on the road. It was provided that if at any time the legislature should deem the securities insufficient the company should be compelled to give such additional security as might be demanded. Upon completion of a section of five miles the acting governor ordered payment of $40,000, but before it was paid the legislature provided, April 1, 1876, that the company should give additional security by depositing state bonds with the treasurer. *Held*, that the latter act was binding, and the company had no right to demand payment of the $40,000, unless the additional security was given. *Hemmingway* v. *Vicksburg & N. R. Co.*, 52 *Miss.* 16.

VI. MISSOURI; NEW YORK.

26. Missouri.—(1) *State decisions.*—Pending a bill in equity for rescission of the sale of a railroad by the governor, and also for an account and for damages, an act was passed by the legislature confirming the sale. *Held*, that the act is a complete bar to that part of the petition which demanded rescission, yet the court is not thereby deprived of all jurisdiction of the cause, but jurisdiction will be retained and justice administered as to the remaining portion of the petition. *State* v. *McKay*, 43 *Mo.* 594.

After such sale by the governor, his seizure of the same, under and by virtue of a clause of forfeiture contained in the act and the deed of conveyance, is not an admission by the state that the sale and transfer were legal, nor does the seizure amount to a ratification of the sale. In making the sale, the governor was not acting in his political or executive capacity, but merely as a special agent; and the duty might have devolved upon any other person as well. And if he proceeded beside the law or outside the law, the state would not be bound by his tortious acts or trespasses. *State* v. *McKay*, 43 *Mo.* 594.

Where such seizure is made on account of a non-compliance with the terms of the contract, for the purpose of foreclosing the state's lien or mortgage, the clause of forfeiture is not distinguishable in principle from one of re-entry by a landlord for condition broken; and such seizure, even if in all respects legal and regular, does not deprive the state of any previous existing right. *State* v. *McKay*, 43 *Mo.* 594.

If the commissioners for the sale of a railroad combine and confederate with other persons in the purchase of the property, the state will be entitled to whatever speculations they made out of the sale; and the other persons, by entering into the league with the full knowledge of the facts, will also be amenable. *State* v. *McKay*, 43 *Mo.* 594.

The state Pacific railroad bonds of January 15, 1852, are payable twenty years from date, and the time of their payment is not postponed by the provision incorporated in the bonds making them redeemable, in the pleasure of the legislature, at any time after the expiration of twenty years. Said bonds can only be paid out of a fund expressly appropriated for that purpose by the legislature. The state interest fund created by the act of 1855, and the state sinking fund created by the act of 1865, were appropriated for the payment of these among other state bonds. Payment is to be made by the state commissioners created by said acts, without any further order than that contained in the acts. If there be not funds enough on hand to pay the bonds as they mature, they are required to sell such bonds as they may have purchased, so as to raise money for that purpose. Said bonds, according to their terms, are payable in gold or silver coin. And this provision is not overruled by the legal-tender acts passed by congress in 1862. And it would be a breach of the contract entered into by the state in issuing these bonds to order their payment in legal-tender notes. *Answers to Questions of Governor*, 49 *Mo.* 216.

The state by the course of its legislature is estopped from now disputing the authority of the governor to contract for the payment of state bonds in gold and silver. *Answers to Questions of Governor*, 49 *Mo.* 216.

The lien of the state upon the Iron Mountain railroad lands, created by the act of 1851, embraced land acquired by the road after the creation of the lien, and foreclosure and sale of the road under said act will carry title to such land. *Whitehead* v. *Vineyard*, 50 *Mo.* 30, 3 *Am. Ry. Rep.* 7.

It is competent for the legislature to modify or repeal a law appropriating money for the payment of these bonds, and its action is not liable to superintendence or control by the judiciary. The state may say in what manner its debts shall be paid,

or that they shall not be paid. And its action may amount to a breach of faith; but there is no power to correct it. *State ex rel.* v. *Hays*, 50 *Mo.* 34.

Semble, that an act of the legislature granting an extension of time upon a loan formerly made to a railroad company is not in conflict with the state Const. art. 11, § 14, which prohibits the giving or loaning of the state's credit, in aid of any person, association, or corporation. *Opinion of the Court given to the General Assembly*, 55 *Mo.* 497.

The acts of Feb. 22, 1851, and Dec. 10, 1855, give the state a lien on the Hannibal & St. Joseph railroad, and provide that upon any default in the payment of the bonds of the state issued to said railroad company, or any default in the payment of interest, the lien shall be enforced by a sale of the road to be made by the governor. The act of Feb. 20, 1865, according to the construction of the relators, puts it out of the power of the governor to sell upon any default in the payment of interest occurring after the first day of July, 1881, when the act was accepted by them, of the lien of the state. Mo. Const., 1875, art. 4, § 50, provides for the enforcement of the lien held by the state on any railroad in accordance with the terms upon which it was acquired. *Held*, that, under the Const. art. 15, § 1, repealing all laws inconsistent with the constitution, and under art. 4, § 50, the act of Feb. 20, 1865, was repealed, and since it did not of itself create any vested right and was not accepted before the constitution took effect, it ceased to be operative as soon as that event occurred. *State ex rel.* v. *Chappell*, 7 *Am. & Eng. R. Cas.* 118, 74 *Mo.* 335.

(2) *Federal decisions.*—The state of Missouri issued its bonds in aid of a railroad, and created a lien on the road to secure them. Afterwards, in 1865, the state constitution was amended with a provision that "the general assembly shall have no power, for any purpose, to release the lien held by the state upon any railroad." The legislature subsequently authorized a sale of "all such right, title, and interest" in and to the road as were subject to the lien of the state, to the railroad company, for $5,000,000, the bonds at the time, with past due interest, amounting to nearly $11,000,000. *Held*, that the constitution did not prohibit a sale of the state's claim, only a release of the lien while the claim remained; therefore, the statute was constitutional. *Woodson* v. *Murdock*, 22 *Wall.* (*U. S.*) 351; *affirming* 2 *Dill.* 188.

By Missouri Act of March 3, 1857, it was provided that the state should issue its bonds in aid of certain railroads, which should "constitute a first lien and mortgage upon the roads and property of the several companies so receiving them." *Held*, that the word "property," as used in the statute, included the lands of a company, and created a lien thereon; that a sale under the mortgage destroyed title to one who subsequently purchased lands from the company. *Wilson* v. *Boyce*, 92 *U. S.* 320; *affirming* 2 *Dill.* 539.

A state holding $3,000,000 in the stock of a railroad, passed a law directing its transfer to the company upon payment into the state treasury of "a sum of money equal in amount to all indebtedness due or owing by said company to the state, * * * together with all interest that has and may have accrued and remains unpaid by said company." The purpose of the law was declared to be to enable the state to reduce its debt. *Held*, that the law required the company to pay to the state the face of the bonds with any interest then due, and in addition thereto a sum that would enable the state to redeem an equal amount of its other bonds, bearing the same rate of interest, i. e., a sum sufficient to pay any premium that might be on the state's bonds. *Rolston* v. *Missouri Fund Com'rs*, 120 *U. S.* 390, 7 *Sup. Ct. Rep.* 599; *reversing in part* 3 *McCrary* 332, 10 *Fed. Rep.* 254.

The Mo. Acts of 1865 and 1881, providing for a transfer to the company of the state's stock in the Hannibal & St. Joseph railroad, upon payment to the state of the principal and interest due thereon, are not in conflict with the provisions of the state constitution of 1875, providing that the state shall release or vary liens on railroads, or release or extinguish debts due the state. *Rolston* v. *Missouri Fund Com'rs*, 120 *U. S.* 390, 7 *Sup. Ct. Rep.* 599; *reversing in part* 3 *McCrary* 332, 10 *Fed. Rep.* 254.

In 1864, while the state was in full possession of the revenue of defendant's road upon certain express trusts, which, it was provided, were to continue until the state bonds loaned to the company were paid or exchanged, by an act of January 7, 1865, the county of St. Louis was empowered to loan

said company its bonds, which was done and accepted by the company. The said act authorized the person who had theretofore been in custody of the earnings of the road for the state (called the fund commissioner), to pay into the county treasury, out of said earnings, a sum sufficient to meet the interest on said bonds loaned by said county as it accrued. *Held*, that the state thereby waived its lien and right to all the earnings of the company to the extent of the sum required to pay the interest on said bonds, and that the country was *pro tanto* substituted as to that amount in place of the state, with a lien or charge to that extent as effectual as the state before possessed. *Ketchum* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 78.

As between the company and the county, the effect of the acceptance of the act, and the issue of the bonds by the county under it, was to convert the provisions of the second section into a contract, by which the company consented that the fund commissioner, or his successor, should, out of the earnings of the railroad, pay the sum necessary to meet the interest on said bonds, until they were paid by the company. This created a lien, statutable in its origin and equitable in its nature, on those earnings as they arise, which may be enforced by the county, so long as the bonds which it loaned to the company remain unpaid. *Ketchum* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 78.

27. New York. — New York Act of December 14, 1847, ch. 471, to release the prior lien of the state on the Hudson & Berkshire railroad, does not violate the state Constitution of 1846, art. 7, § 4, which forbids the release or compromise of the claims of the state against any incorporated company, to pay the interest and redeem the principal of the stock of the state theretofore loaned or advanced to such company, and provides that such claims shall be fairly enforced. *Darby* v. *Wright*, 3 *Blatchf.* (*U. S.*) 170.

Neither does the act of 1847 release, reduce, or compromise the debt created against said company by the act of April 28, 1840, ch. 178, to aid said company; nor does it release from the mortgage to the state, created by the act of 1840, any of the property covered by that mortgage. *Darby* v. *Wright*, 3 *Blatchf.* (*U. S.*) 170.

The constitution only requires that claims originating in loans of state credit, made before its adoption, and the securities taken on such loans, shall be held as the property of the state, and be managed for its direct pecuniary benefit, and shall not be released, reduced or surrendered for the benefit of the borrowing corporations, in disregard of the pecuniary interest of the state, in its distinct and single character of a creditor of the corporation. With those restrictions, the exercise of the ordinary legislative discretion in the management of the claims is not prohibited. *Darby* v. *Wright*, 3 *Blatchf.* (*U. S.*) 170.

The validity of the act of 1847 must be determined by its character and purposes at the time it was passed; and the rights of those who have, on the faith of its validity, advanced money on bonds issued under it and made by it a first lien on the road, cannot depend on the yet unsettled question, whether the arrangement authorized by it will, in the end, prove beneficial or injurious to the state, as a creditor of the corporation. *Darby* v. *Wright*, 3 *Blatchf.* (*U. S.*) 170.

The above act of 1847 is not in violation of the state Constitution of 1846, art. 7, § 9, which forbids the giving or loaning of the credit of the state in aid of any corporation. *Darby* v. *Wright*, 3 *Blatchf.* (*U. S.*) 170.

The comptroller of the state being about to sell the road, and appropriate its proceeds to the sole benefit of the state, to the exclusion of the holders of the bonds issued under the act of 1847, this court enjoined him from so doing in a suit brought by such bondholders. *Darby* v. *Wright*, 3 *Blatchf.* (*U. S.*) 170.

VII. NORTH CAROLINA; PENNSYLVANIA.

28. North Carolina. — (1) *State decisions.* — Where a railroad charter requires that "its treasurer and president should, before receiving an instalment from the state, satisfactorily assure the board of internal improvements by a certificate, under the seal of the company, that an amount of the private subscription has been paid, in equal proportion to the payment required of the state" — *held*, that for the company to take, as cash, the notes of individuals made for the occasion to enable the officers to make the certificate under a promise that such notes were not to be enforced, was immoral and against public policy, and such individuals being *pari delicto*, had no equity to be relieved against such notes. *McRae* v.

Atlantic & N. C. R. Co., 5 *Jones Eq.* (*N. Car.*) 395.

The act of Dec. 18, 1868, in requiring the treasurer of the state to subscribe for stock in Chatham R. Co., and to pay for the same by issuing bonds of the state, is in conflict with the state Const. art. 5, § 5, clause 2. *Galloway* v. *Jenkins*, 63 *N. Car.* 147. *Baltzer* v. *State*, 104 *N. Car.* 265, 10 *S. E. Rep.* 153.

A subscription for stock in a corporation and issuing bonds to pay for such stock, is a gift of the credit of the state, within the meaning of the above section. *Galloway* v. *Jenkins*, 63 *N. Car.* 147.

The legislature authorized a railroad company to issue bonds to the amount of $2,300,000, secured by a first mortgage upon the road; and further engaged that the state should indorse $1,000,000 of such bonds, provided that the company should deposit $500,000 of the unindorsed bonds, as security against the state being required to pay any part of those indorsed. By a subsequent act they authorized the $500,000 of bonds thus deposited to be surrendered to the company, to be used in constructing its road and not otherwise. *Held:* (1) that the latter act involved no injustice to a holder of some of the indorsed bonds, which could entitle him to an injunction restraining the surrender of the bonds; (2) the legislation did not create a contract between the state and the bondholders which could be impaired by the act surrendering the $500,000 of bonds. *First Nat. Bank* v. *Jenkins*, 64 *N. Car.* 719.

By the act of Jan. 29, 1869, the general assembly ordered $4,000,000 of state bonds to be issued to a company, in payment of a like amount of stock therein to be subscribed for by the state, and $3,500,000 were issued accordingly; by the act of Feb. 5, 1870, the company was ordered to return to the treasurer all such bonds as it then had on hand. By the act of March 8, 1870, the act of Jan. 29, 1869, with other like acts, was repealed, and the bonds issued thereunder again ordered to be returned. By the act of March 12, 1870, the general assembly ordered the treasurer to deliver to the company $500,000 of certain first mortgage bonds of such company, theretofore by it deposited in the state treasury as indemnity to the state against risks by it incurred for the company, "upon the surrender to him of $500,000 of state bonds"; and on June 1, 1870, the private stockholders of the company, in special meeting, assented to, and accepted, the two acts last mentioned. *Held*, that taking the acts of Feb. 5, March 8, and March 12 together, the treasurer was not, by the latter act, authorized to receive, in exchange for the bonds by him to be delivered, state bonds included in the terms of the two former acts; and this without regard to the question of the constitutionality of those former acts, as it must be supposed that the general assembly regarded them as constitutional. *McAden* v. *Jenkins*, 64 *N. Car.* 796.—FOLLOWED IN Raleigh & A. A. L. R. Co. *v.* Jenkins, 68 N. Car. 499.

Where a state exchanges its own bonds for the bonds of a railroad company, the effect is to vest the ownership of the railroad bonds in the state, secured by a mortgage on the road, and the state has a valuable interest in the bonds and mortgage as a fund which it may dispose of in aid of other works of internal improvement, subject to existing equities. *Wilmington, C. & R. R. Co.* v. *Western R. Co.*, 66 *N. Car.* 90.

Under North Carolina Ordinance of March 11, 1868, providing that the Chatham railroad company may take up its bonds deposited with the state treasurer by substituting bonds of the state, or other evidence of indebtedness of the state, the treasurer is not bound to accept in exchange for mortgage bonds of the company any state bonds issued after the passage of the ordinance. *Raleigh & A. A. L. R. Co.* v. *Jenkins*, 68 *N. Car.* 499, 502.

The United States courts may take jurisdiction of causes affecting the property of a state in the hands of its agents, without making the state a party when the property or agent is within their jurisdiction. In such cases the courts act through the instrumentality of the property or the agent. *Swasey* v. *North Carolina R. Co.*, 71 *N. Car.* 571.

So where a state subscribes to the stock of a railroad and issues its own certificates of indebtedness therefor, and pledges the faith of the state and the stock owned by it, with any dividends thereon, and suit is commenced thereon without making the state a party, plaintiff is entitled to have a certain amount of the whole stock, or as much as may be necessary, sold to pay past-due interest; and where a proportion of the stock is ordered sold it should bear the same proportion to the whole stock as the

certificates held by him do to the whole amount of stock outstanding; and a federal court may take jurisdiction over the agent of the state who has custody of such stock. *Swasey* v. *North Carolina R. Co.*, 71 *N. Car.* 571.

The amendment of North Carolina constitution in 1880, prohibiting the general assembly from paying, or assuming to pay, any bonds or debt incurred by authority of the convention of 1868, or by the legislature at any session from 1868 to 1870, takes away the jurisdiction of the supreme court, under art. 4, § 9, of the constitution, to hear claims against the state, founded upon obligations alleged to have been incurred by the state during the above period. Such amendment of the constitution does not conflict with the constitution of the United States. *Baltzer* v. *State*, 104 *N. Car.* 265, 10 *S. E. Rep.* 153.

And the above amendment was intended to embrace not only the invalid bonds themselves, but every claim, legal or equitable, growing out of them. *Baltzer* v. *State*, 104 *N. Car.* 265, 10 *S. E. Rep.* 153.

(2) *Federal decisions.*—The stock of the state of North Carolina in the Atlantic & North Carolina railroad, cannot be sold in a suit for non-payment of interest thereon, against the company and others, without making the state a party; and the fact that the act authorizing the stock pledged it for payment of interest and principal of the bonds, would not authorize a proceeding *in rem*, without notice to the state. *Christian* v. *Atlantic & N. C. R. Co.*, 133 *U. S.* 233, 10 *Sup. Ct. Rep.* 260.—QUOTED IN Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 48 Fed. Rep. 139.

N. Car. Act of 1855, authorizing the state to subscribe to the stock of a railroad, pledged "the public faith of the state," and the stock itself, to the payment of interest and principal of the bonds. *Held*, that this did not create an ordinary pledge, but only a solemn promise of the state. *Christian* v. *Atlantic & N. C. R. Co.*, 133 *U. S.* 233, 10 *Sup. Ct. Rep.* 260.

Stock in a railroad held by a state cannot be sold in a suit in equity, as the state cannot be sued without its consent. *Christian* v. *Atlantic & N. C. R. Co.*, 133 *U. S.* 233, 10 *Sup. Ct. Rep.* 260.—CRITICISING Swasey *v.* North Carolina R. Co., 1 Hughes (U. S.) 17. FOLLOWING Cunningham *v.* Macon & B. R. Co., 109 U. S. 446.

A holder of North Carolina railroad bonds instituted suit against the auditor and the state to compel the levying of a special tax to pay interest on the same. *Held*, that the suit against the auditor was the same as a suit against the state, and would not lie. *North Carolina* v. *Temple*, 134 *U. S.* 22, 10 *Sup. Ct. Rep.* 509.—FOLLOWING Louisiana *v.* Jumel, 107 U. S. 711; Cunningham *v.* Macon & B. R. Co., 109 U. S. 446; Hagood *v.* Southern, 117 U. S. 52; In re Ayers, 123 U. S. 443; Hans *v.* Louisiana, 134 U. S. 1.

N. Car. Act of Dec. 22, 1852, authorized the state to subscribe to the stock of a railroad, and issue its bonds therefor, and provided for the payment of the principal, and the annual interest, but said nothing about interest on the principal if not paid when due. The bonds were issued by the state officers with a provision for payment of interest "from the date of this bond, and until the principal be paid." *Held*, that the state was not chargeable with interest after the bonds fell due, as a government can only be liable for interest when it has given its express consent. *United States* v. *North Carolina*, 136 *U. S.* 211, 10 *Sup. Ct. Rep.* 920.—FOLLOWING United States *v.* Sherman, 98 U. S. 565; United States *v.* Bayard, 127 U. S. 251; In re Gosman, 17 Ch. D. 771.

The state subscribed a majority of the stock of a railroad company, with the right to vote the same and to appoint a proportionate number of the directors, and took a statutory mortgage upon its stock to secure certain construction bonds issued by it, but subsequently created a second mortgage on its stock to secure bonds. While the road was paying six per cent. on its capital stock, defendant company leased the road at a rental sufficient to pay the interest on the first mortgage. A second mortgage bondholder filed a bill to compel the lessee company to account for the excess of earnings above the interest on the first mortgage. *Held*, that the bill could not be maintained, in the absence of any averment of fraud in the making of the lease; that the state was not a trustee because it was a majority stockholder, and was under no obligation to the mortgagees, except to conduct itself honestly in exerting its power for the interests of all parties concerned. *Gibson* v. *Richmond & D. R. Co.*, 37 *Fed. Rep.* 743, 2 *L. R. A.* 467.

29. Pennsylvania.—The act of March 7, 1861, authorizing the state treasurer to cancel $3,500,000 of the bonds of the Sunbury & Erie railroad company, and directing the satisfaction of the mortgage for $7,000,000, is not a violation of the state Const. art. 2, § 4, relating to the sinking fund, and is therefore constitutional. *Gratz* v. *Pennsylvania R. Co.*, 41 *Pa. St.* 447.

By an act of assembly, a railroad was to receive from the state certain canal tolls, which were to cease when "net proceeds of the road, after paying necessary expenses of motive power and superintendence, exceeded six per cent. per annum." The net receipts, after paying expenses, were less than six per cent. on capital stock and funded debt, but exceeded six per cent. on the capital stock. *Held*, that the grant had ceased. *West Branch Canal Co.* v. *Elmira & W. R. Co.*, 55 *Pa. St.* 180.

VIII. SOUTH CAROLINA.

30. Construction of statutes.—The act of 1852 provided for two subscriptions to a certain railroad, the whole subscription to be paid in bonds "payable in five instalments of $200,000 each." But one subscription of $500,000 was made, and the first two instalments were paid, $200,000 each, but the comptroller-general refused to make the third payment on the ground that it was but $100,000 and not authorized by the statute. *Held*, that this construction of the statute was wrong, and the amount should be paid. *State ex rel.* v. *Ashmore*, 10 *Rich.* (*So. Car.*) 248.

The act of 1869, authorizing the comptroller-general on a certain contingency to take possession of the Savannah & Charleston railroad, is not repealed by the act of 1871, directing proceedings for foreclosure to be taken against all railroad companies which had failed to pay the interest due upon the bonds of the companies guaranteed by the state. *Ex parte Dunn*, 8 *So. Car.* 207.

Where the state has guaranteed the bonds issued by a railroad company, and has taken a mortgage or lien upon the railroad and all its property to protect the state from loss on account of its guaranty, an act of the legislature authorizing and directing the comptroller-general to take possession of the road on the company becoming insolvent and failing to pay the bonds does not authorize the performance of an act which could only be performed through the instrumentality of the judicial department of the state. *Ex parte Dunn*, 8 *So. Car.* 207.

31. Enforcement of state's lien.—Application was made for leave to purchase a tract of land at private sale belonging to a railroad company, and which was not necessary for its corporate purposes. The land was subject to the liens created by statute in favor of the state as guarantor of bonds of the company, and of mortgages created by the company. *Held*, that the court would not order a sale upon a valuation fixed by a single witness who is not an expert, and who derived his knowledge from others. When the court departs from the general rule of selling property at public auction, it must be fully informed as to its probable value. *Bound* v. *South Carolina R. Co.*, 46 *Fed. Rep.* 315.

The state guaranteed the bonds of a company, issued in exchange for outstanding mortgage bonds, under a statute which provided that the state should take and retain possession of the bonds so surrendered in exchange as "security to the state, and thereby give the state the lien under the first mortgage until all the bonds now secured by mortgage shall be retired;" all of the mortgage bonds not having been surrendered or exchanged. *Held*, that the state could assert the lien of the mortgage bonds so held by her, together with the coupons thereto attached, as of equal rank with the mortgage bonds not exchanged. *Gibbes* v. *Greenville & C. R. Co.*, 4 *Am. & Eng. R. Cas.* 459, 13 *So. Car.* 228.

32. Rights of bondholders, generally.—An act of 1856 provided for an indorsement by the state of a company's bonds, as the road was completed by sections, and that the state should have a lien upon that portion of the road, without any formal writing, and a lien upon the whole of the road when completed. *Held*, that such indorsed bonds constituted a lien upon the entire road when completed, which enured not for the benefit of the state alone, but for the security of the bonds and their coupons in the hands of subsequent holders. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314.—DISTINGUISHED IN Tennessee Bond Cases, 24 Am. & Eng. R. Cas. 217, 114 U. S. 663. QUOTED IN Gibbes *v.* Greenville & C. R. Co., 4 Am. & Eng. R. Cas. 459, 13 So. Car. 228.

By section 5 of the above statute it was provided that "the state expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interests of the state, and to secure it against loss in consequence of the indorsing of bonds under the provisions of this act, but in such a manner as not to impair the vested rights of the stockholders of the company." *Held*, that this did not give the state the right to destroy or postpone the lien created thereby to secure payment of the bonds; and the subsequent act of 1869, which attempts to postpone the lien, is void as impairing the obligation of a contract. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314. *Gibbes* v. *Greenville & C. R. Co.*, 4 *Am. & Eng. R. Cas.* 459, 13 *So. Car.* 228.

Persons holding bonds authorized by the former act were not estopped from insisting upon their prior lien because of a failure to oppose the passage of the latter act, which attempted to postpone their lien; neither were such bondholders estopped from asserting their prior lien by accepting payment of their coupons after the passage of the subsequent act, which provided for the rebuilding of the road, after it had been partially destroyed by the civil war. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314.

Neither can the company, nor junior encumbrancers, object that the original bondholders, under the act of 1856, have made no attempt to obtain payment from the state; nor will a court of equity require such bondholders to look primarily to the state for payment because they hold a double security. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314.

And such original bondholders are not estopped from asserting their prior lien because they permitted, without objection, money to be raised under the act of 1869, and expended in the improvement of the road. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314.

Judgment cannot be rendered against the state upon its guaranty in favor of holders of the redemption bonds of 1869. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314.

The holders of redemption bonds of 1869 have no lien under either act, as the act of 1869 only secures bonds issued for money borrowed. Nor can they require the state as surety to set up the coupons received in exchange for such guaranteed redemption bonds, as against the bonds issued under either act. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314.

A statute authorizing the guarantee by the state of certain bonds of a railroad company to be secured by a statutory lien, was passed in 1861, and the bonds issued and guaranteed thereunder bore the caption "Confederate States of America." In 1866 another act was passed which extended the operation of the act of 1861, and authorized the issue of new bonds in exchange, also certificates of indebtedness to pay interest past due on the bonds of 1861, and bonds for other indebtedness, all of which were to be in like manner guaranteed. *Held*, that the bonds of 1861 not surrendered were of superior rank to the bonds issued under the act of 1866, but those issued under the act of 1866, in exchange for bonds surrendered, could claim a lien only under the latter act, and stood upon the same footing with all other bonds issued under the act of 1866. *Gibbes* v. *Greenville & C. R. Co.*, 4 *Am. & Eng. R. Cas* 459, 13 *So. Car.* 228.—QUOTING Hand *v.* Savannah & C. R. Co., 12 So. Car. 314.

The state chartered a railroad company with an exemption from taxation, and after bonds had been issued which constituted a statutory lien on the property of the company, the legislature passed an act undertaking to postpone the first lien in favor of a second issue of bonds, upon condition that the company would release its exemption from taxation. The postponement of the lien was declared unconstitutional. *Held*, that, as to non-consenting bondholders under the first lien, the property of the company was exempt from taxation, even after it passed to a second company. *Hand* v. *Savannah & C. R. Co.*, 17 *So. Car.* 219.

The fact that some coupons of first-lien bonds were paid in state-guaranteed bonds under the act of 1869 raises no equity for the payment of the unfunded coupons of the same class and dates in preference to the bonds and later coupons. Such unfunded coupons are entitled to take only their *pro rata* with other bonds and coupons of the first lien not postponed by settlement or the estoppel of their owners. *Hand* v. *Savannah & C. R. Co.*, 17 *So. Car.* 219.—QUOTING Claflin *v.* South Carolina R. Co., 8 Fed. Rep. 118.

33. Bondholders, when estopped.—Under So. Car. Act of 1856 the state guaranteed the bonds of a railroad company; but in 1869 it undertook to postpone the first bonds, giving preference to a second issue, but this act was declared unconstitutional. *Held*, notwithstanding, that bondholders of the issue of 1856 who had accepted payment in the bonds of 1869, were estopped from claiming a lien under the first act; but where the question is raised whether certain bondholders had accepted payment as above, it becomes a question of fact, and the burden of proof is on those who claim the benefit of the estoppel; and the fact that persons own coupons from such bonds will not raise a presumption that they own the bonds also. *Hand* v. *Savannah & C. R. Co.*, 17 *So. Car.* 219.

The holders of first-lien bonds retaining that rank are exclusively entitled to the benefit of the first lien, and cannot be required to share that benefit with the second statute lien to the extent of the quantity of the first lien removed by the estoppel of parties holding under it. *Hand* v. *Savannah & C. R. Co.*, 17 *So. Car.* 219; *see also* 12 *So. Car.* 314.

Nor are the interest-fund bonds, guaranteed by the state issued under the act of 1869 in payment for the coupons of the first-lien bonds, entitled to the rank held by the coupons which these bonds satisfied. *Hand* v. *Savannah & C. R. Co.*, 17 *So. Car.* 219.

34. "Revenue bond scrip."—A railroad issued $4,000,000 of bonds with the guaranty of the state thereon. Afterwards the state passed an act to retire these bonds, and issue in lieu thereof $1,800,000 of its certificates of indebtedness, styled "revenue bond scrip," which should be receivable for taxes and all dues to the state, except a tax to pay interest on the public debt. Afterwards the state legislated so as practically to deny its obligation on these certificates. A holder of certain of these certificates filed a bill, to compel certain officers to cease from refusing to take them for taxes, and to cease from refusing to levy a tax to retire them. *Held*, that his bill was fatally defective for not setting up the unconstitutionality of the laws, and that he was injured thereby, and in not averring that he would be injured by such refusal of the officers. *Williams* v. *Hagood*, 98 *U. S.* 72.

The state guaranteed certain railroad bonds, and afterwards, to rid itself of that obligation, passed a law whereby the bonds were surrendered, and in their stead, but for a smaller sum, the state issued its certificates of indebtedness, called "revenue bond scrip." In a suit to enforce the obligation of these certificates—*held*, that the state, being the real party in interest, could not be made a defendant without its consent, and that state officers, who were parties, could not enter appearance for the state, or defend in its name. *Hagood* v. *Southern*, 117 *U. S.* 52, 6 *Sup. Ct. Rep.* 608.—DISTINGUISHING Osborn *v.* Bank of U. S., 9 Wheat. (U. S.) 738; Davis *v.* Gray, 16 Wall. (U. S.) 203; Board of Liquidation *v.* McComb, 92 U. S. 531; Allen *v.* Baltimore & O. R. Co., 114 U. S. 311; Cunningham *v.* Macon & B. R. Co., 109 U. S. 446. FOLLOWING Louisiana *v.* Jumel, 107 U. S. 711.

The revenue bond scrip, issued by the state treasurer, under the act of March 2, 1872, to relieve the state of all liability of its guaranty of the bonds of the Blue Ridge railroad company, being certificates of indebtedness, payable to bearer, issued by the state in its sovereign capacity, with the faith of the state pledged for their ultimate redemption, and intended to circulate as money, are bills of credit, which, by the constitution of the United States, a state is inhibited from issuing, and are, therefore, null and void. *State ex rel.* v. *Comptroller-General*, 4 *So. Car.* 185.

IX. TENNESSEE; TEXAS; VIRGINIA

35. Tennessee.—(1) *In general.*—The act of Feb. 11, 1852, and the subsequent acts enlarging or amending the same, known as the Internal Improvement Acts, provided, among other things, for granting state aid to railroad companies, and authorizing the governor to appoint receivers for the roads upon a failure to pay interest on the state bonds. *Held*, that such receivers had no authority to create debts, except to be paid out of the earnings of the road. And there is no obligation on the state to continue the receiver until current indebtedness created by him has been paid. The fact that the indebtedness created by the receiver increased the value of the property, and thereby strengthened the state's security, cannot add to the strength of the claim. *State* v. *Edgefield & K. R. Co.*, 4 *Am. & Eng. R. Cas.* 86, 6 *Lea* (*Tenn.*) 353.

The indorser of a negotiable state bond, whose liability has been fixed by demand of payment of the bond at maturity, protest for non-payment and notice, is thereby rendered liable for the unpaid coupons then attached to the bonds, with interest thereon, without a separate presentment for payment of the several coupons as they fell due, protest for non-payment and notice. *Lane* v. *East Tenn., V. & G. R. Co.*, 13 *Lea* (*Tenn.*) 547.

A company which had received state aid took land for the purposes of its road, without paying therefor, and the landowner obtained a judgment and sued out execution, which was returned *nulla bona*. Subsequently the state appointed a receiver, who took possession of the road, to enforce the state's lien for extending such aid. *Held*, that the lien of the landowner is superior to that of the state, and where he has no collateral security, as by appeal bond or otherwise, a court of equity will enjoin the receiver from running trains over the land thus taken and not paid for. *White* v. *Nashville & N. W. R. Co.*, 7 *Heisk.* (*Tenn.*) 518.—DISTINGUISHING Pierce *v.* Milwaukee & St. P. R. Co., 24 Wis. 551, 1 Am. Rep. 203. REVIEWING Perks *v.* Great Wycombe R. Co., 3 Giff. 662; State *v.* Mexican Gulf R. Co., 3 Rob. (La.) 513.—DISTINGUISHED IN State ex rel. *v.* Nashville, C. & St. L. R. Co., 7 Lea (Tenn.) 15; Simms *v.* Memphis, C. & L. R. Co., 12 Heisk. 621.

In such case the company's charter contained two provisions, somewhat conflicting: one that the company appealing should be at liberty to proceed with the work of construction only upon giving a bond, and the other prohibiting an injunction or *supersedeas* to stop the work. *Held*, that the latter provision was controlling. *White* v. *Nashville & N. W. R. Co.*, 7 *Heisk.* (*Tenn.*) 518.

(2) *The lien of the state.*—The lien of the state on the property of railroad companies, acquired under the act of Feb. 11, 1852, known as the Internal Improvement Act, and the several amendments thereto, only binds the property of the companies for the payment of principal and interest of bonds issued to the state, and does not extend to the several individual holders of bonds. *Tennessee Bond Cases*, 24 *Am. & Eng. R. Cas.* 217, 114 *U. S.* 663, 5 *Sup. Ct. Rep.* 974, 1098; *affirming* 2 *Flipp.* (*U. S.*) 715, 3 *Fed. Rep.* 673.—DISTINGUISHING Hand *v.* Savannah & C. R. Co., 12 So. Car. 314.

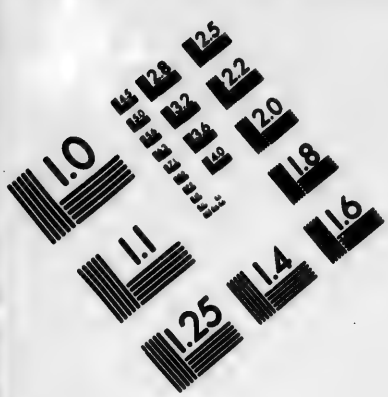
Moneys earned by railroad companies in working their roads after completion are not comprehended within the lien retained by the state under the act of Feb. 11, 1862, providing for a lien where the state loans its bonds to a company. *McGraw* v. *Memphis & O. R. Co.*, 5 *Coldw.* (*Tenn.*) 434.—APPROVING Fowler *v.* Pittsburg, Ft. W. & C. R. Co., 35 Pa. St. 22.

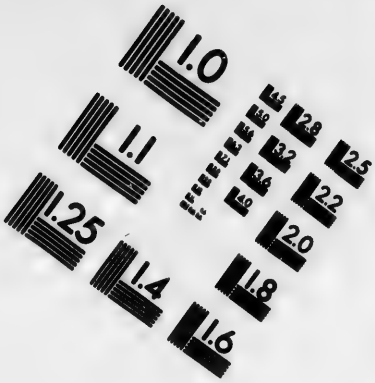
The lien reserved to the state by the act of 1851-2, ch. 151, §§ 3, 4, upon the property of railroad companies which have received state aid in the purchase of iron for their roads, does not attach upon money paid in for stock while said roads are under construction. A debt due from a railroad tax collector for taxes collected to pay a county subscription to a railroad, although reduced into a judgment in a suit against said collector in the name of the state, is nevertheless the property of said railroad company, and therefore the subject of garnishment at the suit of a creditor of the company at any time before said road is completed. *Hoard* v. *Casey*, 4 *Sneed* (*Tenn.*) 178.

The lien of the state on railroads for the security of bonds loaned under the Internal Improvement Laws of 1851-52 is superior to the rights of holders of tax certificates under the act of 1851-52, ch. 117, providing for county subscriptions and making said certificates receivable for freight and passage over the road. A purchaser of the road or the state's interest therein under a sale in pursuance of the act of Dec. 21, 1870, is not bound to receive such certificates for freight or passage on the road. *State ex rel.* v. *Nashville, C. & St. L. R. Co.*, 7 *Lea* (*Tenn.*) 15. — DISTINGUISHING White *v.* Nashville & N. R. Co., 7 Heisk. 518. EXPLAINING Mobile & O. R. Co. *v.* Wisdom, 5 Heisk. 125.

36. Texas.—The act of countersigning and registering bonds by the comptroller contemplated by the charter of the International R. Co. was not a mere clerical or ministerial duty, but it was the duty of the comptroller, as well as of the governor, to see that the proper and necessary work to be done by the company before the bonds could issue under the law had been performed. *Bledsoe* v. *International R. Co.*, 40 *Tex.* 537.

Where bonds are issued without authority of law by a corporation which had received





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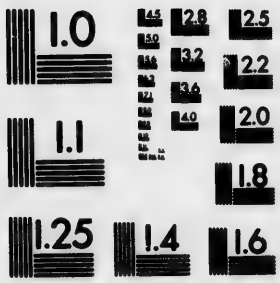

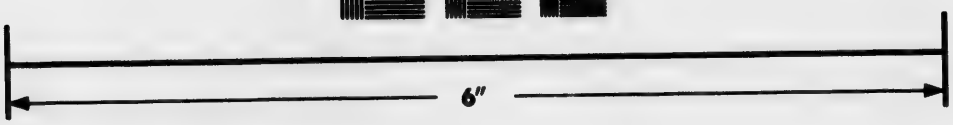

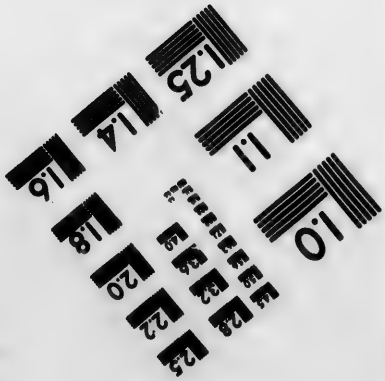

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state aid, and the directory of the corporation fails to resist payment of such bonds, such acts are in violation of a duty owed the stockholders and creditors of the corporation; but such failure is not the exercise of a power not conferred by law, but a failure to exercise a proper and necessary power, which does not present a case within the letter or spirit of the constitution entitling the state to a preventive remedy as against the bondholders, mortgagees, or trustees, unless it be shown that the public has an interest in the non-payment of the bonds through foreclosure or otherwise. *State* v. *Farmers' L. & T. Co.*, 50 *Am. & Eng. R Cas.* 683, 81 *Tex.* 530, 17 *S. W. Rep.* 60.

A railroad mortgage to secure bonds provided that it was entitled, under a statute, to procure a loan from the state of $6000 per mile, on certain conditions, which should constitute a lien on the road prior to the mortgage. When the road was completed, except forty miles, for which no loan had been received from the state, the legislature authorized the company to mortgage the forty miles to secure bonds amounting to $6000 per mile, on condition that it would relinquish any claim upon the state for a loan for that portion of the road. *Held:* (1) that the act of the legislature did not invade any substantial or vested rights, and was therefore valid; (2) that the bonds issued under the second mortgage constituted a first lien upon the forty miles of road, in the hands of persons who paid full face value therefor. *Campbell* v. *Texas & N. O. R. Co.*, 2 *Woods* (*U. S.*) 263.

But in such case it was objected that the bonds which were given to the state varied from those which were to be given, and hence they could not, even by legislative aid, be substituted therefor without impairing the obligation of the contract between the company and the bondholders, as the original bonds were to run for ten years, and were to have a sinking fund provided for their payment, while those given were to run for fifteen years, without any sinking fund. *Held*, that such changes were not of the essence of the contract, and that the legislature might authorize the changes without impairing the obligation of the contract contained in the first mortgage. *Campbell* v. *Texas & N. O. R. Co.*, 2 *Woods* (*U. S.*) 263.

It was further objected that the original bonds were to bear but six per cent. interest, while those given in their stead bore eight per cent. *Held*, that the substitution of the additional two per cent. was an invasion of the rights of the holders of the first bonds, and they had a right to object to any bonds being made superior to theirs above $6000 per mile, at six per cent. interest. *Campbell* v. *Texas & N. O. R. Co.*, 2 *Woods* (*U. S.*) 263.

37. Virginia.—The acts of March 20, 1848, and of March 29, 1851, authorized the guaranty of the state upon the bonds of the city of Wheeling to pay her subscription to the stock of the Baltimore & Ohio R. Co., payable to bearer and transferable by delivery, though not payable to the company, but to a third person. *Arents* v. *Com.*, 18 *Gratt.* (*Va.*) 750.—REVIEWING In re Agra & M. Bank, L. R. 2 Ch. 397.

Though the act of March 1, 1867, entitled "An act to authorize the James River & Kanawha Company to borrow money," when its terms are accepted by such company, creates a contract between the company and the state, it does not create a contract between the company and the holders of the $180,000 of state bonds therein mentioned, and a holder of one of these bonds cannot maintain an action thereon against the company. *Stuart* v. *James River & K. Co.*, 24 *Gratt.* (*Va.*) 294.

Though the company has executed a mortgage on its property to secure the money authorized to be borrowed by said act, yet if the company has not borrowed the money, or made use of the bonds intended to be secured by the mortgage, it cannot be held to have accepted the terms of the act or become liable under its proviso in relation to the $180,000 of state bonds. *Stuart* v. *James River & K. Co.*, 24 *Gratt.* (*Va.*) 294.

The holder of bonds of the state issued before the war to the Kanawha board of the James River & Kanawha company, under the act of March 23, 1860, § 9, is entitled to have the bonds transferred upon the books of the second auditor of the treasury, and funded under the provisions of the act of March 30, 1871, as amended by the repealing clause of the act of March 7, 1872, entitled "An act declaring what shall be received in payment of taxes," etc. *Robinson* v. *Rogers*, 24 *Gratt.* (*Va.*) 319.

A proceeding by mandamus is the proper proceeding to compel the second auditor to transfer and fund said bonds, his act in doing so being merely ministerial. *Robinson* v. *Rogers*, 24 *Gratt.* (*Va.*) 319.

The act of March 18, 1862, passed by the Confederate state government, in relation to said bonds, was temporary in its character, and has been repealed by implication. *Robinson* v. *Rogers*, 24 *Gratt.* (*Va.*) 319.

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1. Admission into the Union.—The effect of the admission of a part of the territory of Dakota as the state of South Dakota, and the erection of federal courts therein, under the Act of Congress of Feb. 22, 1889, was, *ipso facto*, to extinguish the territorial government and its territorial courts. *Wing* v. *Chicago & N. W. R. Co.*, 1 *S. Dak.* 455, 47 *N. W. Rep.* 530.

The above-mentioned act makes provision for the disposition of all cases pending in the territorial courts at the time of the admission of South Dakota into the Union, and the circuit and district courts of the United States are declared to be the successors of the supreme and district courts of the territory, if the circuit and district courts of the United States might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases. *Wing* v. *Chicago & N. W. R. Co.*, 1 *S. Dak.* 455, 47 *N. W. Rep.* 530.

Parties have a right to continue the case in the state courts, irrespective of its federal character. As soon as any active steps have been taken, any acts performed, that show presumptively that an election has been made to remain in the state court, the jurisdiction of the state court becomes complete, and no transfer will take place. *Wing* v. *Chicago & N. W. R. Co.*, 1 *S. Dak.* 455, 47 *N. W. Rep.* 530.

2. Contractual obligations. — Except so far as restrained by constitutional limitations, a state has the same power to enter into contracts that any private person has, and is equally bound by the contracts into which it has entered; and when it has become a party to negotiable paper, its liability is governed by the same principles of law that apply to other persons in that relation. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

3. Exemption from suits.— Where the suit is against state officers on state bonds, if the officers are the mere agents of the state, it will be deemed a suit against the state. *In re Ayers*, 123 *U. S.* 443, 8 *Sup. Ct. Rep.* 164.—FOLLOWED IN North Carolina *v.* Temple, 134 U. S. 22.

The rule which forbids suit against the officers of a state because in effect a suit against the state *seems* to apply only where the interest of the state is through some contract or some property right of hers, or where her interest is in a suit in her own name, brought or threatened by her officers, to enforce some alleged claim of hers. *McWhorter* v. *Pensacola & A. R. Co.*, 37 *Am. & Eng. R. Cas.* 566, 24 *Fla.* 417, 12 *Am. St. Rep.* 220, 2 *L. R. A.* 504, 5 *So. Rep.* 129.

An action by a company to enjoin state railroad commissioners from putting in force a schedule of rates, is not in effect a suit against the state; but the statute having prescribed a penalty for violating the rates fixed, and authorized the commissioners to institute action in the name of the state to recover the penalty, in so far as the bill seeks to enjoin them from doing so, it is in effect a suit against the state. *McWhorter* v. *Pensacola & A. R. Co.*, 37 *Am. & Eng. R. Cas.* 566, 24 *Fla.* 417, 12 *Am. St. Rep.* 220, 2 *L. R. A.* 504, 5 *So. Rep.* 129.

4. Comity.*—Causes of action arising under the statutes of one state may be enforced in the courts of another when the laws of both states are substantially the same, and the action is not opposed to the general policy of the state in which the suit is brought. Such suits are generally allowed on the ground of the comity that exists between the states. *Selma, R. & D. R. Co.* v. *Lacy*, 43 *Ga.* 461. *Western & A. R. Co.* v. *Strong*, 52 *Ga.* 461. *Stallknecht* v. *Pennsylvania R. Co.*, 53 *How. Pr.* (*N. Y.*) 305. *Richardson* v. *New York C. R. Co.*, 98 *Mass.* 85. *Chicago, St. L. & N. O. R. Co.* v. *Doyle*, 8 *Am. & Eng. R. Cas.* 171, 60 *Miss.* 977. *Nashville & C. R. Co.* v. *Spray-*

* As to how far federal courts follow state courts, see FEDERAL COURTS, **14-16.**

berry, 8 *Baxt.* (*Tenn.*) 341. *Dennick* v. *Central R. Co.*, 1 *Am. & Eng. R. Cas.* 309, 103 *U. S.* 11. *Patton* v. *Pittsburgh, C. & St. L. R. Co.*, 11 *Am. & Eng. R. Cas.* 658, 96 *Pa. St.* 169. *Morris* v. *Chicago, R. I. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 180, 65 *Iowa* 727.

By the general comity which obtains between the states of the Union, corporations created in one state are permitted to carry on any lawful business in another, and to acquire, hold, and transfer property there the same as individuals. *Cowell* v. *Colorado Springs Co.*, 100 *U. S.* 55.

A right of action for causing the death of a human being given by a state statute may be enforced in the United States courts. *Holmes* v. *Oregon & C. R. Co.*, 5 *Fed. Rep.* 75.

The principles of comity which exist between the federal and state courts will not induce a federal court to withhold relief in a matter affecting interstate commerce, and leave the determination of the validity of a state statute to the state courts. *In re Langford*, 57 *Fed. Rep.* 570, 4 *Int. Com. Rep.* 437

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Service of notice of construction of street crossing on, see CROSSING OF STREETS AND HIGHWAYS, **71.**
— — process on, see PROCESS, **32.**

1. Term defined. — A station agent means the agent locally in charge of the station or depot, and generally it is not at the end of the road, but at some intermediate place, although there may, no doubt, be such an agent at the terminus; but the name cannot apply presumptively, if at all, to any but one who has general charge at the place where he acts, and there is nothing in the name "commercial agent" which necessarily indicates local authority or functions. *Detroit* v. *Wabash, St. L. & P. R. Co.*, 63 *Mich.* 712, 30 *N. W. Rep.* 321.

A written instrument signed only by a company, by which, in consideration of a promise by the owner of lands to convey to it a right of way through lands, the company binds itself (1) to pay him a specified sum of money, (2) to establish a station or depot at or near a named road crossing, (3) to fence the track through his lands, (4) to locate the house for the section hands at or near the station, and (5) to appoint him agent for said station, to continue him as such so long as he faithfully discharges the duties of the agency, and to pay him salary as agent of $30 per month, shou the business of the station justify the same, does not, of itself, constitute him an agent of the company at said station, on the completion of the road, but gives him an absolute right to demand the appointment; nor does it fix his compensation as agent at $30 per month, but leaves it to be determined by the amount of business done at the station, as computed by the customary percentage on receipts; but the promise of the company to appoint him as its agent is supported by a sufficient consideration, although the e is no promise on his part to accept the agency. *Evans* v. *Cincinnati, S. & M. R. Co.*, 78 *Ala.* 341.

To maintain an action for the breach of such agreement, the plaintiff must aver that he made application for the agency; and to support a claim for compensation at thirty dollars per month, he must aver that the business of the station justified the payment of that sum. *Evans* v. *Cincinnati, S. & M. R. Co.*, 78 *Ala.* 341.

2. Fiduciary relation with company.*—Plaintiff, station agent of a company, sued it to recover for breach of an alleged contract in failing to furnish a train for an excursion. The company supposed from its correspondence with plaintiff that the train was wanted for a third party, and agreed to supply it on certain conditions; but afterwards, on discovering that plaintiff was attempting to procure it for his own benefit, it refused to furnish the train at all. *Held*, that plaintiff could not, from his fiduciary relation towards the company, enter into a binding contract with it for such purpose, unless it agreed thereto after being fully advised of all the circumstances of

* Employment of station agent and accepting services implies a contract to compensate him, see 24 AM. & ENG. R. CAS. 99, *abstr.*

the case. *Pegram* v. *Charlotte, C. & A. R. Co.*, 6 *Am. & Eng. R. Cas.* 470, 84 *N. Car.* 696, 37 *Am. Rep.* 639.

It cannot be presumed, in the absence of evidence, that a local station agent along the line of a railway company has any general authority to contract for furnishing cars to shippers at other stations than his own. *Missouri Pac. R. Co.* v. *Stulls*, 15 *Am. & Eng. R. Cas.* 97, 31 *Kan.* 752, 3 *Pac. Rep.* 522.

3. Power to bind company by contracts for transportation * — (1) *In general.*—Where a railroad places an agent in charge of its business at a station, and empowers him to contract for the shipment of produce and freight, it holds him out as possessing the authority to contract with reference to all the necessary and ordinary details of the business; and within the range of such business he is a general agent. *Wood* v. *Chicago, M. & St. P. R. Co.*, 24 *Am. & Eng. R. Cas.* 91, 68 *Iowa* 491, 27 *N. W. Rep.* 473. — DISTINGUISHED IN Voorhees *v.* Chicago, R. I. & P. R. Co., 29 Am. & Eng. R. Cas. 322, 71 Iowa 735.

Station agents are presumed to have authority to make contracts for the transportation of freight, and in the absence of any adequate notice to the public of any limitation upon their authority in that respect the railway company will be bound thereby, both as to the rates and as to the expedition of transportation and delivery. *Easton* v. *Dudley*, 45 *Am. & Eng. R. Cas.* 340, 78 *Tex.* 236, 14 *S. W. Rep.* 583.—DISAPPROVING Wood *v.* Chicago, M. & St. P. R. Co., 59 Iowa 196.

When the company seeks to avoid liability on the ground that the agent had not authority to make the contract, it must show that the shipper knew that the agent was exceeding his authority. *Gelvin* v. *Kansas City, St. J. & C. B. R. Co.*, 21 *Mo. App.* 273.—QUOTING Pruitt *v.* Hannibal & St. J. R. Co., 62 Mo. 527; Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364.

In such case the question whether the shipper had notice of the limitation of the agent's authority is one of fact for the jury, under proper instructions. *Gelvin* v. *Kansas City, St. J. & C. B. R. Co.*, 21 *Mo. App.* 273.

A depot agent, who receives and forwards freight, in the absence of special instructions made known to the public, can bind the company to receive and forward merchandise, and the contract may be made before the goods are actually tendered or delivered. *Watson* v. *Memphis & C. R. Co.*, 9 *Heisk.* (*Tenn.*) 255, 19 *Am. Ry. Rep.* 256.—APPROVING Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

Station agents are presumed to have power to make contracts for their railroads for the transportation of freight. The limitations on their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them. *Pruitt* v. *Hannibal & St. J. R. Co.*, 62 *Mo.* 527.—QUOTED IN Gelvin *v.* Kansas City, St. J. & C. B. R. Co., 21 Mo. App. 273.

The law will regard station agents as fully authorized to make contracts for future transportation of property, and there is no necessity for a shipper to prove that he was so authorized. *Wood* v. *Chicago, M. & St. P. R. Co.*, 6 *Am. & Eng. R. Cas.* 314, 59 *Iowa* 196, 13 *N. W. Rep.* 99.

A ticket agent cannot bind the company by his statement to a person purchasing a ticket for a certain train to a certain station, that such train will stop at such station, where the same is not a regular stopping place for such train. *Pittsburgh, C. & St. L. R. Co.* v. *Nuzum*, 60 *Ind.* 533.—FOLLOWING Ohio & M. R. Co. *v.* Hatton, 60 Ind. 12.

(2) *Contracts to carry beyond company's road.*—A contract made by a station agent for a shipment beyond his company's line is not binding on the company, unless it has held itself out as a carrier to such place, or the agent has been expressly authorized to make the contract, or there has been such previous dealings from which such authority may be reasonably inferred. *Grover & B. Sewing Mach. Co.* v. *Missouri Pac. R. Co.*, 70 *Mo.* 672, 35 *Am. Rep.* 444.—REVIEWING Burroughs *v.* Norwich & W. R. Co., 100 Mass. 26. — APPROVED IN Baker *v.* Kansas City, St. J. & C. B. R. Co., 21 Am. & Eng. R. Cas. 61, 91 Mo. 152. DISTINGUISHED IN St. Louis & S. F. R. Co. *v.* Ryan, 56 Ark. 245. FOLLOWED IN Turner *v.* St. Louis & S. F. R. Co., 20 Mo. App. 632.—*Patterson* v. *Kansas City, Ft. S. & M. R. Co.*, 47 *Mo.*

* Authority of railway station agents, see notes, 45 AM. & ENG. R. CAS. 344; 21 *Id.* 38.

Liability of company for refusal by station agent to accept goods immediately after his removal, whereby they are carried to next station and lost, see 42 AM. & ENG. R. CAS. 453, *abstr.*

App. 570. *Turner* v. *St. Louis & S. F. R. Co.*, 20 *Mo. App.* 632.—FOLLOWING Grover & B. Sewing Mach. Co. *v.* Missouri Pac. R. Co., 70 Mo. 672.

Although a station agent has no authority to contract for transportation beyond the terminus of the line, yet when the company has made other similar contracts, being represented by the same agent, which contracts have been recognized and carried out by it, this is a "course of dealing between plaintiff and defendant's agent, from which the authority of the agent to make the contract might be inferred." *White* v. *Missouri Pac. R. Co.*, 19 *Mo. App.* 400.

The authority of the agent to contract to carry freight beyond the company's line must either be shown specially or be implied from former conduct or course of dealing. *Turner* v. *St. Louis & S. F. R. Co.*, 20 *Mo. App.* 632.

4. —— by bill of lading.—A freight agent signed a bill of lading for thirty-two bales of cotton, which were never delivered to the company, or any agent. A draft with the bill of lading attached, for the price, was forwarded to plaintiffs and paid by them. *Held*, in an action against the company for a non-delivery, that it was not estopped from showing that the cotton was never delivered, and that the agent had no authority to sign the bill of lading until the cotton was actually delivered. *Robinson* v. *Memphis & C. R. Co.*, 9 *Fed. Rep.* 129. —APPLYING Farmers' & M. Nat. Bank *v.* Erie R. Co., 72 N. Y. 188.

One of the defendant's local freight agents, having authority to receive and forward freight, and to give bills of lading specifying the terms of shipment, but having no right to issue such bill except upon actual receipt of the property for transportation, issued bills of lading purporting to be for sixty-five barrels of beans to one W., describing them to be as received, to be forwarded to C. as consignee, but adding, with reference to the packages, "contents unknown." W. drew a draft on the consignee, which plaintiff discounted on the faith of and on transfer of the bills of lading. No barrels of beans were in fact shipped by W. or delivered to defendant, but the bills were issued in pursuance of a conspiracy between the agent and W. to defraud. Payment of the draft was refused. In an action upon the bills of lading —*held*: (1) that as the company had clothed the agent with power to issue bills of lading it was estopped from denying their existence, and was liable to plaintiff; (2) that the recital in the bills that the contents of the packages were unknown was no defense. *Bank of Batavia* v. *New York, L. E. & W. R. Co.*, 32 *Am. & Eng. R. Cas.* 497, 106 *N. Y.* 195, 8 *N. Y. S. R.* 209, 7 *Cent. Rep.* 822, 12 *N. E. Rep.* 433; *affirming* 33 *Hun* 589.—DISTINGUISHED IN Manhattan L. Ins. Co. *v.* Forty-second St. & G. S. F. R. Co., 46 N. Y. S. R. 130. NOT FOLLOWED IN National Bank *v.* Chicago, B. & N. R. Co., 44 Minn. 224.

A freight agent, and a partner in a firm, caused printed receipts or shipping notes in the form commonly used by the company to be signed by his name as the company's agent, in favor of the firm, for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received the flour addressed to appellants, and were attached to drafts drawn by the firm, and accepted by appellants. The agent received the proceeds of the drafts and absconded. *Held*, in an action to recover the amount of the drafts that the act of the agent in issuing a false and fraudulent receipt for goods never delivered to the company was not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable. (Fournier and Henry, J.J., dissenting.) *Erb* v. *Great Western R. Co.*, 5 *Can. Sup. Ct.* 179.

5. —— by agreement to furnish cars. —It is within the authority of a freight agent to assure a shipper of live stock that there will be no delay in unloading, thereby inducing him to make a shipment at a certain time. *Lake Erie & W. R. Co.* v. *Rosenberg*, 31 *Ill. App.* 47.

The question whether a station agent has, as such, authority to bind the company by a contract to furnish cars to a shipper at his station at a particular time is one of fact, and not of law. (Beck, J., dissenting.) *Wood* v. *Chicago, M. & St. P. R. Co.*, 6 *Am. & Eng. R. Cas.* 314, 59 *Iowa* 196, 13 *N. W. Rep.* 99.—DISAPPROVED IN Easton *v.* Dudley, 78 Tex. 236. OVERRULED IN Wood *v.* Chicago, M. & St. P. R. Co., 68 Iowa 491.

A freight agent having power to contract for the carriage of freight agreed with a party to furnish cars at a given point on a certain day. He then telegraphed to headquarters for the cars which were not fur-

nished. In a suit for breach of contract—*held*, that there was nothing in the above evidence to show that the agent had power to contract to furnish special cars, or that he was held out to the public by the railroad company as having such power. *Wood* v. *Chicago, M. & St. P. R. Co.* (*Iowa*), 21 *Am. & Eng. R. Cas.* 36, 24 *N. W. Rep.* 46.

Where a company authorizes a station agent to contract for the transportation of perishable property at a given rate, such authority, unless restricted by some rule or instruction of the company, carries with it the power to bind the company by an agreement to furnish cars for such transportation on a specified day. *Wood* v. *Chicago, M. & St. P. R. Co.*, 24 *Am. & Eng. R. Cas.* 91, 68 *Iowa* 491, 27 *N. W. Rep.* 473.

And the company cannot avoid liability on a contract made by such agent within the apparent scope of his authority, by showing that the agent acted in violation of instructions of which the shipper had no notice. *Wood* v. *Chicago, M. & St. P. R. Co.*, 24 *Am. & Eng. R. Cas.* 91, 68 *Iowa* 491, 27 *N. W. Rep.* 473.

A local station agent has no authority generally to contract to furnish cars to shippers at stations other than that at which he is stationed. *Missouri Pac. R. Co.* v. *Stults*, 15 *Am. & Eng. R. Cas.* 97, 31 *Kan.* 752, 3 *Pac. Rep.* 522. *Voorhees* v. *Chicago, R. I. & P. R. Co.*, 29 *Am. & Eng. R. Cas.* 322, 71 *Iowa* 735, 30 *N. W. Rep.* 29.—DISTINGUISHING Wood *v.* Chicago, M. & St. P. R. Co., 68 Iowa 491.

A contract by a station agent to furnish a certain number of cars on a certain day, and to ship cattle, is within the scope of his apparent authority, and is binding on the company, unless the shipper has actual knowledge that the agent does not have the authority. *Harrison* v. *Missouri Pac. R. Co.*, 7 *Am. & Eng. R. Cas.* 382, 74 *Mo.* 364, 41 *Am. Rep.* 318.—QUOTED IN Gelvin *v.* Kansas City, St. J. & C. B. R. Co., 21 Mo. App. 273.

A contract by a railway station agent with a shipper for a given number of stock cars at a stated time and place binds the corporation. *Easton* v. *Dudley*, 45 *Am. & Eng. R. Cas.* 340, 78 *Tex.* 236, 14 *S. W. Rep.* 583. *McCarty* v. *Gulf, C. & S. F. R. Co.*, 79 *Tex.* 33, 15 *S. W. Rep.* 164.

Especially where it also appears that the shipper to whom the cars were to be furnished did not know of the lack of authority of the agent so to contract. *Cross* v. *Graves*, 4 *Tex. App.* (*Civ. Cas.*) 149, 16 *S. W. Rep.* 102.

And it is not necessary for the shipper, in a suit against the company for damages resulting from a failure so to furnish the cars, to allege and prove that such station master has authority to make such verbal agreement. *Gulf, C. & S. F. R. Co.* v. *Wright*, 1 *Tex. Civ. App.* 402, 21 *S. W. Rep.* 80.

6. —— by contract for repairs of cars.—Though a station agent is a special agent, he is presumed to have authority sufficient to enable him to attend to the safe loading of freight at his station, and, therefore, to contract on the part of the company for repairs on cars which are essential to the safe loading of such freight. *Rosenthal* v. *St. Louis, I. M. & S. R. Co.*, 40 *Mo. App.* 579.

7. —— By contract for board of injured employe.—The general agent of a railroad company is authorized, by virtue of his position as general manager of the company's affairs, to employ a hotel keeper to furnish board and attendance, at the expense of the company, to a brakeman injured while working for such company. A mere station agent of a railroad company, by virtue of his position as such agent, has not the like authority. *Atlantic & P. R. Co.* v. *Reisner*, 18 *Kan.* 458, 16 *Am. Ry. Rep.* 36.—DISTINGUISHED IN Union Pac. R. Co. *v.* Beatty, 26 Am. & Eng. R. Cas. 84, 35 Kan. 265. QUOTED IN Terre Haute & I. R. Co. *v.* McMurray, 98 Ind. 358. REVIEWED IN Louisville, E. & St. L. R. Co. *v.* McVay, 98 Ind. 391.

8. Authority to employ detectives and to make arrests.—Miss. Act of Feb. 22, 1890, constituting depot agents conservators of the peace, with authority to preserve order in waiting rooms, and power to make arrests, does not make them officers of the state, but merely enlarges and defines their duties as agents of the railroad companies. *King* v. *Illinois C. R. Co.*, 69 *Miss.* 245, 10 *So. Rep.* 42.

For the proper and lawful exercise of this authority railroad companies are responsible, and if a depot agent arrests one not guilty of disorderly conduct or otherwise liable to arrest under said statute, the company is liable for the false imprisonment, although the agent had no express instructions from it to make arrests, and supposed he was acting as an officer of the state. *King* v.

Illinois C. R. Co., 69 *Miss.* 245, 10 *So. Rep.* 42.

There is no presumption that a station agent has a right to employ, in the name of the company, detectives to ferret out robberies. Accordingly, in an action by a detective to recover for services rendered at the instance of a station agent, proof of the contract with the agent to charge the company cannot be admitted until it first appears that the agent had authority to make such contracts. *Schlapbach* v. *Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas* 42, 35 *So. Car.* 517, 15 *S. E. Rep.* 241.—APPLYING Piedmont Mfg. Co. *v.* Columbia & G. R. Co., 19 So. Car. 373; Waldrop *v.* Greenwood, L. & S. R. Co., 28 So. Car. 159.

9. Liability for torts or negligence of.—Where a person enters a station not for the purpose of taking passage on the road, but to wait for a train on another road, the station agent may remove him; but in doing so he acts in the course of his employment, and the company is liable if he uses unnecessary force. *Johnson* v. *Chicago, R. I. & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 206, 58 *Iowa* 348, 12 *N. W. Rep.* 329.

A station in a certain town was in a cut. The track ran alongside a freight platform also in the cut. The station agent directed a party with a loaded wagon of goods to be delivered to the company as freight to drive up to the platform, partly on the track. While so doing he was run over and injured by a car which the agent had previously directed to be moved upon the track. *Held*, that the company was liable. *Foss* v. *Chicago, M. & St. P. R. Co.*, 19 *Am & Eng. R. Cas.* 112, 33 *Minn.* 392, 23 *N. W. Rep.* 553.

10. —— frauds.—If a station agent fraudulently issues a bill of lading for goods not placed in his possession, and delivers it to a person acting in collusion with him, the company is not liable to an innocent indorsee who acquires the bill of lading for value and without notice. *Friedlander* v. *Texas & P. R. Co.*, 10 *Am. & Eng R. Cas.* 70, 130 *U. S.* 416, 9 *Sup. Ct. Rep.* 570.—DISTINGUISHED IN Walters *v.* Western & A. R. Co., 56 Fed. Rep. 369; St. Louis & S. F. R. Co. *v.* Ryan, 56 Ark. 245.

A railroad company is not liable where its agent fraudulently receipts for goods to be shipped, when in fact no goods are ever received, though the purchaser has paid for them on the faith of such receipt. It is not within the scope of the agent's authority to give such fraudulent receipt. *Oliver* v. *Great Western R. Co.*, 28 *U. C. C. P.* 143.—DISTINGUISHING Royal Canadian Bank *v.* Grand Trunk R. Co., 23 U. C. C. P. 225.—REVIEWED IN Erb *v.* Great Western R. Co., 3 Ont. App. 446.

11. Bond and liability of sureties.—Where a railroad company sues the sureties of a bond given by one of its depot agents, to recover for moneys received and not accounted for by the agent, it is not competent to put in evidence printed instructions given by the company to such agents, requiring them to make monthly reports, in the absence of anything to show that the default is shown by such monthly reports or that the agent violated his duty in failing to make such reports. *Memphis & C. R. Co.* v. *Maples*, 63 *Ala.* 601.

The appointment of a station agent was experimental, but the experiment proved satisfactory, and there was no revocation and no reappointment. His bond provided for the faithful discharge of his duties "during the time he holds the said appointment, and until he is relieved therefrom." *Held*, that his sureties were bound to answer for any default during the time he was agent. *Mobile & M. R. Co*, v. *Brewer*, 76 *Ala.* 135.

Where the agent of a railroad company, who receives funds, has given bond and security to pay over and account for such funds, the sureties will not be bound for funds that come into the agent's hands after a want of integrity on his part is discovered by the company, but the sureties may be bound so long as there is nothing to show more than a want of diligence or punctuality. *Charlotte, C. & A. R. Co.* v. *Gow*, 59 *Ga.* 685.

Any substantial change in the duties or liabilities of a ticket agent, after he has given bond and security, without the surety's consent, would discharge him from liability; but where the conditions of the bond are that the agent will "faithfully perform all the duties of the said office or place which are or may be imposed upon him under this or any future appointment," additional railroad connections, which impose additional duties on the agent, will not affect the surety's liability on the bond. *Eastern R. Co.* v. *Loring*, 26 *Am. & Eng. R. Cas.* 92, 138 *Mass.* 381.—DISTINGUISH-

ING Grocer's Bank *v.* Kingman, 16 Gray (Mass.) 473.

A bond recited that the principal obligor had been appointed ticket and freight agent, at Ellicott's Mills, and was conditioned for the faithful performance of the duties of said office so long as he should hold the same. At the date and delivery of the bond, Ellicott's Mills was a second-class station, but the company subsequently made it a first-class station. At first-class stations a greater amount of freight is paid than at second-class stations, but the duties of the ticket and freight agent are the same at both. *Held*, that the change in the regulations of the company, by which this was made a first-class station, did not discharge the sureties on the bond. *Strawbridge* v. *Baltimore & O. R. Co.*, 14 *Md.* 360.

In an action by a railroad company against the sureties on the bond of a station agent, who was in arrears to the company when the bond was executed, and continued to make additional defaults in several subsequent monthly settlements, the presiding judge committed no error in charging the jury that "if the plaintiffs knew when the bond was given that [their agent] was in default and indebted to them in his pre-existing agency, and yet concealed this fact and held him out to [the sureties] as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them." *Wilmington, C. & A. R. Co.* v. *Ling*, 16 *Am. & Eng. R. Cas.* 539, 18 *So. Car.* 116.

But in charging further that "each default of [the agent], after the bond was given, in failing to pay over to the company the money collected by him as their agent, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him;" that "if knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them," the judge erred in failing to limit the discharge to defaults occurring after the first. *Wilmington, C. & A. R. Co.* v. *Ling*, 16 *Am. & Eng. R. Cas.* 539, 18 *So. Car.* 116.

The judge erred in refusing to charge the jury that, as matter of law, it was "no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties." *Wilmington, C. & A. R. Co.* v. *Ling*, 16 *Am. & Eng. R. Cas.* 539, 18 *So. Car.* 116.

He also erred in refusing to charge that "the plaintiffs were not bound to notify the sureties of each or any default of the principal agent," and that "the sureties were not discharged by failure on their part to do so." *Wilmington, C. & A. R. Co.* v. *Ling*, 16 *Am. & Eng. R. Cas.* 539, 18 *So. Car.* 116.

Defendant was a station master, having under him a collector and cashier, whose duties were to collect all moneys due the company, keep regular accounts, and make statement of the business at fixed times to the company's principal office, and such accounts were kept and statements made, and balances were permitted to run up against the station without notice to defendant. *Held*, that he, and the sureties on his official bond, were not liable for such balances, there being nothing to connect him with the defalcation or neglect. *Louisville & N. R. Co.* v. *Blair*, 1 *Tenn. Ch.* 351.

A rule of a railroad required agents to settle monthly, and it was expected, though there was no rule on the subject, that they would transact all business on a cash basis. A local agent let out freights on a credit, which was known by the president, who remonstrated with him for doing so, and a deficit was carried for eighteen months. There was no fraudulent concealment of the facts, but the agent's sureties were not informed. *Held:* (1) that the sureties were not released from liability because the officers of the company knew that the agent gave credit, and if there had been a rule that freight would be paid for in cash, and the rule had been changed after the agent gave bond, the change would not have released the sureties; (2) that the failure to inform the sureties of the facts did not release them. *Richmond & P. R. Co.* v. *Kasey*, 30 *Gratt.* (*Va.*) 218.—QUOTING Albany Dutch Church *v.* Vedder, 14 Wend. (N. Y.) 165; Monroe County Sup'rs *v.* Otis, 62 N. Y. 88. REVIEWING People *v.* Jansen, 7 Johns. (N. Y.) 332; Phillips *v.* Foxall, L. R. 7 Q. B. 666.

In an action of debt on a bond given by a station agent, conditioned for the faithful performance of his duties, and that the sureties should make due and sufficient recompense to the company for any loss or damage occasioned by the agent, the agent may plead as a set-off any claim that he has against the company for services ren-

dered. *Baltimore & O. R. Co.* v. *Jameson*, 13 *W. Va.* 833.—REVIEWED IN Baltimore & O. R. Co. *v.* Bitner, 15 W. Va. 455.

Could the defendant in such suit, with or without notice of his claim, under a plea of conditions performed, prove such service by way of recoupment? *Baltimore & O. R. Co.* v. *Jameson*, 13 *W. Va.* 833.

STATION GROUNDS.

Defects in premises, liability of carrier for, see CARRIAGE OF PASSENGERS, **273.**
Duty to build cattle-guards at, see CATTLE-GUARDS, **10.**
— — **fence at,** see FENCES, **58, 59.**
Liability for injuries caused by negligence at, see STATIONS AND DEPOTS, **89-101.**
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STATION GUARDS.

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STATIONS AND DEPOTS.

Abandonment of, see ABANDONMENT, **5.**
Agreements by agents to locate, see AGENCY, **47.**
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Carrying beyond, as an element of damages, see CARRIAGE OF PASSENGERS, **624.**
Compelling construction of, see MANDAMUS, **11.**
Conditions in subscription as to construction of, see SUBSCRIPTIONS TO STOCK, **216-219.**
— — — — — **place of building,** see MUNICIPAL AND LOCAL AID, **237.**
Construction of statutes relative to, see MUNICIPAL AND LOCAL AID, **69.**
Contracts to locate at particular place, validity of, see CONTRACTS, **59, 60.**
Contributory negligence of passenger at, after alighting from train, see DEATH BY WRONGFUL ACT, **189, 190.**
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Duty to fence track at, see ANIMALS, INJURIES TO, **107.**
— — **furnish freight facilities at,** see INTERSTATE COMMERCE, **106.**
— — **permit building of elevators at,** see ELEVATORS, **3.**
— — **run between designated, under working agreements,** see LEASES, ETC., **133.**
— — **stop for passengers at places other than,** see CARRIAGE OF PASSENGERS, **245.**
— — **stop trains at,** see CARRIAGE OF PASSENGERS, **214-216.**
Enforcement of contract to build, see SPECIFIC PERFORMANCE, **12.**
Erection of, when a "taking" of land, see EMINENT DOMAIN, **166.**
— — **where railways intersect,** see CROSSING OF RAILROADS, **78.**
Evidence of contemplated, see EMINENT DOMAIN, **630.**
Excessive damages to passenger put off at or near, see EJECTION OF PASSENGERS, **131, 132.**
Expulsion of passengers at, see EJECTION OF PASSENGERS, **65, 66.**
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I. DEFINITIONS; INTERPRETATION OF WORDS.

1. What is a depot.* — The place where a carrier is accustomed to receive, deposit and keep ready for transportation or delivery merchandise is a depot, within the general signification of the word. *Maghee* v. *Camden & A. R. Transp. Co.*, 45 *N. Y.* 514.

A depot is a place where passengers get on and off the cars, and where goods are loaded and unloaded; and all grounds necessary or convenient and actually used for these purposes are included in depot grounds. Perhaps, also, as the engine is frequently supplied with wood and water at such places, so much ground as is necessary and used for those purposes, where wood and water are taken at a depot, should be included in depot grounds. *Fowler* v. *Farmers' L. & T. Co.*, 21 *Wis.* 77.

2. Depot waiting room.—A depot waiting room where the public constantly resort ought to be considered a public place. It follows therefore that under the statute a policeman would have authority at such place to arrest a drunken man if guilty of disorderly conduct by being intoxicated. *Pratt* v. *Brown*, 80 *Tex.* 608, 16 *S. W. Rep.* 443.

3. "Depot or station." — The lessee of a railroad for the term of twenty years built a platform for the accommodation of passengers at a place on the road, and gave it a regular station name, and placed an old baggage car on it, which served as shelter to passengers. No agent was ever placed at the station, and no tickets were sold there, nor freight billed to or from the place; but tickets were sold at other stations for the place, and passengers were taken up and let off, and the mail trains

* A depot placed on lands by consent of the owner is not a fixture and may be removed by the company, see 25 AM. & ENG. R. CAS. 251, *abstr.*

made regular stops. *Held*, that the place was a "depot or station," within the meaning of Connecticut Act of 1866, providing that a company shall not abandon "any depot or station" on its road, except by approval of the railroad commissioners. *State* v. *New Haven & N. Co.*, 37 *Conn.* 153.—APPROVED IN New Haven & N. Co. *v.* Hamersley, 2 Am. & Eng. R. Cas. 418, 104 U. S. 1. DISTINGUISHED IN State *v.* New Haven & N. Co., 41 Conn. 134. REVIEWED IN People *v.* New York C. & H. R. R. Co., 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

In such case the company owning the road was concluded by the establishment of the station by the lessee; and a mandamus would lie, at the instance of the attorney-general, to compel the company to re-establish the station, where it was abandoned without the consent of the railroad commissioners. *Connecticut* v. *New Haven & N. Co.*, 37 *Conn.* 153.

Where a company contracts not to "build or allow but one other depot between" certain points, a station at a coal bank, where trains merely stop to take or leave cars, for purposes connected with the trade, is not a "depot" within the meaning of the contract. *Mahaska County R. Co.* v. *Des Moines Valley R. Co.*, 28 *Iowa* 437.

4. "Regular depot or station."—A house and platform at the side of the track, at which freight is occasionally received and discharged by the company, but at which no agent's office or books are kept, or bills of lading or receipts given, is not "a regular depot or station," within the meaning of N. Car. Code, § 1964, imposing a penalty for refusal to receive freight at a regular depot or station. *State* v. *Suffolk & C. R. Co.*, 35 *Am. & Eng. R. Cas.* 529, 100 *N. Car.* 158, 5 *S. E. Rep.* 379.

The terms "a regular depot" or "station," employed in N. Car. Code, § 1964, contemplate fixed and established places on the line of a railroad, equipped with suitable buildings and furnished with the necessary officers and servants for the regular transaction of business, for the receipt and delivery of freights and for the comfort and convenience of passengers. *Land* v. *Wilmington & W. R.*, 40 *Am. & Eng. R. Cas.* 18, 104 *N. Car.* 48, 10 *S. E. Rep.* 80.

Where it was shown that a railroad company had been in the habit of stopping at a certain locality to deliver mails; that it received such passengers there as might wish to embark on its trains, and that it had also been accustomed to receive and deliver freights for the accommodation of its patrons in the vicinity; that the place was designated as a station on its tariff schedule, but that it had no agent, office, warehouse, or other facility for the transaction of its business—*held*, not to constitute "a regular depot" or "station," within the meaning of the statute. *Land* v. *Wilmington & W. R. Co.*, 40 *Am. & Eng. R. Cas.* 18, 104 *N. Car.* 48, 10 *S. E. Rep.* 80.

5. "Station."—A place that has a mere platform at which certain daily trains stop to take on or let off passengers, but where the company has never sold tickets, or kept any office or agent, and which has never been placed on its time-table or list of stations, is not a station, within the meaning of Connecticut statutes which forbid companies to abandon stations without the consent of the railroad commissioners. *State* v. *New Haven & N. Co.*, 41 *Conn.* 134, 6 *Am. Ry. Rep.* 84.—DISTINGUISHING State *v.* New Haven & N. Co., 37 Conn. 153.

Whether such a place is a station or not, is a mixed question of law and fact, and a decision of a trial court that a certain place is a station, within the meaning of the statute, can be reviewed by the supreme court on appeal. *State* v. *New Haven & N. Co.*, 41 *Conn.* 134, 6 *Am. Ry. Rep.* 84.

The word "station" is synonymous with the words passenger depot, meaning the place, the grounds, and the buildings prepared for and used by the traveling public at such points in waiting for, taking, and leaving the trains, and by the company in operating the road at that point. *State* v. *Indiana & I. S. R. Co.*, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

Where the legislature imposes the duty of doing a certain thing, it carries with it the doing of such things as are necessary to perform the duty commanded; and the imposed duty of noting upon blackboards whether or not a train is on time, or if late, how much, carries with it, by necessary implication, the furnishing of the blackboard and the necessary material to write with. *State* v. *Indiana & I. S. R. Co.*, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

Whether there is a failure to make an entry on the board concerning the train, as required by the act, or whether there be an entry concerning such train, which is false,

there could be but one forfeiture as to such train at such station during the same trip. *State* v. *Indiana & I. S. R. Co.*, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

6. "Railway station."—*Prima facie* the term "railway station," in a contract, means the station house. *Carroll* v. *Casemore*, 20 *Grant's Ch.* (*U. C.*) 16.

7. "Usual stopping places." — By the words "any usual stopping place," as used in the statute, is meant either a regular station, or any other place which a company expressly, by public notice or otherwise, or impliedly by user for such purpose, has designated as a proper place for passengers to get on or off its trains, and where they, in consequence thereof, have the right to demand the exercise of this privilege. A place at which a train is stopped for wood or water only is not "a usual stopping-place," in contemplation of the statute. *Texas & P. R. Co.* v. *Casey*, 52 *Tex.* 112.

8. "Depot grounds." — A railroad bridge near a station was so situated that, when an engine was stopped for taking water at the station, a shipper of live stock, who was accompanying his cattle, was compelled to pass around in front of the engine and over the bridge on which the engine was standing, in order to look after his stock. It frequently happened that travelers were compelled to leave a passenger train on the side of the bridge opposite the station while the engine was taking water, as the train would not again stop at the station. *Held*, in an action against the company for the death of a shipper who fell from the bridge in the night-time while passing around the engine to get at his stock, that the question of liability of the company was for the jury, with the understanding that the company would be liable if the bridge could properly be considered as a part of the depot grounds, and a verdict to the effect that defendant was liable by reason of not maintaining a railing on such bridge would not be disturbed. *Illinois C. R. Co.* v. *Foley*, 56 *Am. & Eng. R. Cas.* 273, 53 *Fed. Rep.* 459.

Under Wisconsin statutes railroad companies are required to fence their roads, except at depot grounds and across highways. Plaintiff was injured in the neighborhood of a depot where there was but one track, more than 100 yards beyond the switch. It appeared that the company subsequently placed a cattle-guard between the place of the accident and the station, which it maintained, and it further appeared that long trains in switching would run out to the place of the accident. *Held*, that it could not be considered as a part of the company's depot grounds, within the meaning of the statute. *Blair* v. *Milwaukee & P. du C. R. Co.*, 20 *Wis.* 254.—REVIEWED IN Curry *v.* Chicago & N. W. R. Co., 43 Wis. 665.

A company claimed that it was not liable for stock killed, on the ground that the place was a part of its depot grounds, and it was, therefore, not required to fence. The evidence was conflicting, as to the purposes for which the ground was used. *Held*, that the court would not set aside a verdict on the ground that it was not supported by evidence, where the question was fairly submitted to the jury, though the court was of opinion that the weight of evidence was that the place was a part of the depot grounds. *Fowler* v. *Farmers' L. & T. Co.*, 21 *Wis.* 77.—QUOTED IN Hurt *v.* St. Paul, M. & M. R. Co., 39 Minn. 485, 40 N. W. Rep. 613.

II. ESTABLISHMENT; LOCATION.

1. *Power to Locate.*

9. Generally. — Railroad authorities have unlimited power to locate depots for the best interest of the community and of the road, even though a money consideration be paid therefor, but they cannot make a matter of commerce of them as a punishment to a non-subscribing town. *Currie* v. *Natchez, J. & C. R. Co.*, 20 *Am. & Eng. R. Cas.* 303, 61 *Miss.* 725.

Companies are permitted to establish their own depots, or stations, and to arrange their own schedules for the safe and proper movement and management of their trains. *Wells* v. *Alabama G. S. R. Co.*, 40 *Am. & Eng. R. Cas.* 645, 67 *Miss.* 24, 6 *So. Rep.* 737.

10. In another state. — As a general rule, directors cannot, without the consent of the stockholders, authorize the construction of a passenger station at a city in a state foreign to that in which the company is created, and to which its own road does not extend, or the payment of any portion of the cost of the construction. Such expenditures would not be considered as falling within the ordinary scope of their powers. *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.*, 42 *Am. & Eng. R. Cas.* 688, 136 *U. S.* 356, 10 *Sup. Ct. Rep.* 1004.

But where two roads in adjoining states are run jointly, and increased facilities at such place are necessary to enable the joint management to retain its extended business, such directors may contract to pay a portion of the cost of erecting such increased facilities. *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.*, 42 *Am. & Eng. R. Cas.* 688, 136 *U. S.* 356, 10 *Sup. Ct. Rep.* 1004.—DISTINGUISHED IN Shepaug Voting Trust Cases, 60 Conn. 553.

11. In or near highways—Obstruction—Nuisance.—A railway company authorized by special act to widen its railway and to build additional stations, is not, in the building of such stations, controlled by the London & Metropolis Management Act, passed shortly after the special act requiring certain distances to be left between buildings and highways. *London & B. R. Co.* v. *Limehouse Dist. Board of Works*, 3 *Kay & J.* 123.

Whether, in point of fact, a public highway is injuriously obstructed by the erection of a depot near to it, and a nuisance thereby created, is a question for the jury. *State* v. *Morris & E. R. Co.*, 25 *N. J. L.* 437.

A railroad company is not justified in building a depot upon a public highway, or so near to it that trains must injuriously obstruct the public travel. *State* v. *Morris & E. R. Co.*, 25 *N. J. L.* 437.

Railroad companies have no right to build station houses in highways, which merely cross the railroad, and the location of which they do not change. In such cases they have no right to use the land covered by the highway except on the track crossing; and in this they are bound to do as little damage to the highway as possible. *State* v. *Vermont C. R. Co.*, 27 *Vt.* 103.

12. In streets—Interpretation of statutes.—Under the laws of Iowa, as construed by the supreme court of the state, a railroad company has a right to lay its tracks over Water street in the city of Keokuk, in front of an abutting lot owner, without his consent, after having obtained the consent of the city authorities; but the right does not extend to the erection of a depot building in the street, without the lot owner's consent. *Barney* v. *Keokuk*, 4 *Dill.* (*U. S.*) 593.

By N. Y. Act of 1884, ch. 187, the common council of the city of Schenectady was authorized to close a part of Liberty street in that city, to allow defendant company to build a large depot. This act was amended the same year by chapter 546, by providing for compensation to adjoining property owners, which should be ascertained according to article 7 of the act, entitled "An act to amend and consolidate the several acts relative to the city of Schenectady, for appraising damages and compensation to be made for property taken for public improvements." *Held*, that the latter act was not in conflict with the state Constitution, art. 3, § 17, providing that no act shall be passed which shall provide that any existing law, or any part thereof, shall be made a part of said act, or which shall enact that any existing law shall be applicable, except by inserting it in such act. *Weinckie* v. *New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 584, 61 *Hun* 619; *affirmed in* 133 *N. Y.* 656, *mem.*, 31 *N. E. Rep.* 625, 45 *N. Y. S. R.* 929.

Neither was such statute in violation of the state Constitution, art. 3, § 18, which prohibits the legislature from passing private or local acts for laying out, opening, working, or discontinuing roads, highways, or alleys. *Weinckie* v. *New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 584, 61 *Hun* 619, 15 *N. Y. Supp.* 680; *affirmed in* 133 *N. Y.* 656, *mem.*, 31 *N. E. Rep.* 625, 45 *N. Y. S. R.* 929.

Neither does the statute violate the state Constitution, art. 3, § 18, paragraphs 11, 12, which prohibits laws conferring the right to lay down tracks, or conferring exclusive privileges. *Weinckie* v. *New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 584, 61 *Hun* 619, 15 *N. Y. Supp.* 680; *affirmed in* 133 *N. Y.* 656, *mem.*, 31 *N. E. Rep.* 625, 45 *N. Y. S. R.* 929.

By said acts the legislature conferred upon the common council the authority to provide by their ordinance to close the street to vehicles, horses and cattle, and provide such safe and reasonably convenient way of passage for pedestrians as could be done consistently with the grant of that part of the street for depot purposes. *Weinckie* v. *New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 584, 61 *Hun* 619, 15 *N. Y. Supp.* 680; *affirmed in* 133 *N. Y.* 656, *mem.*, 31 *N. E. Rep.* 625, 45 *N. Y. S. R.* 929.

By N. Y. Act of 1869, ch. 919, the New York & Harlem railroad company was authorized, in constructing its new depot in the city of New York, to use a portion of Fourth avenue and Forty-second street. By the act of 1884, ch. 261, the company

was authorized to enlarge its passenger depot, by extending the same over an additional portion of Fourth avenue. *Held*, that any portion of the avenue which the company has not occupied remains a part of Fourth avenue, as it was before the new depot was built; and it has no right to interfere with one using it in a lawful manner for transferring baggage. *New York, N. H. & H. R. Co.* v. *Jackson*, 15 *N. Y. S. R.* 167; *affirmed in* 120 *N. Y.* 664, *mem.*, 24 *N. E. Rep.* 1104, 31 *N. Y. S. R.* 1000.

A company was empowered by a special act passed subsequently to the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), to make under a street in London a subway "with all necessary works connected therewith," and to take and use such of the lands delineated on the deposited plans, and described in the deposited books of reference as might be required for that purpose. The company built in the street within the limits of deviation a station, a part of which projected beyond the general line of buildings. This station was necessary for the purposes of the railway, and apart from the provisions of the Metropolis Management Acts was unobjectionable, but it could have been erected within the general line of buildings without any inconvenience except a considerable increase of expense. *Held*, that the station being necessary, the special act empowered the company to make it upon any of the scheduled lands lying within the limits of deviation; that the effect was to repeal section 75 of the Metropolis Management Amendment Act, 1862, so far as related to the station. *City & S. L. R. Co.* v. *London County Council* [1891], 2 *Q. B.* 513. —DISTINGUISHING Queen *v.* Wycombe R. Co., L. R. 2 Q. B. 310.

13. Without consulting convenience of public.—Railway companies, in the absence of statutory provisions, are vested with a very broad discretion in the matter of locating, constructing and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. *People ex rel.* v. *Chicago & A. R. Co.*, 40 *Am. & Eng. R. Cas.* 352, 130 *Ill.* 175, 22 *N. E. Rep.* 857.—QUOTING Ohio & M. R. Co. *v.* People ex rel., 120 Ill. 200.

In the absence of direct legislation regulating and controlling railroads, a court of general jurisdiction may compel a company to extend to the public proper depot facilities for the transaction of business. *Northern Pac. R. Co.* v. *Territory ex rel.*, 29 *Am. & Eng. R. Cas.* 82, 3 *Wash. T.* 303, 13 *Pac. Rep.* 604.

Defendant company abandoned its station in a village of 500 inhabitants, which was the largest business centre on that branch of the road, was a county seat, with flourishing churches and schools, and doing an annual business of from $200,000 to $300,000, and had available grounds for depots and other buildings; and located its depot at a place four miles distant, which was simply a town on paper, with no inhabitants save a few speculators, who, being in the secrets of the company, had located there for the purpose of profiting by building up a town at the expense of the other place. *Held*, that the courts of the territory, without direct legislation, had the power to compel the company to grant the former place proper station facilities. *Northern Pac. R. Co.* v. *Territory ex rel.*, 29 *Am. & Eng. R. Cas.* 82, 3 *Wash. T.* 303, 13 *Pac. Rep.* 604.

14. Authority of railway commissioners.—Under the authority of Me. Act of 1871, ch. 204, the railroad commissioners decided that public convenience and necessity require the erection of a freight and passenger depot at a certain place on defendant's road. The corporation refused to comply with the order, and the commissioners filed their petition praying this court to enforce compliance. *Held:* (1) that the statute is constitutional; (2) that it is not in conflict with that provision of the company's charter which requires it "to receive at all proper times and places, and convey, persons and articles." Such provision does not leave it to the company to determine what are proper times and places. *Railroad Com'rs* v. *Portland & O. C. R. Co.*, 63 *Me.* 269.—APPROVING Com. *v.* Eastern R. Co., 103 Mass. 258. REVIEWING AND DISTINGUISHING State *v.* Noyes, 47 Me. 205. — REVIEWED IN Scofield *v.* Lake Shore & M. S. R. Co., 23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571, 54 Am. Rep. 846.

The railroad commission, under N. Y. Act of 1882, ch. 353, has judicial power to hear and determine, upon notice, questions arising between the people and a railroad

corporation, but no power is given to it or to any court to enforce the decision, and its proceedings and determinations amount to nothing more than an inquest for information. The attorney-general is given no new power in the matter, and the corporation may continue the management of its business in its own way, without regard to the judgment of the commissioners. *People* v. *New York, L. E. & W. R. Co.*, 104 *N. Y.* 58, 9 *N. E. Rep.* 856.

The supreme court has no jurisdiction to grant a mandamus on behalf of the people, at the instance of the attorney-general, requiring a railroad corporation to erect a building, at a station on its road, of sufficient capacity to accommodate the passengers and freight business at that place, although its station building is entirely inadequate for these purposes, and the absence of a suitable depot building and warehouse is a serious injury to the public business, and although upon a complaint made to the railroad commissioners they have adjudged and recommended that the company should construct a suitable building within a time named. *People* v. *New York, L. E. & W. R. Co.*, 104 *N. Y.* 58, 9 *N. E. Rep.* 856.

2. Duty to Locate.

15. Generally.* — In the absence of charter or statutory provisions, a railroad cannot be required to construct and maintain depot buildings at those points on the line where it is in the habit of receiving and discharging passengers and freight. *People ex rel.* v. *Chicago & A. R. Co.*, (*Ill.*) 35 *Am. & Eng. R. Cas.* 462.—QUOTING Marsh *v.* Fairbury, P. & N. W. R. Co., 64 Ill. 414.

A company cannot be compelled to maintain a station when the welfare of the company and its patrons requires that it should be changed to some other point. *Mobile & O. R. Co.* v. *People*, 42 *Am. & Eng. R. Cas.* 671, 132 *Ill.* 559, 24 *N. E. Rep.* 643.

The duty devolves upon railways as common carriers to furnish and maintain suitable warehouses or depots at all appropriate points on their lines for the receipt and discharge of passengers and freight. *State ex rel.* v. *Republican Valley R. Co.*, 22 *Am. & Eng. R. Cas.* 500, 17 *Neb.* 647, 24 *N. W. Rep.* 329, 52 *Am. Rep.* 424.—QUOTING Messenger *v.* Pennsylvania R. Co., 36 N. J. L. 407.—DISTINGUISHED IN State ex rel. *v.* Chicago, St. P., M. & O. R. Co., 19 Neb. 476. QUOTED IN State ex rel. *v.* Missouri Pac. R. Co., 29 Neb. 550.

16. Where cost of maintenance exceeds profits.*—The location of stations at points most desirable for the convenience of travel and business being indispensable to the efficient operation of a railroad and the enjoyment of it by the public, a company cannot be compelled to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom, nor allowed to locate them so far apart as practically to deny reasonable access thereto. *Mobile & O. R. Co.* v. *People*, 42 *Am. & Eng. R. Cas.* 671, 132 *Ill.* 559, 24 *N. E. Rep.* 643.

17. Under statutes — Alabama — Enjoining interference.—A company, being required by statute to provide suitable depot accommodations for the traveling public, may maintain a bill in equity against the authorities of a municipal corporation to restrain and enjoin their interference with the erection or enlargement of necessary depot buildings, either when the municipal ordinance under which they claim the right to interfere is void, or when the complainant's structure is not within its terms. *Montgomery City Council* v. *Louisville & N. R. Co.*, 84 *Ala.* 127, 4 *So. Rep.* 626.—FOLLOWING Mobile *v.* Louisville & N. R. Co., 84 Ala. 115.

18. —— Illinois — Villages of 500 population.—Under Illinois Act of 1877, § 1, which provides that all railroad companies in the state shall "build and maintain depots for the comfort of passengers, and for the protection of shippers of freight where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages on the line of their road having a population of 500 or more," a railroad cannot be required to construct and maintain depots—that is, buildings—at a particular point, unless it is made clearly to appear that such place contains a population of over 500, and is also a point on its road where it is "in the practice of receiving and delivering passengers and freight." *People ex rel.* v. *Chicago & A. R. Co.*, (*Ill.*) 35 *Am. & Eng. R. Cas.* 462.

* Duty of company to condemn lands for depot purposes, see note, 9 L. R. A. 295.

* Compulsory location of depot. Lack of profits as an objection thereto, see 22 AM. & ENG. R. CAS. 515, *abstr.*

19. — Nebraska — Interpretation of terms.—Under the provisions of the Constitution and statutes relating to railroads, where a railroad is built through a town of 1500 or more inhabitants, and it is necessary to have a station at that place, the corporation may be compelled to erect the same, with the necessary side tracks, notwithstanding it has a station at the junction of that line and another one and one half miles distant. *State ex rel.* v. *Republican Valley R. Co.*, 22 *Am. & Eng. R. Cas.* 506, 18 *Neb.* 512, 26 *N. W. Rep.* 205; *adhering to* 17 *Neb.* 647, 24 *N. W. Rep.* 329.

20. — New York—Village.—There is nothing in N. Y. General Railroad Act of 1850 by which a company organized thereunder can be compelled to provide suitable freight and passenger houses at a village located on the line of the road. The law leaves the matter entirely to the discretion of the company. Neither have the railroad commissioners any authority which can be enforced in the courts to require the company to provide such accommodations. *People* v. *New York, L. E. & W. R. Co.*, 29 *Am. & Eng. R. Cas.* 480, 104 *N. Y.* 58, 9 *N. E. Rep.* 856, 5 *N. Y. S. R.* 550; *reversing* 40 *Hun* 570, 2 *N. Y. S. R.* 237.—APPLIED IN Florida C. & P. R. Co. *v.* State ex rel., 31 Fla. 482. DISTINGUISHED IN Alabama G. S. R. Co. *v.* Arnold, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.

21. At the crossing of two railroads.*—Missouri Act of 1881, requiring railroad companies, where their tracks cross each other, to erect suitable depots and waiting rooms to accommodate passengers, is valid as a legitimate exercise of the police power of the state. *State ex rel.* v. *Kansas City, Ft. S. & G. R. Co.*, 32 *Fed. Rep.* 722. *State* v. *Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 133, 83 *Mo.* 144.

Either one of the companies may be prosecuted for failing to comply with the above statute, without joining the other, as one company is not released from liability by the failure of the other to comply with the statute. *State ex rel.* v. *Kansas City, Ft. S. & G. R. Co.*, 32 *Fed. Rep.* 722.

The above statute provides a penalty of $25 a day "for each day" that a company fails to comply with the statute. *Held*, that a delinquent company was liable for $25 a day for each day that it failed to comply with the statute up to the time of bringing suit, and the company could not escape by paying a single penalty of $25. *State ex rel.* v. *Kansas City, Ft. S. & G. R. Co.*, 32 *Fed. Rep.* 722. —NOT FOLLOWING Fisher *v.* New York C. & H. R. R. Co., 46 N. Y. 644; Parks *v.* Nashville, C. & St. L. R. Co., 13 Lea (Tenn.) 1; Murray *v.* Gulf, C. & S. F. R. Co., 63 Tex. 407.

In an action before a justice of the peace against a railroad, founded on the above statute, for a failure to erect passenger waiting rooms at railroad crossings, a statement is fatally defective which omits to aver that the intersecting railroads were both carriers of passengers. *State* v. *Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 133, 83 *Mo.* 144.—FOLLOWED IN State ex rel. *v.* Kansas City, Ft. S. & G. R. Co., 32 Fed. Rep. 722.

Texas Rev. St. 1879, art. 4238, regulating the receiving and carrying of freights by connecting or intersecting roads, was amended in 1889, ch. 23, so as to provide for depots at crossings, with a provision added that every company should keep its depots lighted and warmed and open a reasonable time before the arrival and departure of its trains, or if such depot is at a crossing of roads then for a reasonable time before the arrival and departure of trains on either road. *Held*, that the act was not unconstitutional as containing more than one subject which was not expressed in its title, which was merely "An act to amend article 4238 Rev. St." *Texas & P. R. Co.* v. *Mays*, 4 *Tex. App. (Civ. Cas.)* 225, 15 *S. W. Rep.* 43.

22. At the junction of two railroads.—A railroad company has authority to establish its own stations for receiving and putting down passengers and merchandise, and may regulate the time and manner in which it will carry them, and in the absence of statutory obligations it is not required in Colorado to establish stations for those purposes at a point where another railroad company has made a mechanical union with its road. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.*, 16 *Am. & Eng. R. Cas.* 57, 110 *U. S.* 667, 4 *Sup. Ct. Rep.* 185; *reversing* 15 *Fed. Rep.* 650.

23. What is a performance of this duty.*—A railroad aid note was condi-

* Duty of company to maintain station at point of intersection with another road. Constitutionality of statutes, see note, 45 AM. & ENG. R. CAS. 592.

* Depot and shop grounds; duty to fence, see notes, 35 AM. & ENG. R. CAS. 172; 13 *Id.* 537; 23 *Id.* 234. See also 42 *Id.* 578, *abstr.*

tioned for the erection, within fifteen months, of a regular station for passengers and freight at a designated point. The company put up a small building, and left it open, but kept no one in charge to look after baggage or freight, and there were none of the usual facilities, and in fact none, for the shipment of lumber or logs or cattle, and none for the care of other freight received or left for shipment. *Held*, that, as a matter of law, a regular station for freight and passengers had not been established. *Port Huron & N. W. R. Co.* v. *Richards*, 90 *Mich.* 577, 51 *N. W. Rep.* 680.

It is not necessary to distinguish, in such a case, between a station and a regular station, as a station for passengers and freight would include the usual and necessary incidents of a station for the convenience of passengers, and to and from which it was intended to ship freight. *Port Huron & N. W. R. Co.* v. *Richards*, 90 *Mich.* 577, 51 *N. W. Rep.* 680.

As a depot for a railroad requires room outside the depot edifice for approaches, passengers, deposit of baggage and the standing of trains, the mere fact that the main depot edifice does not stand on discontinued streets is not such a failure to comply with the act as can make defendants liable. *Weinckie* v. *New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 584, 61 *Hun* 619; *affirmed in* 133 *N. Y.* 656, *mem.*, 31 *N. E. Rep.* 625, 45 *N. Y. S. R.* 929.

24. —— covered station. — *Semble*, that a covered station is a reasonable accommodation which a railway company is bound to provide for the public. *Caterham R. Co.* v. *London, B. & S. C. R. Co.*, 1 *C. B. N. S.* 410, 26 *L. J. C. P.* 16, 1 *Ry. & C. T. Cas.* 32.

25. —— too near to cattle-guards. —If it be the duty of the company to maintain a cattle-guard at a given place, then it is its duty to locate its station house, or place for landing and receiving passengers, at a safe distance therefrom; or, if convenience seems to require a nearer location, then it is bound, by guards or warnings, lights or signals, to furnish passengers suitable protection. *Hulbert* v. *New York C. R. Co.*, 40 *N. Y.* 145. — DISTINGUISHED IN Flagg *v.* Chicago, D. & C. G. T. J. R. Co., 96 Mich. 30. FOLLOWED IN Hoffman *v.* New York C. & H. R. R. Co., 75 N. Y. 605.

26. —— privy accommodations. — By statute enacted since the occurrence of the injury in this case, it is made the duty of railroad companies to provide privy accommodations at depots and stations, when required to do so by the railroad commission (Acts 1882-3, p. 154); and this may be regarded as "a legislative intimation that, theretofore, the duty was at least doubtful." *Montgomery & E. R. Co.* v. *Thompson*, 77 *Ala.* 448, 54 *Am. Rep.* 72.

27. —— weighing machines.—A company which maintains at its station a weighing machine so disordered that the index finger stands when not in use at four pounds instead of zero, is guilty of having in its possession a weighing machine found to be incorrect and unjust. *Great Western R. Co.* v. *Bailie*, 5 *B. & S.* 928, 11 *Jur. N. S.* 264, 34 *L. J. M. C.* 31, 13 *W. R.* 203, 11 *L. T.* 418.

28. Enforcement of performance of duty, generally.*—Under Neb. constitution and statutes, where a railroad is built through a town of 1500 or more inhabitants, and it is necessary to have a station at that place, the corporation may be compelled to erect the same with the necessary side tracks, notwithstanding it has a station at the junction of that line and another one and one half miles distant. *State ex rel.* v. *Republican Valley R. Co.*, 22 *Am. & Eng. R. Cas.* 506, 18 *Neb.* 512, 26 *N. W. Rep.* 205.

N. H. Gen. St. ch. 147, § 14, provides that if any railroad company shall not "upon request, establish proper stopping-places and depots for the public accommodation," it may be compelled to establish them. *Held*, that a notification of a vote at a local town meeting that the town "require" the company to locate a depot at a certain place, is equivalent to a "request," within the meaning of the statute. *Nashua & R. R. Co.* v. *Derry*, 58 *N. H.* 65.

A railroad company was notified that "the town of Derry requires the Nashua & Rochester railroad to locate a stopping-place and depot in the town of Derry, on the line of said railroad, west of the Back Meadows, so called, the said railroad not having established any proper stopping-places for the public accommodation for the said town." *Held*, that the vote was sufficiently definite, as to location. *Nashua & R. R. Co.* v. *Derry*, 58 *N. H.* 65.

* Compelling a railroad company to build stations, see notes 35 AM. & ENG. R. CAS. 464; 30 *Id.* 180; 29 *Id.* 485; 22 *Id.* 509.

29. Mandamus.—Under the provision of Illinois Act of 1887, that all railroad companies shall build and maintain depots for the comfort of passengers and for the protection of shippers of freight, "where such railroad companies are in the practice of receiving and delivering passengers and freight at all towns and villages on the line of their roads having a population of 500," mandamus will not lie to compel the construction of a depot at a town having a population of more than 500, when it affirmatively appears that the railroad company has not been in the practice of receiving and delivering passengers and freight at that place. *People ex rel.* v. *Chicago & A. R. Co.*, 40 *Am. & Eng. R. Cas.* 352, 130 *Ill.* 175, 22 *N. E. Rep.* 857.

Mandamus against a company properly issued to compel it to locate a station on its line in a village of 1800 inhabitants, necessity for such station having been shown. *People ex rel.* v. *Chicago & A. R. Co.*, 40 *Am. & Eng. R. Cas.* 352, 130 *Ill.* 175, 22 *N. E. Rep.* 857.

Where it is the duty of a railroad company, imposed by the statute, to establish a station at a certain place along its line of road, mandamus is the proper method to compel the performance of the duty. *State ex rel.* v. *Republican Valley R. Co.*, 22 *Am. & Eng. R. Cas.* 506, 18 *Neb.* 512, 26 *N. W. Rep.* 205.

In the absence of any statutory law, a railroad company, at common law, owes it to the people to provide suitable accommodations at its stations. *People* v. *New York, L. E. & W. R. Co.*, 17 *Abb. N. Cas.* (*N. Y.*) 304. — QUOTING AND APPROVING McDonald *v.* Chicago & N. W. R. Co., 26 Iowa 138.

But under N. Y. General Railroad Act of 1850, ch. 140, § 36, requiring railroad companies to furnish accommodation for the transportation of all passengers and property, a court has power, upon mandamus, at the instance of the attorney-general, to compel a company to construct suitable freight and passenger buildings; and this duty may be enforced so long as the company continues to operate its road, without regard to the amount of its income. *People* v. *New York, L. E. & W. R. Co.*, 17 *Abb. N. Cas.* (*N. Y.*) 304.—QUOTING New York & H. R. Co. *v.* Kip, 46 N. Y. 546. REVIEWING Caterham R. Co. *v.* London, B. & S. C. R. Co., 1 C. B. N. S. 410.

But in such case the court will not prescribe particularly what accommodations shall be furnished, beyond requiring them to be sufficient. *People* v. *New York, L. E. & W. R. Co.*, 17 *Abb. N. Cas.* (*N. Y.*) 304.

30. Order of railway commissioners.—Upon complaint that two stations were not adequate to the requirements of the traffic—*held*, that the company had not, under the circumstances, afforded reasonable facilities for the receiving, forwarding and delivery of traffic upon its railway, and ordered that the platforms should be extended, and that a substantial part of such platforms should be roofed in; that the station yard should be so arranged as that carriages might set down and take up passengers under cover; that more waiting rooms should be provided and a part of the station reserved for refreshment purposes; that the booking office should have more than one window for the issuing of tickets; that cattle-pens into which the stock could be unloaded should be erected; and that a bridge which connected the up and down platforms, and by which persons at the station were required to cross the line, should be covered over. *Hastings Town Council* v. *South Eastern R. Co.*, 3 *Ry. & C. T. Cas.* 179.—FOLLOWING Caterham R. Co. *v.* London, B. & S. C. R. Co., 1 Ry. & C. T. Cas. 32.

The commissioners have jurisdiction to entertain an application under the Railway and Canal Traffic Act, 1854, § 2, for an order compelling a company to provide a station, on the ground that there are no stations in use where the traffic of a particular district traversed by the railway can come or go without public inconvenience. *Harris* v. *London & S. W. R. Co.*, 3 *Ry. & C. T. Cas.* 331.

The commissioners cannot order accommodation to be provided which entails the acquisition by the company of additional land which they have no immediate power to take. *Harris* v. *London & S. W. R. Co.*, 3 *Ry. & C. T. Cas.* 331.

31. Penalty.—Mississippi Act of 1888, ch. 26, § 2, which authorizes the railroad commissioners "to designate the site or location of any new depot building or station house that may be ordered built * * * and to prescribe the number and dimensions of the rooms therein for passengers, designating and providing, if deemed necessary, separate rooms for the sexes and for the races," and which imposes a penalty of fifty dol-

lars a day for failure to comply with the order of the commissioners, is highly penal in its character, and the penalty can only be enforced where the order of the commissioners not only directs the building of a new depot, but also prescribes the number of rooms. *State* v. *Alabama & V. R. Co.*, 42 *Am. & Eng. R. Cas.* 681, 67 *Miss.* 647, 7 *So. Rep.* 502.

32. Duty to designate flag station.—The refusal of a railroad company to designate as a flag station for its through trains a place which is not an incorporated town, which contains only a few houses, and is situated within three miles of a regular station, is not an unreasonable regulation; and when the facts are uncontroverted, it is error for the court to submit to the jury the question of the reasonableness of such regulation. *St. Louis, I. M. & S. R. Co.* v. *Adcock*, 40 *Am. & Eng. R. Cas.* 682, 52 *Ark.* 406, 12 *S. W. Rep.* 874.

3. *As Affected by Contract.*

33. Contract to locate at particular place.*—A company cannot contract to maintain stations at particular points, or not to maintain them at other points. The company must be left free to establish and re-establish its depots wherever the public welfare or wants of the public may require. *Mobile & O. R. Co.* v. *People*, 42 *Am. & Eng. R. Cas.* 671, 132 *Ill.* 559, 24 *N. E. Rep.* 643.—QUOTING People ex rel. *v.* Chicago & A. R. Co., 130 Ill. 175.

A railway company may bind itself to maintain a permanent depot at a particular place. *Texas & St. L. R. Co.* v. *Robards*, 60 *Tex.* 545. *International & G. N. R. Co.* v. *Dawson*, 62 *Tex.* 260.

34. Authority of engineer to bind company.—A railroad engineer whose duty it was to obtain transfers of land and determine the situations of station houses procured from plaintiffs, for a nominal consideration, grants of land for a station house and ground, representing that the station would be put as desired by plaintiffs at a certain point, advantageous to both. The deed contained the proviso "that said company, their successors and assigns, do erect and maintain on said lands a station for the accommodation of passengers and freight, and name the same B." The station was erected on the land, but not at the point represented. *Held*, that though plaintiffs had the expectation that the station would be placed where they desired, yet there had been no deceit practised by defendants' engineer for the purpose of obtaining the grants of land; that the engineer had no power to bind defendants to such a thing; and that defendants had done all they were bound to do by observing the proviso in the deed which called for the erection of the station house on the lands without specifying any particular point. *Schliehauf* v. *Canada Southern R. Co.*, 28 *Grant's Ch.* (*U. C.*) 236.

35. Interpretation of contract.—A subscriber to railroad stock entered into an agreement with the company that he might pay his subscription by conveying fifteen acres of land along the road, a deed to be made whenever the land should be run off and the boundaries located, with a further provision that the company was to locate a depot on the land. The land was surveyed and a deed was executed and left with a third person to be delivered when the depot was located and substantially commenced. No depot was built, and the road passed into the hands of another company. *Held*, that the location and construction of the depot was not a condition either precedent or subsequent, and that the creditors of the company could subject the land to the payment of the company's debts, but that the landowner was entitled to damages for failing to locate a depot. *Ramsey* v. *Edgefield & K. R. Co.*, 3 *Tenn. Ch.* 170.

A company agreed to locate its depot at the nearest "practicable" point within one mile of a court-house. *Held*, that the word "practicable" was not synonymous with "possible." *Wooters* v. *International & G. N. R. Co.*, 4 *Am. & Eng. R. Cas.* 100, 54 *Tex.* 294.

36. Time as the essence of the contract.—A contract provided that in consideration of the location of a depot at a certain point, and the building of the usual depot buildings there, and the running of trains to and from the same before a given date, defendants would convey certain land. *Held*, not to require the building of the depot, but only the running of the trains within the time named. *Minneapolis & St.*

* Agreements to locate station, see note, 38 AM. & ENG. R CAS. 711

Grants of land to railroads in consideration of location of depot, etc., see note, 19 L. R. A. 266.

L. R. Co. v. *Cox*, 76 *Iowa* 306, 41 *N. W. Rep.* 24.

37. Validity of contract—Statute of frauds.—Where a landowner orally agrees to convey land to a company on condition that it will construct a side track thereon and erect station buildings on adjoining land, evidence that the company erected the station buildings as agreed, constructed the track on part of the land, used the remainder as a roadway and expended several hundred dollars in grading and macadamizing it, warrants the finding that the contract was sufficiently performed to take it out of the statute of frauds. *Hays* v. *Kansas City, Ft. S. & G. R. Co.*, 108 *Mo.* 544, 18 *S. W. Rep.* 1115.

The mere fact that depot grounds were donated will not render void a contract for the location of the depot. *Harris* v. *Roberts*, 12 *Neb.* 631, 12 *N. W. Rep.* 89.

A deed of land to a railroad company stating the consideration to be a certain number of dollars and another instrument executed at the same time by the landowner reciting that he would do certain acts "in consideration of the purchase of land from me for the location of a town site and the location of a depot at a point between" certain stations—*held*, not to show the entire contract between the landowner and the company, and parol evidence was admissible to show that the consideration of the deed was that defendant should locate a depot on the land conveyed, although neither fraud nor mistake was alleged. *Gulf, C. & S. F. R. Co.* v. *Jones*, 51 *Am. & Eng. R. Cas.* 415, 82 *Tex.* 156, 17 *S. W. Rep.* 534.—QUOTING East Line & R. R. R. Co. *v.* Garrett, 52 Tex. 137.

38. —— contrary to public policy.*—Contracts undertaking to obligate a company to establish its depots exclusively at particular points are void as against public policy. Such companies should be left free to establish and re-establish their depots wherever the public welfare or wants of the public may require. *Florida C. & P. R. Co.* v. *State ex rel.*, 31 *Fla.* 482, 13 *So. Rep.* 103.—QUOTING People ex rel. *v.* Chicago & A. R. Co., 130 Ill. 175; Holladay *v.* Patterson, 5 Oreg. 177.

Defendant entered into a written agreement with a stockholder in a railroad to pay a sum of money to the stockholder on his procuring the location of a depot at a certain place near defendant's property, such a location tending to enhance the value of said property. The stockholder formed a stock company which purchased land in the neighborhood and donated a portion to the railroad upon which it erected a depot. *Held*, that this agreement was contrary to public policy and to open, upright and fair dealing, because it tended injuriously to affect the public interest in having the fittest location of the depot, and the interest of the two corporations, and therefore was invalid. *Fuller* v. *Dame*, 18 *Pick.* (*Mass.*) 472.—DISTINGUISHED IN First Nat. Bank *v.* Hendrie, 49 Iowa 402. QUOTED IN St. Joseph & D. C. R. Co. *v.* Ryan, 11 Kan. 602; Holladay *v.* Patterson, 5 Oreg. 177. REVIEWED IN Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755.

And the same rule applies to a contract made by a director and president of a company and owner of a controlling interest therein, who agreed with an individual that in consideration of a certain sum of money he would cause the line of the road to be located on a certain route, and a depot to be built at a certain place, instead of adopting another route then surveyed, which was shorter, and over which said road could be constructed at less expense. *Holladay* v. *Patterson*, 5 *Oreg.* 177, 18 *Am. Ry. Rep.* 260. — DISTINGUISHING McClure *v.* Missouri River, Ft. S. & G. R. Co., 9 Kan. 373. QUOTING Fuller *v.* Dame, 18 Pick. (Mass.) 472. REVIEWING Cumberland Valley R. Co. *v.* Beale, 2 Am. Ry. Cas. 187.—NOT FOLLOWED IN First Nat. Bank *v.* Hendrie, 49 Iowa 402. QUOTED IN Florida C. &. P. R. Co. *v.* State ex rel., 31 Fla. 482. REVIEWED IN Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755.

39. Contract not binding on lessee.—A railway company leasing another company's line under a statute making it liable to all duties and obligations to which the lessor company would have been subjected, is not bound either at law or in equity by a covenant entered into by such lessor company with a landowner to erect a station, but will be bound when such station is made to stop trains there. *Churchill* v. *Salisbury & D. R. Co.*, 23 *W. R.* 894; *varying the decision of Bacon, V.C.*, 23 *W. R.* 534, 33 *L. T.* 216.

* Validity of contracts for location of stations at certain places. Public policy, see notes, 56 AM. & ENG. R. CAS. 315; 36 AM. REP. 214.

40. —— nor on purchasers under execution.—Under the Texas statutes a person or corporation acquiring the property and franchises of a railway through sale under execution, takes them freed from all liability for former indebtedness not secured by a prior lien. So a purchaser of a road at execution sale takes it freed from the contract of the former company to maintain a depot at a certain place. *Gulf, C. & S. F. R. Co.* v. *Newell*, 38 *Am. & Eng. R. Cas.* 503, 73 *Tex.* 334, 11 *S. W. Rep.* 342.

41. Performance of contract. — A landowner conveyed a right of way over his land on condition that the company should make a certain village a station. The company made the village a station, but located the depot about one and one fourth miles from the village. *Held*, that this was a sufficient compliance with the condition. *Jenkins* v. *Burlington & M. R. R. Co.*, 29 *Iowa* 255.

The owner of land agreed in writing to convey it to a company for depot purposes on condition that it be occupied for the western part of the company's depot grounds and that a part of the usual depot buildings be erected thereon. It was then expected that the other part of the depot grounds and buildings would be located across a street adjoining the ground to be conveyed on the east, but nothing was said in the agreement about the location of the eastern part of the depot grounds and buildings. The company caused to be erected and sustained on said piece of ground a warehouse for the accommodation of the public in doing business on the road, and constructed thereon facilities for loading and unloading live stock, coal, and lumber; but erected the principal depot buildings forty rods east of said land. *Held*, that the company had complied with the condition of the agreement, and was entitled to hold the land. *Pittsburg, Ft. W. & C. R. Co.* v. *Rose*, 24 *Ohio St.* 219, 7 *Am. Ry. Rep.* 1.

Where a company has covenanted with a landowner that a piece of land purchased from him shall be forever used as a first-class station, and such company is afterwards made a part of another company having a much longer line, and the station erected has remained for many years without objection, the passengers being few, the court will not, on the application of such landowner, compel the company to erect a larger station; but as many trains as stop at any other station between the *termini* of the original road, excepting mail, express and special trains, must stop at such station. *Hood* v. *North Eastern R. Co.*, *L. R.* 5 *Ch.* 525, 18 *W. R.* 473, 23 *L. T.* 206.

42. —— and excuse for non-performance. — A contract to convey land in consideration of the location and maintenance of a depot at a certain place cannot be avoided, after the depot has been built, on the ground that the courts will not compel the other contracting party to maintain the depot at that place. *Minneapolis & St. L. R. Co.* v. *Cox*, 76 *Iowa* 306, 41 *N. W. Rep.* 24.

43. Breach of contract — Damages.* — The damages recoverable for breach of a covenant to erect a depot are to be determined by the injury actually sustained by the failure of the company to perform its contract, and evidence tending to show the increase in value of plaintiff's remaining land, which the location of a station at the point agreed upon would have produced, is proper. *Louisville, N. A. & C. R. Co.* v. *Sumner*, 24 *Am. & Eng. R. Cas.* 641, 106 *Ind.* 55, 5 *N. E. Rep.* 404.

Plaintiff agreed to convey certain lands to a railroad company on which it agreed to erect a depot, which it was supposed would greatly enhance the value of a tavern and other grounds belonging to plaintiff. Very soon afterwards all the lands belonging to plaintiff, including that agreed to be conveyed to the company, were sold under execution. By the indulgence of the purchaser plaintiff continued in possession of the tavern and received the rents and profits for a number of years. *Held*, that a conveyance to the company was a condition precedent to its obligation to erect a depot, and when the property was sold under execution, and it was impossible for plaintiff to convey, the agreement was wholly dissolved. And any damages to the tavern business from a failure to erect a depot belonged to the purchaser at the execution sale, and not to plaintiff. *Sayre* v. *New York & H. R. Co.*, 3 *Duer* (*N. Y.*) 54.

A contract to convey a right of way provided that the company should erect a station in "a neat, tasty, ornamental style." The company objected to a specific performance on the ground that the descrip-

* Breach of contract to build depot or station, see note, 26 Am. & Eng. R. Cas. 593.

tion was too indefinite. The evidence showed that two similar stations had been built near, under the same contracts. *Held*, that this was practical evidence of what the remaining station should be. And the company should be required to build a station like the others, or pay damages. *Lawrence* v. *Saratoga Lake R. Co.*, 3 *N. Y. S. R.* 743; *former appeal* 36 *Hun* 467.

In an action against a railroad for not erecting a depot at an agreed place, the measure of damages is the additional value that would have accrued to plaintiff's land as a business place had the depot been built. *Watterson* v. *Allegheny Valley R. Co.*, 74 *Pa. St.* 208, 8 *Am. Ry. Rep.* 30.

A company in breach of a contract entered into by it to run trains from the eastern part of a city to the western part, ceased to run such trains. *Held*, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners, and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as fairly to represent the money compensation to which the plaintiffs were entitled. Stated broadly, the inquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued. *St. Thomas* v. *Credit Valley R. Co.*, 36 *Am. & Eng. R. Cas.* 473, 15 *Ont.* 673.—REVIEWING Wilson *v.* Northampton & B. J. R. Co., L. R. 9 Ch. 279.

If the company admits that it is never again going to run trains to the western end of the city, the damages should be assessed once for all, which may be done either by fixing one solid sum, or by directing a yearly payment. *St. Thomas* v. *Credit Valley R. Co.*, 36 *Am. & Eng. R. Cas.* 473, 15 *Ont.* 673.

44. Enforcement of contract. — Plaintiff, by its president, agreed, for a subscription of $1200, to build a depot in a certain place. Parties interested started a subscription. After a part of the required sum had been subscribed the president notified subscribers and others that he required, in lieu of such general subscription, an assumption by two or three responsible persons of the payment of the sum required, and therefore L. and others promised by parol to assume it, after which canvass was made for further subscriptions and subscriptions obtained for $1400, the subscribers intending not only to put L. and others in funds, but to pay in part for a telegraph line. In assumpsit by plaintiff against a subscriber, the court charged that if the undertaking of L. and others was a mere collateral guaranty, plaintiff might recover, but that if the promise of L. and others was substituted for the subscription, and plaintiff agreed to look to them alone for payment, it could not recover. *Held*, that L. and others were the contracting parties with plaintiff, that they alone could be sued for a breach, and that the charge was without error. *Lamoille Valley R. Co.* v. *Marsh*, 49 *Vt.* 37, 17 *Am. Ry. Rep.* 136.

45. —— specific performance. — A contract whereby a railway company agrees to build a station at a particular spot, but containing nothing as to the user of such station or the accommodations to be afforded, is too indefinite to be specifically enforced; but the court will give damages for the breach of such contract. *Wilson* v. *Northampton & B. J. R. Co.*, 43 *L. J. Ch.* 503, *L. R.* 9 *Ch.* 279, 22 *W. R.* 380, 30 *L. T.* 147.

46. —— notice of performance. — When a party agrees to pay a company a certain sum of money on the completion of a depot building at a certain place, he is entitled to notice of such completion before suit can be brought to enforce payment under the contract. *Vannoy* v. *Dupree*, 72 *Ind.* 26.

III. ABANDONMENT AND RELOCATION.

1. *In General.*

47. Right to abandon or remove.* — After having once fixed the terminal points of its road, and located its depot in a town or city, a company has no power afterwards to change the same without legislative authority, but it will be held to its election. *People ex rel.* v. *Louisville & N. R. Co.*, 120 *Ill.* 48, 10 *N. E. Rep.* 657.

48. Right to damages for removal. —An action can be maintained for the value of certain land conveyed to a railroad company, the consideration being a parol agreement between the grantor and the company

* Removal and abandonment of railroad stations, see note, 50 AM. & ENG. R. CAS. 14.

that the latter's depot should be permanently located in the southern part of a city, the railroad having afterwards removed its depot from that location. *International & G. N. R. Co.* v. *Dawson*, 62 *Tex.* 260.

49. —— damages for depreciation in value of property.—Where an individual sues for damages caused by the depreciation of his property by reason of defendant company discontinuing its old route for through trains, and constructing a new route, so that they did not stop at a depot near his premises, it is not competent for him to raise the question that such change violates the company's charter. Such question can only be raised by the state. *Kinealy* v. *St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 658. —DISTINGUISHING Tate *v.* Missouri, K. & T. R. Co., 64 Mo. 149. REVIEWING Little Miami R. Co. *v.* Naylor, 2 Ohio St. 236; Baltimore & S. R. Co. *v.* Compton, 2 Gill (Md.) 20. REVIEWING AND QUOTING Brainard *v.* Missiquoi R. Co., 48 Vt. 107.

In a suit for damages for removing a railroad depot from the location in which it has been for years, evidence of damage by loss of custom, reduction in rents, and damage to the property for hotel purposes is admissible to prove the depreciation in the value of property. *Houston & T. C. R. Co.* v. *Molloy*, 25 *Am. & Eng. R. Cas.* 244, 64 *Tex.* 607.

50. Ownership and use of land after removal.—Land was conveyed to a company in consideration that it would locate and maintain a depot thereon, which was maintained for eleven years. *Held*, that there was only a partial failure of consideration, and the land would not revert to the original owner, but he might recover damages. *Berkley* v. *Union Pac. R. Co.*, 33 *Fed. Rep.* 794.

When one has granted land upon consideration that the grantee will locate its depot on the ground, the grantor believing that his adjoining lands will thereby be enhanced in value, the fact that both the granting clause and the *habendum* recite that the land is for the use of said depot "and other railroad purposes" does not entitle the company, after removing its depot to another part of the city, to continue to use the land for "other railroad purposes," it being expressly stipulated in the deed that the grantor shall have the right to resume possession of the land "in event the said railroad shall discontinue the said point as a depot for the said road, and said ground shall no longer be useful for said purposes." The erection of a depot on the ground and its continuous use as a depot was the sole consideration of the possessory grant, and the other uses to which the ground might be applied were merely privileges that might be enjoyed in conjunction with its use for a depot, and not independently of that use. *Owensboro & N. R. Co.* v. *Griffith*, 92 *Ky.* 137, 17 *S. W. Rep.* 277.

2. *Statutory Provisions.*

51. Connecticut. — (1) *Statutes construed.**—A company having two stations only a mile apart applied to the railroad commissioners, under Connecticut Act of 1866 (Gen. St. 327), for the privilege of discontinuing both and erecting an intermediate station. The commissioners made an order authorizing the company to abandon both stations, upon condition that it erect a new passenger station at a designated place, with suitable approaches, and to continue the old stations for freight. *Held*, that this was not such a conditional order as to render it invalid. *State* v. *New Haven & N. Co.*, 42 *Conn.* 56.

After railroad commissioners had consented that a certain station be discontinued, the legislature passed an act re-establishing it as a station. The company's charter provided that the legislature might alter or repeal it at pleasure; but a general statute provided that amendments to charters should not be operative unless accepted within six months. *Held*, that the act re-establishing the station was operative without the acceptance of the company, as it was not strictly an amendment to the company's charter. *State* v. *New Haven & N. Co.*, 43 *Conn.* 351.

The act of the commissioners in discontinuing the old station, and of the company in erecting a new one under the order of the commissioners, did not constitute a contract between the state and the company; therefore, the act of the legislature in re-establishing the old station was not void as impairing the obligation of a contract. *State* v. *New Haven & N. Co.*, 43 *Conn.* 351.

The railroad commissioners of Connecticut are a judicial tribunal, but their findings

* What constitutes a station within the meaning of statutes relating to the abandonment of stations, see note, 21 AM. & ENG. R. CAS. 241.

are not strictly judgments; therefore, the above act of the legislature was not void as an attempt to annul or reverse a judgment. *State* v. *New Haven & N. Co.*, 43 *Conn.* 351.

(2) *Powers of commissioners — Orders.* — Under Conn. Act of 1866, ch. 67, the railroad commissioners have power to discontinue any station, regardless of how it may have been established. *Chester* v. *Connecticut Valley R. Co.*, 41 *Conn.* 348.

A company that had been maintaining two stations only 160 rods apart made application to the railroad commissioners to discontinue one of them. The commissioners ordered that one of the stations should be discontinued, upon condition that a certain private road leading to the other station be conveyed to the town, and upon the company paying $250 to the town to improve the highways. *Held*, that the commissioners had no right to impose such conditions. The conditions could not be disregarded, and allow the order otherwise to stand, where it appears that it would not have been made except for the conditions. *Chester* v. *Connecticut Valley R. Co.*, 41 *Conn.* 348.

After such order had been made and the conditions complied with, the company applied to the commissioners for an absolute order for the discontinuance of the station, and the commissioners made an order, reciting that the conditions had been complied with, and directed the station discontinued. *Held*, that this order was void, as it was founded on the former order, which was unauthorized and void. *Chester* v. *Connecticut Valley R. Co.*, 41 *Conn.* 348.

52. Massachusetts.—(1) *Statute construed.*—The records of the board of railroad commissioners contained a vote that the board approved the relocation of a passenger station "as proposed by the selectmen" of the town. The records of the selectmen contained a vote, written by the town clerk, who was not a member of the board nor sworn as its clerk, but who acted as such, that the station "be relocated" at the place named "in concurrence with the vote of the railroad commissioners." *Held*, that there was an "approval in writing" by the railroad commissioners and by the selectmen, within Mass. Pub. St. ch. 112, § 157. *Attorney-General* v. *Eastern R. Co.*, 21 *Am. & Eng. R. Cas.* 237, 137 *Mass.* 45.

Mass. Pub. St. § 156, providing that no passenger station established for five years shall be abandoned without the consent of the legislature, and a later act providing that, with certain exceptions, stations may be relocated with the written consent of the railroad commissioners and of the local authorities, are not in conflict, in view of the general tendency of the legislature to place the regulation of the relocation of stations within the operation of general laws; and the statutes as they stand authorize the consolidation of two such stopping-places into one by relocation at one point in one proceeding, with special regard to the accommodation of the public convenience. *Cunningham* v. *Railroad Com'rs*, 56 *Am. & Eng. R. Cas.* 301, 158 *Mass.* 104, 32 *N. E. Rep.* 959.

Two railroad stations can be relocated at the same point in one proceeding under Mass. Pub. St. ch. 112, § 157, and the contention that such a change, necessarily lessening the number of stopping places, is an abandonment forbidden by ch. 114, § 156, is unsound. *Cunningham* v. *Railroad Com'rs*, 56 *Am. & Eng. R. Cas.* 301, 158 *Mass.* 104, 32 *N. E. Rep.* 959.

(2) *Relocation distinguished from abandonment.*—A railroad corporation, which had maintained a passenger station in a town for five consecutive years, after obtaining the approval of the railroad commissioners and of the selectmen, established a new station in the same town and neighborhood, and, after giving public notice of its intention, discontinued the stopping its trains at the old station, and used the new station. *Held*, that there was a relocation, and not an abandonment, of the station, within the Pub. St. ch. 112, §§ 156, 157. *Attorney-General* v. *Eastern R. Co.*, 21 *Am. & Eng. R. Cas.* 237, 137 *Mass.* 45.

(3) *Review of commissioners' acts.*—If the board of railroad commissioners and the selectmen of a town have properly signified their "approval" of the relocation of a passenger station of a railroad corporation, as required by the Pub. St. ch. 112, § 157, in such cases, the supreme court will not revise their decision. *Attorney-General* v. *Eastern R. Co.*, 21 *Am. & Eng. R. Cas.* 237, 137 *Mass.* 45.

Where none of the petitioners for a certiorari to review the action of the commissioners in authorizing such relocation were parties to the proceedings before the board, and none of them would have been entitled to a private remedy if the action of

the board was unauthorized, they cannot maintain the certiorari, however much their estates may be affected by the proposed changes. *Cunningham* v. *Railroad Com'rs*, 56 *Am. & Eng. R. Cas.* 301, 158 *Mass.* 104, 32 *N. E. Rep.* 959.

53. Mississippi — New York. — (1) *Consent of commissioners.* — Changing the site of a station house from one place to another in the same town, for reasons of convenience, necessity, or the public good, is not within the meaning of Miss. Act of February 22, 1890, § 4, which prohibits the "abolishment or disuse of any depot when once established," without the consent of the railroad commission. *State ex rel.* v. *Alabama & V. R. Co.*, 50 *Am. & Eng. R. Cas.* 10, 68 *Miss.* 653, 9 *So. Rep.* 469.

Such change can only be made without the approval of the commission when the proposed new site is convenient and accessible, and when the interest of the public and that of the company concur in demanding the change. *State ex rel.* v. *Alabama & V. R. Co.*, 50 *Am. & Eng. R. Cas.* 10, 68 *Miss.* 653, 9 *So. Rep.* 469.

(2) *Enjoining removal.* — Notwithstanding the state railroad commission has declared a proposed new site to be inconvenient, and ordered a new station house erected on the site of the old, a bill filed, under the order of the commission, by the representative of the state, to enforce compliance and to enjoin the removal, cannot be maintained unless it is made to appear that the new site is inconvenient and inaccessible, regard being had to the interests of the company and the public. *State ex rel.* v. *Alabama & V. R. Co.*, 50 *Am. & Eng. R. Cas.* 10, 68 *Miss.* 653, 9 *So. Rep.* 469.

Under N. Y. Act of 1855, ch. 255, providing that highway commissioners may maintain an action against a railroad company to "sustain the rights of the public in or to a highway, or to enforce performance of any duty enjoined upon a railroad corporation in relation to a highway," the highway commissioners of a town have no legal capacity to maintain an action to restrain a company from changing the location of its depots, when the action is not brought for any of the purposes specified in the act. *Moore* v. *Brooklyn City R. Co.*, 36 *Am. & Eng. R. Cas.* 76, 108 *N. Y.* 98, 15 *N. E. Rep.* 191, 13 *N. Y. S. R.* 97; *affirming* 36 *Hun* 642, *mem.*

IV. RULES OF COMPANY.

54. Generally.* — A railroad corporation has authority to make and carry into execution reasonable regulations for the conduct of all persons using the railroad or resorting to its depots, without prescribing such regulations by by-laws; and the superintendent of a railroad depot, appointed by the corporation, has the same authority by delegation. *Com.* v. *Power*, 7 *Metc.* (*Mass.*) 596.—QUOTED IN Landrigan *v.* State, 31 Ark. 50.

Any person who desires to go upon the cars has the right, in a proper manner, and at suitable times, to go upon the premises of the company, at any station where passenger trains stop to receive passengers, for the purpose of procuring a ticket and getting on board, and the company has no right to prevent or hinder his coming on the premises, or order him to depart therefrom, before the departure of the train. *Harris* v. *Stevens*, 31 *Vt.* 79.

And such person has the right to remain on the premises of the company, at such station, until the departure of the train, and then to get upon it, and this too whether he has purchased a ticket or not. The right to remain until the arrival of the train and then to get upon it does not depend upon the purchase of a ticket, unless the rules of the company require that all persons shall purchase tickets before they enter the cars. The procuring of a ticket only furnishes evidence of an intent to go upon the train. *Harris* v. *Stevens*, 31 *Vt.* 79.

The right to enter and remain upon the company's premises for such purpose may be forfeited by the improper conduct of the person or by a violation of the rules and regulations of the company; and if the person does so forfeit his right to remain, the company may require him to depart, and if he refuses, may use force enough to remove him. *Harris* v. *Stevens*, 31 *Vt.* 79.

The right thus to go upon and remain on the company's premises must be exercised in a proper manner, with a due regard to the just requirements of the company, and it must be exercised within a reasonable time; that is, the person may go upon the premises within a reasonable time next prior to the regular time of departure of the

* Rules and regulations of railroad companies generally, see notes, 33 AM. & ENG. R. CAS. 496; 9 *Id.* 304.

train, and remain until it arrives. What is a reasonable time must depend upon the circumstances of each case. *Harris* v. *Stevens*, 31 *Vt.* 79.

55. Providing for the admission, exclusion or removal of certain persons.*—A company may make reasonable regulations for the conduct of all persons who come upon its premises, and may authorize its agents and servants to remove therefrom any person who violates its regulations, using no greater force than is necessary. *Landrigan* v. *State*, 31 *Ark.* 50, 18 *Am. Ry. Rep.* 14.—QUOTING Com. *v.* Power, 7 Metc. (Mass.) 596; Hall *v.* Power, 12 Metc. 482; Harris *v.* Stevens, 31 Vt. 79.

A railroad company has a right to make reasonable regulations in regard to the use of its stations, such as ordering that hacks shall not stand in front of the ladies' entrance. It may also order a person not a passenger to leave the inner platform. And it has a right, by its police appointed under Pa. Act of Feb. 27, 1865, to enforce such regulations and such order, using such force as is necessary for the purpose. *Smith* v. *New York, L. E. & W. R. Co.*, 149 *Pa. St.* 249, 24 *Atl. Rep.* 304.

Railroad corporations, by erecting station houses and opening them to the public, impliedly license all to enter. Still, such license is revocable as to all except those who have legitimate business there growing out of the road, or with the officers or employés of the company. As to persons having no business at the station, the corporation has the right to direct them to depart, and on their refusal to go they may be removed. *Harris* v. *Stevens*, 31 *Vt.* 79.—REVIEWING White River Turnpike Co. *v.* Vermont C. R. Co., 21 Vt. 590.—QUOTED IN Landrigan *v.* State, 31 Ark. 50; Pittsburgh, Ft. W. & C. R. Co., *v.* Bingham, 29 Ohio St. 364.

56. —— innkeepers.—Where an innkeeper or his agent, in violation of a regulation of a company, comes upon its platform for the purpose of soliciting patronage for his hotel, he may be ejected by the servants of the company, who may use such force as is necessary for that purpose. *Landrigan* v. *State*, 31 *Ark.* 50, 18 *Am. Ry. Rep.* 14. *Com.* v. *Power*, 7 *Metc.* (*Mass.*) 596.—REVIEWED IN Hicks *v.* Pacific R. Co., 64 Mo. 430.

57. —— persons selling lunches.—The dominion of a railroad corporation over its trains, tracks, and "right of way" is no less complete or exclusive than that which every owner has over his own property. Hence the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or other third persons, and admit whom it pleases, when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches. *Fluker* v. *Georgia R. & B. Co.*, 38 *Am. & Eng. R. Cas.* 379, 81 *Ga.* 461, 8 *S. E. Rep.* 529, 2 *L. R. A.* 843.

V. INJURIES CAUSED BY NEGLIGENCE.

1. *At and around Stations, Generally.*

58. Providing suitable accommodations.*—It is the duty of a railroad corporation to furnish reasonable depot facilities for the accommodation of the public in the matter of transportation and travel. *St. Joseph & D. C. R. Co.* v. *Ryan*, 11 *Kan.* 602.

In the absence of any statutory law, a railroad company at common law owes a duty to the people to provide reasonable accommodations at its stations. *People* v. *New York, L. E. & W. R. Co.*, 17 *Abb. N. Cas.* (*N. Y.*) 304.—QUOTING McDonald *v.* Chicago & N. W. R. Co., 26 Iowa 138. —*McDonald* v. *Chicago & N. W. R. Co.*, 26 *Iowa* 124.—FOLLOWED IN McDonald *v.* Chicago & N. W. R. Co. 29 Iowa 170, QUOTED IN People *v.* New York, L. E. & W. R. Co., 17 Abb. N. Cas. 304.

59. Providing for unusually large crowds.—If railroads make unusual efforts, by offering low rates and by extended advertisements, to secure a greater number of passengers to travel over their

* Right of railroad companies to exclude hackmen from station grounds, see note, 50 AM. & ENG. R. CAS. 9.

Regulations as to admission of passengers and others to stations or grounds, see note, 16 L. R. A. 449.

* Liability of company for injury to passengers in or about stations, see note, 1 L. R. A. 157.

Regulations of companies concerning gates and gate-keepers at entrance to trains. Assaults on passengers by gate-keepers, see 52 AM. & ENG. R. CAS. 169, *abstr.*

Frightening horses at station. Measure of damages, see 56 AM. & ENG. R. CAS. 322, *abstr.*

lines than they can safely and reasonably care for at their terminal points, and accidents follow, they must answer for risks thus assumed; and the care to be exercised in caring for crowds must be proportioned to the number of people. *Taylor* v. *Pennsylvania Co.*, 50 *Fed. Rep.* 755.

A company is not bound to provide at a station (even when an unusually large number of passengers by a special train is expected) a staff of servants sufficient, not merely for the guidance and assistance of passengers and the preservation of order among them, but adequate to control the violence of an assemblage of persons entering the station without permission and overcrowding the platform. *Cannon* v. *Midland G. W. R. Co.*, 6 *L. R., Ir.* 199, 3 *Ry. & C. T. Cas.* xv.

60. Safe buildings—Extraordinary storms.—A railroad company is not liable for injuries occasioned by its buildings or structures being blown down by storms, where it has used that care and skill, in their structure and maintenance, which men of ordinary prudence and skill usually employ; and it is error, in such case, to charge the jury that the company is "bound to guard against all storms which can reasonably be anticipated." *Pittsburgh, Ft. W. & C. R. Co.* v. *Brigham*, 29 *Ohio St.* 374.—APPROVED IN Moore *v.* Wabash, St. L. & P. R. Co., 84 Mo. 481.

In such case the general custom of prudent persons, and not the absolute requirements of the occasion, is the true standard by which the company should be tried. It is only bound to come up to the fair average of careful and prudent men. *Pittsburgh, Ft. W. & C. R. Co.* v. *Brigham*, 29 *Ohio St.* 374.

61. Degree of care required.*—The general rule is that companies must make their station grounds, approaches and platforms safe, or, as some of the cases put it, reasonably safe. *McDonald* v. *Chicago & N. W. R. Co.*, 26 *Iowa* 124; *Pennsylvania Co.* v. *Marion*, 123 *Ind.* 415, 23 *N. E. Rep.* 973. *Delaware, L. E. & W. R. Co.* v. *Trautwein*, 52 *N. J. L.* 169, 7 *L. R. A.* 435, 19 *Atl. Rep.* 197. *Collins* v. *Toledo, A. A. & N. M. R. Co.*, 80 *Mich.* 390, 45 *N. W. Rep.* 178. *Moses* v. *Louisville, N. O. & T. R. Co.*, 39 *La. Ann.* 649, 2 *So. Rep.* 567. *Alexandria & F. R. Co.* v. *Herndon*, 87 *Va.* 193, 12 *S. E. Rep.* 289. *Texas & P. R. Co.* v. *Brown*, 78 *Tex.* 397, 14 *S. W. Rep.* 1034. *Dillaye* v. *New York C. R. Co.*, 56 *Barb.* (*N. Y.*) 30. *Hulbert* v. *New York C. R. Co.*, 40 *N. Y.* 145. *Moore* v. *Wabash, St. L. & P. R. Co.*, 84 *Mo.* 481. *Cross* v. *Lake Shore & M. S. R. Co.*, 69 *Mich.* 363, 37 *N. W. Rep.* 361. *Hoffman* v. *New York C. & H. R. R. Co.*, 75 *N. Y.* 605.

Carriers of passengers are bound simply to exercise ordinary care as to the condition of the station at which passengers are received, in view of the dangers to be apprehended; and whether there has been an exercise of such care depends upon the circumstances of the case, the nature of the road, and the character of the traffic and place where the accident occurred. *Falls* v. *San Francisco & N. P. R. Co.*, 97 *Cal.* 114, 31 *Pac. Rep.* 901.

Railroad depot grounds and passenger houses are *quasi* public, and a person going to such houses and passing over such grounds in a proper manner is not a trespasser; but where persons go upon or pass over the grounds connected with railroad depots, they are presumed to know that the place is dangerous, and hence are required to use care and prudence commensurate with the known danger of the place. *Illinois C. R. Co.* v. *Hammer*, 72 *Ill.* 347.

On the other hand, the servants of a railroad company, knowing the enhanced danger at depot grounds on account of persons constantly passing and repassing, are required to exercise a greater degree of caution and prudence for the preservation of life and limb, than at other places where persons have no right to be, and the employés of the company have no right to expect to find them. *Illinois C. R. Co.* v. *Hammer*, 72 *Ill.* 347.

62. Warnings and signals when train is approaching.—Where a company erects its platform, where passengers step to and from trains, on one side of the track and its ticket office on the other, thereby compelling passengers to cross the track, the company must keep a careful lookout for persons on the track. It is the duty of those in charge of an engine approaching such a station at a high rate of speed, just before a passenger train is due, to slow the speed and give necessary warning signals; and this is so, though the sta-

* Duty of company to keep stations in proper condition and repair, see notes, 23 AM. & ENG. R. CAS. 517; 8 *Id.* 550.

tion be but a flag station in a small village. *Nichols* v. *Chesapeake, O. & S. W. R. Co.*, (*Ky.*) 2 *S. W. Rep.* 181.

A way provided by the company over its own grounds, for a passage to and from its depot, is not a "traveled public road or street," within the meaning of the Missouri statute, requiring a bell to be rung or a whistle sounded on locomotives when within eighty rods of a traveled public road or street; and where a person is injured while on such way, the liability of the company is not fixed by merely showing a failure to give the signal. There must be proof of actual negligence; but evidence of a failure to give the signal is admissible as tending to show negligence. *Bauer* v. *Kansas Pac. R. Co.*, 69 *Mo.* 219.—FOLLOWED IN Hodges *v.* St. Louis, K. C. & N. R. Co., 2 Am. & Eng. R. Cas. 190, 71 Mo. 50.

But whether a failure to give such signals constitutes negligence is a question for the jury. *Hodges* v. *St. Louis, K. C. & N. R. Co.*, 2 *Am. & Eng. R. Cas.* 190, 71 *Mo.* 50.

As between the company and its employés, the former is not required to place a light upon each car moved at night, in making up or distributing trains in a yard, nor to have a man precede such cars to give warning of their approach. *Crowe* v. *New York C. & H. R. R. Co.*, 70 *Hun* 37, 53 *N. Y. S. R.* 558, 23 *N. Y. Supp.* 1100.

A train was run along a side track at a junction station at the rate of thirty miles per hour; no bell was rung or whistle blown, and no means adopted to warn persons on the side track of danger. The side track was between the main track and the depot, and had to be crossed by passengers who arrived on the other train, which was standing on the main track. It was reasonably to be anticipated that persons would be upon the side track and in danger of being injured, unless properly warned, from trains approaching at such a rate of speed. *Held*, that these facts show negligence on the part of company. *Sanchez* v. *San Antonio & A. P. R. Co.*, 3 *Tex. Civ. App.* 89, 22 *S. W. Rep.* 242.

Plaintiff was injured on station grounds where those in charge of the train knew that adults and children in considerable numbers were likely to be passing. The accident occurred at dusk, and the lights were set on the train, and the conductor and brakemen were using lighted lanterns. The train was moving slowly and comparatively noiselessly. It was a long train, containing forty cars or more, and it was doubtful whether any signal by bell or whistle was given. The injury was caused by the cars backing upon plaintiff. *Held*, that as a matter of law, defendant was guilty of negligence in not providing a proper lookout on the train. *Whalen* v. *Chicago & N. W. R. Co.*, 41 *Am. & Eng. R. Cas.* 558, 75 *Wis.* 654, 44 *N. W. Rep.* 849.—DISTINGUISHING Hogan *v.* Chicago, M. & St. P. R. Co., 59 Wis. 139. QUOTING Townley *v.* Chicago, M. & St. P. R. Co., 53 Wis. 626.

Ont. Railway Act, c. 66, § 145, requiring a person to be stationed on the last car in the train, applies to the station grounds of companies in cities, towns, and villages, as well as to the limits outside of such station grounds. *Bennett* v. *Grand Trunk R. Co.*, 13 *Am. & Eng. R. Cas.* 627, 3 *Ont.* 446.

63. —— before starting train.—The failure to ring a bell or blow a whistle on the starting of a train, as required by the statute, fixes the charge of negligence on a company, and any one injured thereby may recover damages for the injury, unless his own negligence or fault has disabled him from making complaint. *Memphis & C. R. Co.* v. *Copeland*, 61 *Ala.* 376.—APPLIED IN Central R. & B. Co. *v.* Letcher, 12 Am. & Eng. R. Cas. 115, 69 Ala. 106.

Where a freight car is standing upon a track, separate from any other car or engine, and the yard master mounts the car to loosen the brakes, it is not his duty to give any signal before the brakes are loosed, lest the car might move, when he has no reason to suppose any person would be endangered thereby, although, when he mounted the car, there were boys near the car, beside the track. *Chicago & A. R. Co.* v. *McLaughlin*, 47 *Ill.* 265.

Plaintiff, a boy, found his approach to a station cut off by a frieght train that lay on the middle one of three tracks, and to pass around the engine it was necessary to go between the train and cars that were standing on one of the outside tracks. The tracks were parallel, six feet and ten inches apart, which left a space of about three feet between the cars. Before plaintiff was around the engine the train started, and the evidence tended to show that he turned back and fell so as to throw his hand on the track, causing the injury sued for. *Held*, that the conductor was not negligent in

starting the train without a signal, as there was nothing to show that the boy was in danger at the time. *Barkley* v. *Missouri Pac. R. Co.*, 96 *Mo.* 367, 9 *S. W. Rep.* 793.

The starting of a train without the usual bell ringing or whistle sounding, from a flag station on a railway where trains do not usually stop unless signaled, whereby one who had left the train during its temporary stopping at midnight was injured in the effort to return to it, is not negligence *per se*. Whether negligence did in fact exist is for the jury. *Galveston, H. & H. R. Co.* v. *Cooper*, 70 *Tex.* 67, 8 *S. W. Rep.* 68.

Apart from the statute, care must be taken when starting engines from stations. *Bennett* v. *Grand Trunk R. Co.*, 13 *Am. & Eng. R. Cas.* 627, 3 *Ont.* 446.— APPLYING Bender *v.* Canada Southern R. Co., 37 U. C. Q. B. 25.

64. Watchman at station.—The failure to keep a watchman at a station which is passed without stopping, and a rate of speed of six miles or more per hour, are not negligence *per se*, though they may be evidence of negligence. *Latty* v. *Burlington, C. R. & M. R. Co.*, 38 *Iowa* 250.

65. Sudden backing of cars against cars. — Plaintiff's husband was one of a gang, unloading freight for an elevator company from cars on defendant's track; he was injured by the unexpected backing of other cars on an adjacent track near which he was standing while an unloaded car was being weighed. *Held*, that the sudden backward movement of the cars, without warning, under the circumstances, was evidence of defendant's negligence; and that the question of plaintiff's exercise of ordinary care was also one of fact. *Spotts* v. *Wabash Western R. Co.*, 111 *Mo.* 380, 20 *S. W. Rep.* 190.

Where the direct and usual path to a depot lies over a switch on which freight cars often stood with an opening between two of them, so as to leave the path unobstructed, and this path is habitually used by the patrons and employés of the company with the knowledge and without the disapproval of the officials, it may be assumed that the company invites persons having business at the depot to use the path between the cars; and in using it for that purpose, such persons are not guilty *per se* of negligence, and if by a sudden, unsignaled act of the company's servants the cars are run together, thereby crushing such a person, the company is liable. *Nichols* v. *Washington, O. & W. R. Co.*, 32 *Am. & Eng. R. Cas.* 27, 83 *Va.* 99, 5 *Am. St. Rep.* 257, 5 *S. E. Rep.* 171.—QUOTED IN Stewart *v.* Cincinnati, W. & M. R. Co., 89 Mich. 315; Woolwine *v.* Chesapeake & O. R. Co., 36 W. Va. 329.

66. Injuries caused by trucks on platform.* — The rules applicable to injuries caused by locomotives and cars do not apply to injuries caused by moving a truck on a station platform. *Palmer* v. *Platt*, 27 *Hun* (*N. Y.*) 534; *affirmed in* 98 *N. Y.* 628.

The giving of warning is not the only duty of him who draws a truck. He must move it carefully and prudently upon the platform so as not needlessly to expose any one to danger; and he should also be constantly upon the alert not to strike those who for any reason are not aware of their danger. *Palmer* v. *Platt*, 27 *Hun* (*N. Y.*) 534; *affirmed in* 98 *N. Y.* 628.

67. Injuries while loading or unloading cars.—Where cars have been run out on a side track to be unloaded, a company is guilty of negligence in allowing other cars to be thrown violently against them, without warning, whereby a teamster engaged in unloading is injured; and the company cannot escape liability because its employés did not know that any one was unloading. After the cars were placed in a position for unloading, the employés had reason to anticipate that some one might be there, and should have exercised proper care. *Watson* v. *Wabash, St. L. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 114, 66 *Iowa* 164, 23 *N. W. Rep.* 380.

The evidence tended to show that plaintiff's horse and dray, with a load of lumber for shipment, were sent to a station, and the driver asked the agent where he should deliver the load, and was directed to a side platform. The track at the place was in a cut, and a side track was laid so near the platform that a horse and dray could not be driven by the side of the platform without being partly on the track. While in this position the horse was killed by a passing train. *Held*, that the evidence was sufficient to sustain a verdict for plaintiff. *Foss* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 112, 33 *Minn.* 392, 23 *N. W. Rep.* 553.

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* See also CARRIAGE OF PASSENGERS, 277.

Plaintiff was engaged in unloading grain from defendant's cars into a boat. A canvas was placed between the cars and the boat to catch falling grain. After some cars had been unloaded plaintiff was spreading the canvas for the next car when the train started and caught his arm and severely injured it. The evidence tended to show that the cars were started without notice by bell or whistle, and that plaintiff had not time or opportunity to escape. *Held*, that the question of defendant's negligence was for the jury. *Barton* v. *New York C. & H. R. R. Co.*, 1 *T. & C.* (*N. Y.*) 297; *affirmed in* 56 *N. Y.* 660, *mem.* — DISTINGUISHED IN Murphy *v.* New York, L. E. & W. R Co., 42 N. Y. S. R. 580.

68. Injury caused by things thrown from car.*—Plaintiff, while lawfully passing along a passenger platform to a depot to ascertain the time of departure of a train, was struck and injured by a piece of timber, thrown from a box car which the employés of the company were unloading, he having no previous warning of danger. *Held*, that the company was liable. *Toledo, W. & W. R. Co.* v. *Maine*, 67 *Ill.* 298.

Plaintiff's intestate went upon a depot platform to get a paper from the train newsboy, and was hit and killed by the mail agent throwing the sacks from the train, which was running at a high and unlawful rate of speed. It appeared that the company regularly permitted train boys to sell papers from the platform. *Held*, that the company was liable. *Ohio & M. R. Co.* v. *Simms*, 43 *Ill. App.* 260.—REVIEWING Carpenter *v.* Boston & A. R. Co., 97 N. Y. 494.

69. Projections from passing trains.† — Plaintiff was on an elevated plank walk alongside of a track, constructed by the company for the use of passengers, and hearing a train approaching from behind, stepped to the middle of the walk, where he would have been safe from ordinary trains; but the approaching train was a construction train, with brakes at the side. A brake wheel struck plaintiff, inflicting the injuries sued for. *Held:* (1) that he had a right to be on the walk and to suppose himself safe when beyond danger from ordinary trains; (2) that the train employés were guilty of negligence in not guarding against injury after seeing him and knowing the danger. *Sullivan* v. *Vicksburg, S. & P. R. Co.*, 39 *La. Ann.* 800, 2 *So. Rep.* 586.

Plaintiff, a stranger in the place, arrived at a union depot after dark, over one road, walked across the station platform, and was struck, while standing near the edge of the platform looking for a cab to depart in, by defendant's train, which passed rapidly without signals on a track which plaintiff did not know existed, and which was so near the platform as to allow the cars to overlap it several inches. *Held*, that he had a right to assume that the platform was a safe and proper place; and that there was sufficient evidence of negligence to justify a submission of the case to the jury, and to sustain a verdict for plaintiff. *Archer* v. *New York, N. H. & H. R. Co.*, 106 *N. Y.* 589, 13 *N. E. Rep.* 318, 11 *N. Y. S. R.* 32, 885, 9 *Cent. Rep.* 233; *affirming* 36 *Hun* 644, *mem.*

70. Movement of trains according to time-table.—It is impossible for a company to move its trains according to a time-table, when being made up, or when being broken up; but it is practicable to prescribe in what manner engineers and conductors shall give notice of the approach of an engine, with or without cars, when trains are being made up, or moving about freight houses, depots, or engine houses. If proper precautions are not taken, a person, not an employé, who is injured by such engines or cars, is entitled to recover. *Haskin* v. *New York C. & H. R. R. Co.*, 65 *Barb.* (*N. Y.*) 129; *affirmed in* 56 *N. Y.* 608, *mem.*

71. Stumbling over freight piled on platform.*—At flag stations for sparsely settled districts, railroad companies have the right to use the same platform for freight and for passengers, and if they use ordinary and reasonable care to allow sufficient room for passengers, they are not liable for an unforeseen accident to a passenger from stumbling over freight, in broad daylight, which could not have been reasonably anticipated; and a verdict in favor of the person injured will be set aside as against evidence, where the evidence clearly shows that ordinary care was used by the company, and that it could not have rea-

* See also CARRIAGE OF MAILS, **7**; CARRIAGE OF PASSENGERS, **278**.

† When passenger may recover for injuries received by cars which projected over platform striking him, see 33 AM. & ENG. R. CAS. 510, *abstr.*

* See also CARRIAGE OF PASSENGERS, **265-285**.

sonably anticipated the accident. *Falls* v. *San Francisco & N. P. R. Co.*, 97 *Cal.* 114, 31 *Pac. Rep.* 901.—REVIEWING Cornman *v.* Eastern Counties R. Co., 4 H. & N. 781; Stokes *v.* Suffolk & C. R. Co., 107 N. Car. 178.

72. Liability when person is bitten by dog.—A railway company is not liable to a person bitten by a dog at a station where the dog was not owned by the company, and was not seen by its servants until immediately before the accident. *Smith* v. *Great Eastern R. Co.*, 36 *L. J. C. P.* 22, 15 *W. R.* 131, 15 *L. T.* 246, *L. R.* 2 *C. P.* 4.

73. Duty to licensees.*—Where it is the practice of consignees of coal to assist in unloading, a consignee who, with the permission of the station master, goes to his wagon, which was shunted in the usual place, is not a mere licensee, and is entitled to require that the premises shall be in a reasonably safe condition. *Holmes* v. *North Eastern R. Co.*, *L. R.* 6 *Ex.* 123, 40 *L. J. Ex.* 121, 24 *L. T.* 69; *affirming L. R.* 4 *Ex.* 254, 38 *L. J. Ex.* 161, 20 *L. T.* 616, 17 *W. R.* 800.—FOLLOWED IN Wright *v.* London & N. W. R. Co., 33 L. T. 830, L. R. 1 Q. B. D. 252, 45 L. J. Q. B. 570.

Plaintiff, without having procured a ticket, was crossing a side track, in the night, to get upon a passenger train at its usual stopping place, on the main track; but by the negligence of the employés of the company, a switch had been left open, and the train was thrown upon the side track, and ran against plaintiff and broke his leg. *Held:* (1) That he was not a passenger at the time of the injury. (2) That he had the same right to cross the side track as he did that persons have to cross a railroad upon a public street or highway. (3) The company having the legal right to run its train upon the side track, it is immaterial whether it was run upon that track by accident or design, if run with due care. No greater care would be required in case of such accident than if the train were thrown upon the track by design. (4) If the train, in running upon the side track, was managed with due care, the plaintiff cannot recover. *Indiana C. R. Co.* v. *Hudelson*, 13 *Ind.* 325.

A foot traveler upon a highway in the evening, who for the sake of reaching a connecting highway by a short cut enters upon the uninclosed grounds and platform of a railway station, and while walking along the platform is injured by falling into an unguarded hole made by the raising of a trap door forming part of the platform and opening upon the cellar steps of the station building is a mere licensee, and cannot recover from the company. *Redigan* v. *Boston & M. R. Co.*, 155 *Mass.* 44, 28 *N. E. Rep.* 1133.

Where several intervening tracks between a station and the business part of a town have been leveled up with cinders so as to make a smooth crossing, over which the railroad officials and the public continually pass in going to and from the station, there being no other convenient passageway, persons who are injured by a train while crossing such tracks cannot be held to be on the right of way by permission only, but are there at the invitation of the company; and it is the duty of the company to exercise extraordinary diligence in the management of its trains at such crossing. *Louisville, N. O. & T. R. Co.* v. *Hirsch*, 56 *Am. & Eng. R. Cas.* 291, 69 *Miss.* 126, 13 *So. Rep.* 244.

Where, by means of an inducement or invitation, expressed or implied, held out to the public by it, a company leads the public to use a crossing or way over its track in passing to and from its depot grounds, it is bound to keep such crossing or way reasonably safe for travel. *Moore* v. *Wabash, St. L. & P. R. Co.*, 84 *Mo.* 481.—APPROVING Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 368; Latham *v.* Roach, 72 Ill. 179; Pittsburgh, Ft. W. & C. R. Co. *v.* Brigham, 29 Ohio St. 374; Vanderbeck *v.* Hendry, 34 N. J. L. 467; Illinois C. R. Co. *v.* Godfrey, 71 Ill. 500.—FOLLOWED IN Rowland *v.* Missouri Pac. R. Co., 20 Mo. App. 463.—*Chicago & I. C. R. Co.* v. *De Baum*, 2 *Ind. App.* 281, 28 *N. E. Rep.* 447.

A company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station house, where, at the time of receiving the injury, such person was at such station house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road. *Pittsburgh, Ft. W. & C. R. Co.* v. *Bingham*, 29 *Ohio St.* 364.—DISTINGUISHING Tobin

* See also CARRIAGE OF PASSENGERS, **89-91.**

v. Portland, S. & P. R. Co., 59 Me. 183; Toledo, W. & W. R. Co. *v.* Grush, 67 Ill. 262. QUOTING Harris *v.* Stevens, 31 Vt. 90; Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 372. REVIEWING Nicholson *v.* Erie R. Co., 41 N. Y. 525; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129.—QUOTED IN Lary *v.* Cleveland, C., C. & I. R. Co., 3 Am. & Eng. R. Cas. 498, 78 Ind. 323, 41 Am. Rep. 572; Omaha & R. V. R. Co. *v.* Martin, 19 Am. & Eng. R. Cas. 236, 14 Neb. 295. REVIEWED IN Woolwine *v.* Chesapeake & O. R. Co., 50 Am. & Eng. R. Cas. 37, 36 W. Va. 329, 15 S. E. Rep. 81; Harriman *v.* Pittsburgh, C. & St. L. R. Co., 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11.

The platform of a railroad at a station is not a public highway; therefore mere sightseers, who resort to a platform to see a distinguished person pass, and break it down, cannot recover of the company for the injury thereby received. *Gillis* v. *Pennsylvania R. Co.*, 59 *Pa. St.* 129.—DISTINGUISHED IN Keffe *v.* Milwaukee & St. P. R. Co., 21 Minn. 207; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269. FOLLOWED IN Jeffersonville, M. & I. R. Co. *v.* Goldsmith, 47 Ind. 43; Baltimore & O. R. Co. *v.* Schwindling, 8 Am. & Eng. R. Cas. 544, 101 Pa. St. 258. QUOTED IN Hicks *v.* Pacific R. Co., 64 Mo. 430; Woolwine *v.* Chesapeake & O. R. Co., 36 W. Va. 329. REVIEWED IN Pittsburgh, Ft. W. & C. R. Co. *v.* Bingham, 29 Ohio St. 364; Davis *v.* Chicago & N. W. R. Co., 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am. Rep. 667; Griswold *v.* Chicago & N. W. R. Co., 23 Am. & Eng. R. Cas. 463, 64 Wis. 652.

74. —— friends or relatives of passenger.*—An old lady went to a station to assist friends, who intended to remove from the country permanently, to get to the station, a distance from the train then about to depart, and after bidding her friends good-bye, and after they had gone upon the train, stood for about five minutes upon the station platform to see the train start, and to bid her friends a last farewell. *Held*, that she was not guilty of such culpable contributory negligence as would prevent her from recovering for the injuries sustained by her through the negligence of the company. *Atchison, T. & S. F. R. Co.* v. *Johns*, 34 *Am. & Eng. R. Cas.* 480, 36 *Kan.* 769, 14 *Pac. Rep.* 237.

A man went to a depot to meet his wife, and having occasion to seek a retired spot, no special resort being provided, he stepped off the walk, in the darkness, upon a portion of the depot grounds, and fell into a hole. *Held*, that he was a customer of the company and not a trespasser, and that he could maintain an action against the company for the injury. *McKone* v. *Michigan C. R. Co.*, 13 *Am. & Eng. R. Cas.* 29, 51 *Mich.* 601, 17 *N. W. Rep.* 74, 47 *Am. Rep.* 596.—REVIEWED IN Montgomery & E. R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

A company is under special duty to persons who come upon its premises for the purpose of doing business with it as a common carrier to provide suitable and safe accommodations with regard to its depot. The company is under like obligations to "persons who are on the premises to welcome the coming or speed the parting guest." *Hamilton* v. *Texas & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 336, 64 *Tex.* 251.—FOLLOWED IN Texas & P. R. Co. *v.* Best, 66 Tex. 116.

If the infirmities of passengers require the assistance of others to see them safely on the train, servants or friends attending them for that purpose are under an invitation of the company as direct as that given passengers themselves. *Hamilton* v. *Texas & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 336, 64 *Tex.* 251.—REVIEWING Tobin *v.* Portland, S. & P. R. Co., 59 Me. 183.

75. —— trespassers.*—Where a company so locates its station as to require persons approaching it from the main business portion of the town to cross several tracks which are kept smooth for pedestrians and without any well-defined crossings, this is tantamount to an invitation to such persons to cross at any point near the station, and persons so crossing are not trespassers. *Louisville, N. O. & T. R. Co.* v. *Hirsch*, 69 *Miss.* 126, 13 *So. Rep.* 244.

Under such circumstances the company will be held to the utmost caution in the movement of its trains on such tracks to prevent injury to persons so crossing. *Louisville, N. O. & T. R. Co.* v. *Hirsch*, 69 *Miss.* 126, 13 *So. Rep.* 244.

Plaintiff sued for personal injuries. The evidence showed that he was in a switch-yard and on a track in advance of a stand-

*See also CARRIAGE OF PASSENGERS, 90, 91.

*See also CARRIAGE OF PASSENGERS, 92-96.

ing car which was moved by being struck by other cars. It was at a place where employés of the company had no reason to expect persons, and especially so at the time (half-past 4 A.M.). The morning was foggy, and it was not shown that the employés were wanting in due care. *Held*, that a verdict and judgment for defendant cannot be set aside as against the evidence. *Bradley* v. *San Antonio & A. P. R. Co.*, 80 *Tex.* 84, 16 *S. W. Rep.* 55.

2. *Platforms.*

76. Duty to provide and maintain safe and suitable platforms.* — Railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do, or would naturally, resort, and all portions of their station grounds reasonably near to the platforms where passengers, or those who have purchased tickets with a view to take passage, would naturally be. *Green* v. *Pennsylvania R. Co.*, 36 *Fed. Rep.* 66.—FOLLOWING McDonald *v.* Chicago & N. W. R. Co., 26 Iowa 124.—*McDonald* v. *Chicago & N. W. R. Co.*, 26 *Iowa* 124. *Pennsylvania Co.* v. *Marion*, 123 *Ind.* 415, 7 *L. R. A.* 687, 23 *N. E. Rep.* 973. — QUOTING Louisville, N. A. & C. R. Co. *v.* Lucas, 119 Ind. 583; Lucas *v.* Pennsylvania Co., 120 Ind. 205.—*White* v. *Cincinnati, N. O. & T. P. R. Co.*, 42 *Am. & Eng. R. Cas.* 547, 89 *Ky.* 478, 12 *S. W. Rep.* 936. *Stafford* v. *Hannibal & St. J. R. Co.*, 22 *Mo. App.* 333.—QUOTING Gaynor *v.* Old Colony & N. R. Co., 100 Mass. 215.—*Union Pac. R. Co.* v. *Sue*, 25 *Neb.* 772, 41 *N. W. Rep.* 801. *Skottowe* v. *Oregon S. L. & U. N. R. Co.*, 51 *Am. & Eng. R. Cas.* 444, 22 *Oreg.* 430, 30 *Pac. Rep.* 222, 16 *L. R. A.* 593.

And if passengers are discharged after dark it must provide lights. *Louisville, N. A. & C. R. Co.* v. *Lucas*, 119 *Ind.* 583, 21 *N. E. Rep.* 968.—QUOTED IN Pennsylvania Co. *v.* Marion, 123 Ind. 415.

If a station room is full, or if it is intolerably offensive, by reason of tobacco smoke, so that a female passenger has good reason for not remaining there, it will justify her endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing she uses proper care and violates no rule or regulation of the company of which she has actual knowledge, or which, as a reasonable person, she would be bound to presume existed. *McDonald* v. *Chicago & N. W. R. Co.*, 26 *Iowa* 124.—FOLLOWED IN Green *v.* Pennsylvania R. Co., 36 Fed. Rep. 66. QUOTED IN Alexandria & F. R. Co. *v.* Herndon, 87 Va. 193. REVIEWED IN Moses *v.* Louisville, N. O. & T. R. Co., 30 Am. & Eng. R. Cas. 556, 39 La. Ann. 649, 2 So. Rep. 567.

To render a company liable for an injury to a passenger which resulted from leaving its station platform in an unsafe condition, it is not necessary that precisely such an accident as actually occurred might be anticipated, for the company is liable if it is probable that some injury might result from such negligence. *Louisville, N. A. & C. R. Co.* v. *Lucas*, 119 *Ind.* 583, 21 *N. E. Rep.* 968.

Where a company has a platform and other facilities for entering and leaving cars with safety on the depot side of the track, the failure to have the opposite side likewise prepared as a place for entering and leaving the cars cannot be regarded as negligence; the company may select and adhere to such arrangement of depots and platforms as it sees fit, if those it makes are safe and commodious. *Michigan C. R. Co.* v. *Coleman*, 28 *Mich.* 440, 12 *Am. Ry. Rep.* 59.

A company having a telegraph office in one of its stations, open to the public, is responsible to one of its passengers who is injured through the company's negligence alone, while going to the telegraph office over the structure or platform by which it is made accessible. *Clussman* v. *Long Island R. Co.*, 9 *Hun* (*N. Y.*) 618; *affirmed* (?) *in* 73 *N. Y.* 606, *mem.*—APPLYING Hulbert *v.* New York C. R. Co., 40 N. Y. 145.

If a company, instead of furnishing a platform on which passengers may alight, furnishes but a small box, it is its duty to render such assistance to passengers as will make the box as safe as a platform. *Missouri Pac. R. Co.* v. *Wortham*, 37 *Am. & Eng. R. Cas.* 82, 73 *Tex.* 25, 3 *L. R. A.* 368, 10 *S. W. Rep.* 741.

Proof that a company failed to furnish a platform for the use of passengers, but used a box only eleven inches square on the top and a little larger at the bottom, justifies the jury in finding that the company has failed to furnish sufficient platform accom-

* Duty of railroad to furnish safe approaches, platforms, etc., see notes, 3 L. R. A. 74; 7 *Id.* 111. Duty to light, see 6 *Id.* 193.

Liability of company for injury caused by defective platforms, see notes, 3 L. R. A. 76; 11 *Id.* 721.

modations. And this is so regardless of the time such box has been used or the number of persons who had used it, or the amount of expert testimony as to its safety. *Missouri Pac. R. Co.* v. *Wortham*, 37 *Am. & Eng. R. Cas.* 82, 73 *Tex.* 25, 3 *L. R. A.* 368, 10 *S. W. Rep.* 741.

If it be shown that plaintiff was careful and was injured in the attempt to get off a platform negligently constructed and badly lighted, and if a person would naturally get off the platform at the place plaintiff did, then he should recover. *Texas & P. R. Co.* v. *Brown*, 78 *Tex.* 397, 14 *S. W. Rep.* 1034.

An accident occurred at night during a snowstorm. It was intensely dark, and the platforms of the cars were covered with snow. Plaintiff, a female, was unattended and encumbered with heavy clothing and packages. There was no platform at the station, and defendant's servants offered her no assistance. The court instructed the jury that if there was no platform or other proper landing at the stopping place, and defendant's servants rendered plaintiff no assistance, and if, for want of such landing and assistance, plaintiff was injured, without fault on her part, she should recover. *Held*, no error. *Alexandria & F. R. Co.* v. *Herndon*, 87 *Va.* 193, 12 *S. E. Rep.* 289.—QUOTING McDonald *v.* Chicago & N W. R. Co., 26 Iowa 124.

77. To whom the duty is owed.*—To the class of persons having business with it, a company is under obligation to keep in safe condition all parts of its platforms with the approaches thereto, to which the public do, or would naturally, resort, and all portions of the station grounds reasonably near to the platform, where passengers would be likely to go, and to provide safe waiting rooms, and to keep the depot and platform well lighted at night; but to the public at large the company owes "nothing beyond the observance of the duties of good neighborhood," which includes "the universal duty of doing no wilful or wanton injury, and of erecting or continuing, on or near its platform or approaches, to which the public may be expected to go, no nuisance, trap or pitfall, from which personal injury is likely to ensue." *Montgomery & E. R. Co.* v. *Thompson*, 77 *Ala.* 448, 54 *Am. Rep.* 72.—LIMITED IN Alabama G. S. R. Co. *v.* Arnold, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.—*Memphis & C. R. Co.* v. *Whitfield*, 44 *Miss.* 466.

One who goes upon a platform at a station from curiosity, or for the transaction of business in no way connected with the company, is without remedy against the company for any injury received from defects of the platform. *St. Louis, I. M. & S. R. Co.* v. *Fairbairn*, 30 *Am. & Eng. R. Cas.* 166, 48 *Ark.* 491, 4 *S. W. Rep.* 50.—FOLLOWED IN Sibley *v.* Ratliffe, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477. QUOTED IN St. Louis, I. M. & S. R. Co. *v.* Ferguson, 57 Ark. 16.

To entitle such a person to recover, he must show gross and wanton negligence on the part of the company equivalent to intentional mischief. *Burbank* v. *Illinois C. R. Co.*, 45 *Am. & Eng. R. Cas.* 593, 42 *La. Ann.* 1156, 8 *So. Rep.* 580.

An Arkansas statute requires railroad companies to post at the nearest station house a notice of the killing of stock by trains. A person missed a cow, and being unable to read, took plaintiff with him upon a depot platform to read for him what notices were there posted. In climbing up to get at the notice, he fell through a defective plank in the platform and was injured. *Held:* (1) that the company was bound to use ordinary care to keep the platforms at its station houses in good repair and in good condition for those who have the legal right to go upon them, and that it was liable to plaintiff; (2) that the fact that it was about dark when plaintiff went upon the platform cannot, as a conclusion of law, be declared *per se* negligent. *St. Louis, I. M. & S. R. Co.* v. *Fairbairn*, 30 *Am. & Eng. R. Cas.* 166, 48 *Ark.* 491, 4 *S. W. Rep.* 50.

A railroad corporation is liable to a hackman for an injury received while carrying a passenger to its depot, by stepping, without fault, into a cavity in the platform, and occasioned solely by the want of ordinary care on the part of the corporation in leaving the platform in an unsafe condition; and the liability is not changed by the fact that the platform was erected and maintained within the limits of a highway. *Tobin* v. *Portland, S. & P. R. Co.*, 59 *Me.* 183.—DISTINGUISHED IN Pittsburgh, Ft. W. & C. R. Co. *v.* Bingham, 29 Ohio St. 364. QUOTED IN Griswold *v.* Webb, 16 R. I. 649. REVIEWED IN

* To whom railroads owe duty of keeping station platforms safe, see note, 20 L. R. A. 527.

Hamilton *v.* Texas & P. R. Co., 21 Am. & Eng. R. Cas. 336, 64 Tex. 251.

The rule that it is the duty of a company to have its station platform reasonably safe for persons accompanying an intending passenger who is about to take a regular passenger train does not extend to persons accompanying one who is about to leave in a freight car in charge of live stock, although he has been allowed to load such stock into the car at the freight platform on one side of the station (instead of at the stock-yards, as is customary), from which place the car is to be taken in the night by a freight train which does not usually stop at that station, and is not allowed to carry passengers, and for which the station is never kept open, and although he and his friends have been allowed by the agent to occupy the waiting room. *Dowd* v. *Chicago, M. & St. P. R. Co.*, 84 *Wis.* 105, 54 *N. W. Rep.* 24.—QUOTING Watkins *v.* Great Western R. Co., 46 L. J. C. P. 817; Cahill *v.* Layton, 57 Wis. 614; Hemmingway *v.* Chicago, M. & St. P. R. Co., 67 Wis. 676.

78. Degree of care required.* — With respect to its platforms and approaches, a company is only held to that reasonable degree of care which is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business. *Pennsylvania Co.* v. *Marion*, 27 *Am. & Eng. R. Cas.* 132, 104 *Ind.* 239, 3 *N. E. Rep.* 874.

The high degree of care which a company owes to its passengers extends to all necessary appliances to enable them safely to leave the cars. It is negligence to leave a wheel-box or its guard so out of repair that it is liable to throw down a passenger alighting from the car. *Chase* v. *Jamestown St. R. Co.*, 38 *N. Y. S. R.* 954, 60 *Hun* 582, *mem.*, 15 *N. Y. Supp.* 35; *affirmed in* 133 *N. Y.* 619, *mem.*, 30 *N. E. Rep.* 1150, 44 *N. Y. S. R.* 931.

79. Need not be absolutely safe.— A railroad company is not bound to keep its station platforms and approaches absolutely safe, but only in a reasonably safe condition. *Gulf, C. & S. F. R. Co.* v. *Gross* (*Tex. Civ. App.*), 21 *S. W. Rep.* 186. *Gulf, C. & S. F. R. Co.* v. *Butcher*, 52 *Am. & Eng. R. Cas.* 615, 83 *Tex.* 309, 18 *S. W. Rep.* 583.

* Measure of care which company must exercise to keep platforms and approaches safe, see note, 20 L. R. A. 520.

80. Guard railings.—A company is not guilty of negligence in maintaining a platform, extending from its station to its steamboat pier, such platform being four feet three inches wide, and on one side protected by railings, but on the side next the railway, which runs parallel with it for some distance, having only a guard of wood nine inches high. *Rigg* v. *Manchester, S. & L. R. Co.*, 12 *Jur. N. S.* 525, 14 *W. R.* 834.

81. Covering—Roof.—While standing looking at a time-table on a station platform a passenger was injured by a plank falling through the covering of the platform, and upon looking up he saw the legs of a man protruding through the covering. *Held*, that there being nothing to show that the man was employed by the company, or that it knew the covering to be insecure, the plaintiff was properly nonsuited. *Welfare* v. *London & B. R. Co.*, 38 *L. J. Q. B.* 241, *L. R.* 4 *Q. B.* 693, 17 *W. R.* 1065, 20 *L. T.* 743.

82. Hole in floor. — Plaintiff, while lawfully on a railroad platform, fell through a hole in decaying boards, which had been known to the company's agent for nearly two years, and received severe internal injuries. *Held*, that the negligence of the company in not making the platform safe rendered it liable, and $1000 damages were not excessive. *Toledo, W. & W. R. Co.* v. *Grush*, 67 *Ill.* 262. — DISTINGUISHED IN Pittsburgh, Ft. W. & C. R. Co. *v.* Bingham, 29 Ohio St. 364.

A company is guilty of gross negligence in leaving a hole in the floor of a depot where its passengers are accustomed to alight from its cars. *Liscomb* v. *New Jersey R. & T. Co.*, 6 *Lans.* (*N. Y.*) 75.

83. Proximity to track.—As plaintiff was leaving a car on the Brooklyn Bridge she fell into the space between the car and the platform and was injured. The evidence tended to show that the platform was not sufficiently lighted, and it was claimed that the opening between the platform and the car was too wide. The evidence differed as to the width of the opening at the place of the accident, it being fixed by different witnesses at from eleven and a half to eighteen inches; but the track at the point was constructed on a curve, so that the centre of the car was necessarily much closer to the platform than the ends. Plaintiff had been in the habit of crossing the bridge, but on previous occasions she had gotten off at the middle of the car. No previous acci-

dent had occurred. *Held*, that the opening in itself was not evidence of negligence. *Fox* v. *Mayor, etc., of N. Y.*, 53 *N. Y. S. R.* 902, 70 *Hun* 181, 24 *N. Y. Supp.* 43.

In such case it was error to refuse to charge that, if the jury believed that the platform was lighted on the night of the accident, as testified by defendant's witnesses, the verdict must be for defendant; and to refuse further to charge that there was no evidence that the space between the platform and the car was unnecessarily wide, and that the only question which the jury might consider was whether the platform was properly lighted. *Fox* v. *Mayor, etc., of N. Y.*, 53 *N. Y. S. R.* 902, 70 *Hun* 181, 24 *N. Y. Supp.* 43.

The proximity of a platform to a railroad track is not negligence on the part of the company when it is constructed on private property and not on the company's right of way. *Barber* v. *Richmond & D. R. Co.*, 34 *So. Car.* 444, 13 *S. E. Rep.* 630.

It is negligence in a company so to construct a platform that passing cars shall extend over it as much as eighteen inches. *Houston & T. C. R. Co.* v. *Reason*, 61 *Tex.* 613.

84. Too narrow between tracks.—A railroad constructed a platform for passengers on a narrow strip between two tracks, leaving a space of only two feet and two inches between coaches when a train was on each track. Plaintiff, while about to take passage on an approaching train, was hit by a train approaching on the other track from his rear. *Held*, that the construction of so narrow a platform at such a place, and an attempt to pass trains with passengers on the platform, amounted to wanton carelessness and gross negligence, or wilful injury; and plaintiff, being a stranger, had a right to suppose that the trains would be properly managed, and could not be held guilty of contributory negligence. *Chicago & A. R. Co.* v. *Wilson*, 63 *Ill.* 167.—DISTINGUISHED IN Chicago, B. & Q. R. Co. *v.* Mehlsack, 44 Ill. App. 124. QUOTED IN Pennsylvania Co. *v.* Keane, 41 Ill. App. 317.

A company will be liable for an injury if it builds a platform between tracks so as to compel a passenger to stand dangerously near passing trains; but it will not be liable if the platform is wide enough to afford ample room, though the edge nearest to the track could not be safely occupied. *Chicago, B. & Q. R. Co.* v. *Mahara*, 47 *Ill. App.* 208.

85. Too high.—It is negligence for a company to have a station platform higher than the car steps, and to require passengers to board the trains from a baggage car. *Turner* v. *Vicksburg, S. & P. R. Co.*, 37 *La. Ann.* 648, 55 *Am. Rep.* 514.—FOLLOWING Peniston *v.* Chicago, St. L. & N. O. R. Co., 34 La. Ann. 778.

86. Too low.—It is negligence on the part of a company to construct and maintain a station platform twenty-six inches below the level of the lowest steps of its cars. *Toledo, St. L. & K. C. R. Co.* v. *Wingate*, 58 *Am. & Eng. R. Cas.* 232, 143 *Ind.* 125, 37 *N. E. Rep.* 274.

87. Machinery on platform.—A company is not guilty of negligence in maintaining on its station platform, in a proper place, and properly lighted, a machine, the edge of which is raised a few inches above the level of the platform and over which a passenger falls and is injured. *Blackman* v. *London, B. & S. C. R. Co.*, 17 *W. R.* 769. *Cornman* v. *Eastern Counties R. Co.*, 4 *H. & N.* 781, 29 *L. J. Ex.* 94.

88. Ice and snow.—A railway company is guilty of negligence in maintaining a station platform across which there extends a strip of ice, upon which a passenger slips, sustaining injuries. *Shepperd* v. *Midland R. Co.*, 20 *W. R.* 705, 25 *L. T.* 879.

It is the duty of a railroad corporation to remove snow and ice from a platform over which it is necessary for passengers to pass in order to reach its cars, or to take precautions by covering it with ashes or other substance, to protect passengers from the danger to which otherwise they would be exposed. *Weston* v. *New York El. R. Co.*, 73 *N. Y.* 595; *affirming* 10 *J. & S.* 156.—DISTINGUISHED IN Palmer *v.* Pennsylvania Co., 111 N. Y. 488, 18 N. E. Rep. 859, 19 N. Y. S. R. 493; Kelly *v.* Manhattan R. Co., 112 N. Y. 443, 20 N. E. Rep. 383, 21 N. Y. S. R. 507. FOLLOWED IN Foster *v.* New York C. & H. R. R. Co., 108 N. Y. 636. REVIEWED IN Timpson *v.* Manhattan R. Co., 52 Hun 489, 24 N. Y. S. R. 629, 5 N. Y. Supp. 684.

This duty is not performed simply by appointing servants, whose duty it is to keep the platform in a safe condition; nor is it any excuse that they neglected their duty. *Weston* v. *New York El. R. Co.*, 73 *N. Y.* 595; *affirming* 10 *J. & S.* 156.

Proof that plaintiff was injured in stepping from a car onto an icy platform, and that snow and ice had been forming since the day before, and that no means had been used, by either sanding or putting ashes on the platform, to make it safe, is sufficient to make out a *prima facie* case of negligence against the company, and to justify a verdict for plaintiff. *Timpson* v. *Manhattan R. Co.*, 5 *N. Y. Supp.* 684, 52 *Hun* 489, 24 *N. Y. S. R.* 629.—REVIEWING Weston *v.* New York El. R. Co., 73 N. Y. 595; Hulbert *v.* New York C. R. Co., 40 N. Y. 145.

A company is under no obligation to remove the effects of a continuous storm of snow, sleet and rain from the exposed platform of a car while making its passage between stations or the *termini* of its route; and a passenger who has reason to know that there is snow and ice upon the platform, and that the company has had no reasonable opportunity to remove it, cannot recover damages for injuries sustained through a fall caused by slipping thereon. *Palmer* v. *Pennsylvania Co.*, 37 *Am. & Eng. R. Cas.* 150, 111 *N. Y.* 488, 18 *N. E. Rep.* 859, 19 *N. Y. S. R.* 493; *reversing* 42 *Hun* 656, 4 *N. Y. S. R.* 888.—DISTINGUISHING Weston *v.* New York El. R. Co., 73 N. Y. 595.—APPLIED IN Kelly *v.* Manhattan R. Co., 112 N. Y. 443, 20 N. E. Rep. 383, 21 N. Y. S. R. 507; Buck *v.* Manhattan R. Co., 32 N. Y. S. R. 51, 10 N. Y. Supp. 107. QUOTED IN Bruswitz *v.* Netherlands A. S. Nav. Co., 46 N. Y. S. R. 623. REVIEWED IN Hanrahan *v.* Manhattan R. Co., 53 Hun 420, 24 N. Y. S. R. 790, 6 N. Y. Supp. 395.

3. *Station Grounds and Approaches.*

89. Duty as to premises—Need not be absolutely safe.*—When a structure or appliance, such as is in general use, and which is not inherently dangerous, has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it cannot be said that a person has not acted with ordinary prudence if he fails to anticipate an accident which afterwards happens in its use when substantially in its usual condition. *Wabash, St. L. & P. R. Co.* v. *Locke*, 112 *Ind.* 404, 11 *West. Rep.* 877, 14 *N. E. Rep.* 391.—QUOTED IN McKee *v.* Chicago, R. I. & P. R. Co., 48 Am. & Eng. R. Cas. 154, 83 Iowa 616. REVIEWED AND DISTINGUISHED IN Murphy *v.* Wabash R. Co., 115 Mo. 111.

A public carrier is only bound to use ordinary care in view of the dangers to be apprehended; it is not bound to keep its premises absolutely safe, nor is it liable for accidents due to a want of ordinary care on the part of the injured person. *Skottowe* v. *Oregon S. L. & U. N. R. Co.*, 51 *Am. & Eng. R. Cas.* 444, 22 *Oreg.* 430, 30 *Pac. Rep.* 222, 16 *L. R. A.* 593.—DISTINGUISHING Eisenberg *v.* Missouri Pac. R. Co., 33 Mo. App. 91; Cusick *v.* Adams, 115 N. Y. 55, 12 Am. St. Rep. 772; Texas & N. O. R. Co. *v.* Dessommes, (Tex.) 15 S. W. Rep. 806.

90. To whom duty is owed. — A company owes to one, not a servant of the company, who is lawfully engaged in loading a car upon its side track, the duty to have its premises in a reasonably safe condition, and to prevent damages to him and others having occasion to transact business with it, from any unseen or unusual danger of which it has knowledge, or by the exercise of reasonable vigilance and sagacity should have knowledge. *Wabash, St. L. & P. R. Co.* v. *Locke*, 112 *Ind.* 404, 11 *West. Rep.* 877, 14 *N. E. Rep.* 391.

91. Degree of care.—The measure of care due from a railroad company to its passengers, whom it invites to use a sidewalk which it has laid between its station and the street, is the same as that required of a municipal corporation with respect to the public sidewalks which it is required by law to maintain. *Bateman* v. *New York C. & H. R. R. Co.*, 47 *Hun* 429, 14 *N. Y. S. R.* 454.

92. Bridges.—Although a company is not bound to erect a foot bridge over its line to give passengers access from one platform to the other, and the want of such a bridge will not, *per se*, make it liable for injuries received by the public on that account, still, the absence of such a precaution throws a greater onus on the company to provide for the safety of the public. *Girdwood* v. *North British R. Co.*, 4 *Sc. Sess. Cas.* (*4th Series*) 115, 3 *Ry. & C. T. Cas.* xviii.

A company is liable for the death of a passenger owing to a defective bridge which it has constructed between two platforms at its station, although there was a safer bridge about 100 yards farther round, which

* Defective station surroundings, see notes, 16 AM. & ENG. R. CAS. 320; 27 *Id.* 130; 30 *Id.* 171; 35 *Id.* 481. See also 56 AM. & ENG. R. CAS. 289, *abstr.*

the deceased might have used. *Longmore* v. *Great Western R. Co.*, 19 *C. B. N. S.* 183.

A shallow ditch, not more than two feet wide, ran parallel with defendant's track, at the point where passengers got on and off, with a bridge or platform fifteen feet wide erected over it, which was in good condition, except that one plank was slightly shorter than the others, and plaintiff, in the daytime, in attempting to get on a train, stepped into a hole caused by the short plank, and was injured. *Held*, that defendant was entitled to an instruction that, if the jury found the bridge to be such as testified to, it was sufficient as a crossing place for passengers, and defendant was not chargeable with negligence. *Stokes* v. *Suffolk & C. R. Co.*, 107 *N. Car.* 178, 11 *S. E. Rep.* 991.—REVIEWED IN Falls *v.* San Francisco & N. P. R. Co., 97 Cal. 114.

Where a bridge leading to a railroad station is being repaired for the company by independent contractors, and the work of repair has been nearly completed, so that the company has begun to use the bridge as a passageway for people passing to and from its station, the company is liable for the death of a person who falls through an opening in the bridge while passing to the station to purchase his ticket. *Gilmore* v. *Philadelphia & R. R. Co.*, 56 *Am. & Eng. R. Cas.* 279, 154 *Pa. St.* 375, 25 *Atl. Rep.* 774.

93. Ditches.—Plaintiff left a train on a dark night, and took the usual route for passengers, and when a short distance from the station, fell in an open ditch under a trestle, which it was necessary to cross. *Held*, that it was the duty of the company to keep such places in a safe condition, and that it was liable for the injury. *Texas & St. L. R. Co.* v. *Orr*, 46 *Ark.* 182.

94. Open hatchways and holes.* —A company owned the grounds from one of its depots to a steamboat landing on a river. The only means of foot passage to the landing led through the railroad station house. A passenger from a train in attempting to go to a boat, in the night-time, fell through an open hatchway in the station-house floor and was injured. *Held*, that the railroad was liable. *Bennett* v. *Louisville & N. R. Co.*, 1 *Am. & Eng. R. Cas.* 71, 102 *U. S.* 577.

Plaintiff left a train at her destination on a dark night, and on passing in the rear of the station to reach a stage, fell into an opening constructed in the ground to form an entrance to the basement of the station. The evidence showed that it was in the passageway likely to be used by persons in going to and from the cars. *Held*, that it was negligence in the company not to keep the place guarded or in a safe condition. *Green* v. *Pennsylvania R. Co.*, 30 *Fed. Rep.* 66.—FOLLOWING McDonald *v.* Chicago & N. W. R. Co., 26 Iowa 124.

A hole so near a recognized way, used by the public in going to and from a depot, that a man in the "ordinary aberrations of travel" might fall into it, should be guarded by the company to prevent such an accident. *Cross* v. *Lake Shore & M. S. R. Co.*, 35 *Am. & Eng. R. Cas.* 476, 69 *Mich.* 363, 14 *West. Rep.* 181, 37 *N. W. Rep.* 361.—DISTINGUISHED IN Flagg *v.* Chicago, D. & C. G. T. J. R. Co., 96 Mich. 30.

95. —— left unguarded by independent contractor.—A railroad company is liable to a passenger for injuries from falling through an opening at the head of a flight of stairs which it has opened as a means of access to the station, although the opening was left by independent contractors engaged in repairing such stairway. *Gilmore* v. *Philadelphia & R. R. Co.*, 154 *Pa. St.* 375, 25 *Atl. Rep.* 774.

96. Turntable.—A turntable belonging to defendant company was located upon its depot grounds, six feet from the line of a street passing through a sparsely settled portion of the city, and very little traveled. It had stood upon its present location for about fifteen years, and constituted in itself a conspicuous object of warning of whatever danger it presented. Plaintiff while attempting to pass along the street on a dark night fell into it and sustained serious injury. It was shown that plaintiff knew of its location from the time it was built. He had worked for the company eighteen years, and fourteen years of that time was a night watchman. He knew all about the danger in passing, if there was any. There was no statute requiring the company to fence its depot grounds. *Held:* (1) that plaintiff could not recover; (2) that negligence will not be presumed from the bare fact of the occurrence of the accident on defendant's land; (3) and that evidence of other and previous accidents occurring at

* Passenger falling into hole in leaving station may recover for injuries received, see 35 AM. & ENG. R. CAS. 509, *abstr*

the same place was inadmissible. *Early* v. *Lake Shore & M. S. R. Co.*, 30 *Am. & Eng. R. Cas.* 163, 66 *Mich.* 349, 9 *West. Rep.* 863, 33 *N. W. Rep.* 813.

97. Bunters — Snubbing posts. — A track was laid upon a descending grade, which at its lower end stopped at a street. There was no bunter or other obstruction to prevent cars from going beyond the end of the track. There was a telegraph pole near the end of the track and in the street. Plaintiff, a hackman, was standing with his team in the street. Some cars suddenly, and apparently without the fault of the company, became detached, ran beyond the end of the track, and struck the telegraph pole, which was thereby broken, and the wires fell upon plaintiff's horses, frightening them and causing them to injure plaintiff. *Held*, that the jury were authorized to find that a bunter should have been put up to guard against such accidents, and that the evidence was sufficient to sustain a verdict for plaintiff. *Shaw* v. *New York & N. E. R. Co.*, 41 *Am. & Eng. R. Cas.* 547, 150 *Mass.* 182, 22 *N. E. Rep.* 884.

It is for the jury to determine whether it is not negligence in a railway company to omit means to prevent its cars from moving or being driven beyond the rails where these if extended would cross a passageway left open by the company to give access to the depot. *Grand Rapids & I. R. Co.* v. *Martin*, 41 *Mich.* 667.

98. Means of ingress and egress. —It is made the duty of railway companies to establish depots and so to operate their roads as to afford the public reasonable safety and dispatch in the transaction of business; and to effect this, it is necessary that they should, at all reasonable times, provide a ready and convenient means of access to their stations and depots. *Chicago, B. & Q. R. Co.* v. *Hans*, 111 *Ill.* 114.—QUOTING Chicago & G. T. R. Co. *v.* Campbell, 47 Mich. 265.—*Burbank* v. *Illinois C. R. Co.*, 45 *Am. & Eng. R. Cas.* 593, 42 *La. Ann.* 1156, 8 *So. Rep.* 580. *Collins* v. *Toledo, A. A. & N. M. R. Co.*, 80 *Mich.* 390, 45 *N. W. Rep.* 178. *Warren* v. *Fitchburg R. Co.*, 8 *Allen (Mass.)* 227.—DISTINGUISHED IN Young *v.* Old Colony R. Co., 156 Mass. 178; Terry *v.* Jewett, 78 N. Y. 338; Ormsbee *v.* Boston & P. R. Corp., 14 R. I. 102, 51 Am. Rep. 354. REVIEWED IN Beisiegel *v.* New York C. R. Co., 34 N. Y. 622.—*Delaware, L. & W. R. Co.* v. *Trautwein*, 41 *Am. & Eng. R. Cas.* 187, 52 *N. J. L.* 169, 19 *Atl. Rep.* 178, 7 *L. R. A.* 435. *Texas & P. R. Co.* v. *Brown*, 78 *Tex.* 397, 14 *S. W. Rep.* 1034.

A railway company which has provided all reasonable facilities for ingress and egress from its station houses has done its full duty in that regard, and cannot be bound to suppose that passengers who do not know the way will neglect the means open to their sight and go off in the darkness somewhere else. *Sturgis* v. *Detroit, G. H. & M. R. Co.*, 72 *Mich.* 619, 40 *N. W. Rep.* 914.

99. Approaches.* — A company is bound to keep all approaches to its depot, constructed by it and under its control for the use of persons having lawful occasion to use them to go to or from the depot or cars, safe and convenient for such use, even though the same may be within the limits of a highway. *Quimby* v. *Boston & M. R. Co.*, 69 *Me.* 340.

It is the duty of a company to keep in a reasonably safe condition a recognized way used by the public in going to and from its depot. *Cross* v. *Lake Shore & M. S. R. Co.*, 35 *Am. & Eng. R. Cas.* 476, 69 *Mich.* 363, 14 *West. Rep.* 181, 37 *N. W. Rep.* 361.—FOLLOWED IN Cole *v.* Lake Shore & M. S. R. Co., 81 Mich. 156.

100. Passageways. — It may be assumed that a company will take the utmost care to protect persons from injury in crossing a passage left by it to give access to the depot, when the passage does not actually cross the track. *Grand Rapids & I. R. Co.* v. *Martin*, 41 *Mich.* 667.

Where a passenger is injured by falling over obstructions in a passageway leading from a station, the company is not released from liability by the fact that there was another passageway leading from the station, which plaintiff might have taken. *Delaware, L. & W. R. Co.* v. *Trautwein*, 41 *Am. & Eng. R. Cas.* 187, 52 *N. J. L.* 169, 7 *L. R. A.* 435, 13 *N. J. L. J.* 72, 19 *Atl. Rep.* 178.

101. Stairs and steps.— A company is not guilty of negligence in maintaining, at a station platform, a staircase the steps of which are nosed with brass which has become smooth from use. A passenger who slips on such steps and hurts himself cannot

* As to duty of carrier in maintaining safe approaches beyond its own grounds, see note, 16 L. R. A. 593.

recover. *Crafter* v. *Metropolitan R. Co.*, 1 *H. & R.* 164, *L. R.* 1 *C. P.* 300, 12 *Jur. N. S.* 272, 35 *L. J. C. P.* 132, 14 *W. R.* 334.

In an action for an injury to a passenger sustained through falling down stairs at a station, it is not enough to show that the stairs were of improper condition or construction, unless the fall was caused thereby. *Davis* v. *London & B. R. Co.*, 2 *F. & F.* 588.

Plaintiff was injured by falling on steps leading to defendant's station, which steps defendant had allowed to be slippery and dangerous. There was no contributory negligence on the part of plaintiff, but there were other steps which he might have used, and he admitted that he knew that the steps used by him were dangerous, and went down carefully, holding the handrail. *Held*, that defendant had not shown that plaintiff with a full knowledge of the nature and extent of the danger had voluntarily agreed to incur it, so as to make the maxim "*Volenti non fit injuria*" applicable, and therefore he was entitled to recover. *Osborne* v. *London & N. W. R. Co.*, 35 *Am. & Eng. R. Cas.* 483, 21 *Q. B. D.* 220, 57 *L. J. Q. B.* 618, 6 *Ry. & C. T. Cas.* lxviii.—APPROVING Thomas *v.* Quartermaine, 18 Q. B. D. 685.

Plaintiff was injured by falling over the railing of the stairs of a station on defendant's elevated road, and charged negligence in the method in which the rail was constructed. *Held*, that the company was bound to exercise ordinary care and diligence; that is, the care and diligence of a person of ordinary prudence, considering the uses to which the stairs were put; but it was not bound to anticipate every danger, nor to provide for the unexpected. As long as the structure was reasonably suited to the purpose to which it was applied, and the attention of the company had not been called to any deficiency, it was not guilty of negligence. *Johnson* v. *Manhattan R. Co.*, 52 *Hun* 111, 23 *N. Y. S. R.* 388, 4 *N. Y. Supp.* 848.

There was a platform extending from the east side of a depot to the railroad track, over which passengers passed to and from the cars. Stairs led through the centre of the depot to the street on the opposite side, which was several feet lower than the track, and there were also stairs at either end of the depot, leading from the platform to the street. The stairs at the north end of the depot were open at the top, as if they might be used. These stairs, and a platform at the bottom of them about four feet from the ground, were constructed by an express company for its sole use, but they were on defendant's premises, of which it had control. Plaintiff, a passenger, in attempting to pass down these stairs in the dark, from the upper platform to the street, without fault on her part, fell from the lower platform to the ground, striking beyond the limit of defendant's premises, and was injured. *Held*, that defendant was liable. *Beard* v. *Connecticut & P. R. R. Co.*, 48 *Vt.* 101, 16 *Am. Ry. Rep.* 375.—REVIEWED IN Delaware, L. & W. R. Co. *v.* Trautwein, 41 Am. & Eng. R. Cas. 187, 52 N. J. L. 169, 7 L. R. A. 435, 19 Atl. Rep. 178.

4. *Lighting Station Grounds; Warming Stations.*

102. Duty to light, generally.*—The complaint being, not that plaintiff did not have proper facilities for getting on and off a car, but that the car was stopped near a precipice, without a light, and without notice to plaintiff of its dangerous proximity, it was not error to modify a request to charge that the company is not bound to make landings or any provision for the reception and discharge of passengers where none are expected to be. *Central R. & B. Co.* v. *Smith*, 34 *Am. & Eng. R. Cas.* 456, 80 *Ga.* 526, 5 *S. E. Rep.* 772.

A company is bound to provide suitable modes of egress and ingress to and from its cars, and to provide sufficient lights at stations where passengers take or leave the cars at night. *Reynolds* v. *Texas & P. R. Co.*, 37 *La. Ann.* 694.

It is the duty of a company to keep lights at proper times at its depots, approaches, and other places connected therewith, which are likely to be visited by passengers and persons lawfully on the premises; and a negligent omission of such duty, causing injury, will entitle the injured party, without fault on his part, to damages. *Rozwadosfskie* v. *International & G. N. R. Co.*, 1 *Tex. Civ. App.* 487, 20 *S. W. Rep.* 872. *Galveston, H. & S. A. R. Co.* v. *Thornsberry*, (*Tex.*) 17 *S. W. Rep.* 521.

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* Obligations to keep stations lighted and in repair, see note, 18 AM. & ENG. R. CAS. 155.

Failure of company properly to light stations and platforms and to render assistance to passengers, see 47 AM. & ENG. R. CAS. 529, *abstr.*

103. Before and after arrival of trains at night.—Where a company has erected a station house, consisting of a ticket office, waiting room and platform, for the accommodation of and transaction of business with the public, it is its duty to see that the same are adapted for the purpose for which they are erected, and safe; and it should cause the same to be lighted a proper time before the arrival and after the departure of trains. *Alabama G. S. R. Co.* v. *Arnold*, 35 *Am. & Eng. R. Cas.* 466, 84 *Ala.* 159, 4 *So. Rep.* 359, 5 *Am. St. Rep.* 354. —DISTINGUISHING People *v.* New York, L. E. & W. R. Co., 29 Am. & Eng. R. Cas. 480, 104 N. Y. 58. LIMITING Montgomery & E. R. Co. *v.* Thompson, 77 Ala. 448. QUOTING Knight *v.* Portland, S. & P. R. Co., 56 Me. 234.—*Fordyce* v. *Merrill*, 49 *Ark.* 277, 5 *S. W. Rep.* 329. *Wallace* v. *Wilmington & N. R. Co.*, 8 *Houst.* (*Del.*) 529, 18 *Atl. Rep.* 818. *Grimes* v. *Pennsylvania Co.*, 36 *Fed. Rep.* 72. *Sargent* v. *St. Louis & S. F. R. Co.*, 58 *Am. & Eng. R. Cas.* 184, 114 *Mo.* 348, 21 *S. W. Rep.* 823, 19 *L. R. A.* 460.

Railroad companies are not bound to take passengers on their freight trains, but when they do so, and receive their money, they must not set them down in dangerous places on dark nights, without light and without notice of the danger. *Central R. & B. Co.* v. *Smith*, 34 *Am. & Eng. R. Cas.* 456, 80 *Ga.* 526, 5 *S. E. Rep.* 772.

104. To whom duty is owed.—A person who enters a station intending to take a train, and finding it gone, waits in the station for a horse-car, is not a passenger, and the company is not under the duty as to him of keeping its premises safely lighted. *Heinlein* v. *Boston & P. R. Co.*, 33 *Am. & Eng. R. Cas.* 500, 147 *Mass.* 136, 16 *N. E. Rep.* 698.

Where a railroad company permits an express company to use its offices and platforms, it will be liable to one who is injured by falling from a platform, which is not sufficiently lighted, while engaged in business with the express company. *Smith* v. *Texas & P. R. Co.*, 2 *Tex. Unrep. Cas.* 329.

105. Lighting and warming under Texas statute—Union depots.—The provision of Texas Act of 1889, ch. 23, requiring railroads to light and warm their depots, applies to all passenger depots, and is not limited to union depots or those where railroads cross. *Texas & P. R. Co.* v. *Mays*, 4 *Tex. App.* (*Civ. Cas.*) 225, 15 *S. W. Rep.* 43.

And a passenger may recover damages resulting from contracting a cold and a fever which followed, while waiting in a depot which was not sufficiently warmed. *Texas & P. R. Co.* v. *Mays*, 4 *Tex. App.* (*Civ. Cas.*) 225, 15 *S. W. Rep.* 43.

5. *Ejection from Station.*

106. Right to eject by force.*—Plaintiff sued for being ejected from a station building. The evidence showed that after his arrival at the station he visited several saloons, where he drank intoxicating liquors, and then returned to the station not for the purpose of waiting for a train on defendant's road. *Held*, that the company owed him no duty more than it owed to the general public, and the agent might eject him, using no unnecessary force. *Johnson* v. *Chicago, R. I. & P. R. Co.*, 51 *Iowa* 25.

Plaintiff came to a station intending to buy a ticket and become a passenger, but the ticket agent refused to sell him a ticket, claiming that he was drunk, which seems, however, not to have been the fact. *Held*, that after he failed to buy the ticket he was still lawfully upon the station, with the duty of leaving it with ordinary promptness, and of not loitering there, or of using it for any other purpose than of leaving it. *McKernan* v. *Manhattan R. Co.*, 22 *J. & S.* (*N. Y.*) 354.

Where such person refuses to leave the station after being requested to do so, the company's agents have a right to use necessary force to compel him to do so. *McKernan* v. *Manhattan R. Co.*, 22 *J. & S.* (*N. Y.*) 354.

But if the agents employ more force than is necessary to compel a removal, the company is liable, although the manner of the excessive force was selected by the agent to gratify his own passion or wilfulness. *McKernan* v. *Manhattan R. Co.*, 22 *J. & S.* (*N. Y.*) 354.

107. —— for violation of rules.—A superintendent of a railroad depot has authority to exclude therefrom persons who persist in violating the reasonable regulations prescribed for their conduct, and

*See also *ante*, **54, 55.**

Excluding persons not passengers from the platform of station, see note, 41 AM. DEC. 472.

thereby annoy passengers, or interrupt the officers and servants of the corporation in the discharge of their duties. *Com.* v. *Power*, 7 *Metc.* (*Mass.*) 596.—APPLIED IN Hall *v.* Power, 12 Metc. (Mass.) 482. DISTINGUISHED IN Rose *v.* Wilmington & W. R. Co., 106 N. Car. 168, 11 S. E. Rep. 526. QUOTED IN The D. R. Martin, 11 Blatchf. (U. S.) 233.

The superintendent of a railroad depot has not a right to order a person to leave the depot, and not come there any more, and to remove him therefrom by force if he does come, merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations established by the railroad corporation, or had conducted himself offensively towards the superintendent. *Hall* v. *Power*, 12 *Metc.* (*Mass.*) 482.—APPLYING Com. *v.* Power, 7 Metc. 596.—QUOTED IN Landrigan *v.* State, 31 Ark. 50.

108. —— for spitting on floor—Assault.—Railway passengers are entitled to remain in the waiting room at a station as long as they have occasion to do so and commit no offense against the good order of the place and reasonable regulations made to govern it; they are not bound to leave on being ordered out by the keeper for any such indecorum as spitting on the floor, and the refusal to go on being ordered will not excuse the commission of an assault and battery upon them to compel them to go. *People* v. *McKay*, 8 *Am. & Eng. R. Cas.* 205, 46 *Mich.* 439, 9 *N. W. Rep.* 486.

109. —— negro from room reserved for whites.*—Where plaintiff, a colored woman, sues for being wrongfully and violently ejected from the waiting room for whites, an instruction is erroneous that announces non-liability, merely, if plaintiff was expelled by a peace officer, there being certain evidence that he was acting under direction of defendant's servants, and, while so acting, used unnecessary violence. *Rose* v. *Louisville, N. O. & T. R. Co.*, 70 *Miss.* 725, 12 *So. Rep.* 825.

It is likewise error to instruct that if plaintiff entered and occupied the waiting room set apart for whites, she cannot recover, if a separate and suitable waiting room was provided for colored people, since this instruction ignores the ground of complaint that she was ejected in a violent and improper manner. *Rose* v. *Louisville, N. O. & T. R. Co.*, 70 *Miss.* 725, 12 *So. Rep.* 825.

109a. —— of man from ladies' room.—Plaintiff, a man, without any lady, went into the ladies' waiting room of a union depot, there being a different room provided for gentlemen, and about dusk went into the "ladies' private room," and when ordered out refused to go, and was then taken by the collar and put out upon the platform, receiving no personal injuries, and his clothes not being torn. *Held*, that he was not entitled to recover. *Toledo, W. & W. R. Co.* v. *Williams*, 77 *Ill.* 354.

6. *Contributory Negligence.*

110. Effect as defense, generally.*—To an action against a company, to recover damages on account of personal injuries sustained through neglect by the company to keep its depot grounds and approaches in safe condition, contributory negligence is a complete defense. *Montgomery & E. R. Co.* v. *Thompson*, 77 *Ala.* 448, 54 *Am. Rep.* 72.

If a company keeps its yard in proper repair for the purpose of hauling, and the damage occurs by reason of the plaintiff or his agent undertaking to use a part of the yard not designed for that purpose, or arises from want of ordinary care to avoid the injury, either in the manner of driving or in the plaintiff's conduct at the time of the injury, there can be no recovery. *Central R. Co.* v. *Gleason*, 69 *Ga.* 200.

Plaintiff lived at a small station, and did business near the track, and his storehouse was used as a deposit for the company's freight. He had been traveling over the road on a pass issued to him as the company's agent at that place, and was injured after leaving the train on his return and starting for his home. *Held*, that he was estopped by using the ticket from denying that he was agent. *Central R. Co.* v. *Henderson*, 69 *Ga.* 715.

Under the rule in Georgia, where a passenger is injured, and is not entirely free from negligence himself, the damages may be apportioned; but in this case, where plaintiff's injury was disconnected from the

* Dominion of company over station grounds and right of way, including power to remove persons therefrom, see note, 8 L. R. A. 753.

* Injury at station. Contributory negligence in leaving horse untied, see note, 50 AM. & ENG. R. CAS. 24.

running of trains, and resulted from a hole in the ground used by the company, near the depot, into which plaintiff fell after leaving the train, he cannot recover, unless he is wholly free from fault. *Central R. Co.* v. *Henderson*, 69 *Ga.* 715.

A person injured by an engine while walking through the yards of a company cannot recover damages when he was guilty of contributory negligence, and where the servants of the company exercised due diligence to avert the accident. *Missouri Pac. R. Co.* v. *McKernan*, 82 *Tex.* 204, 17 *S. W. Rep.* 1057.

111. Degree of care. — Passengers about a station at night when trains are passing should look where they are stepping and be observant of what is going on around them. *Sargent* v. *St. Louis & S. F. R. Co.*, 58 *Am. & Eng. R. Cas.* 184, 114 *Mo.* 348, 21 *S. W. Rep.* 823, 19 *L. R. A.* 460.

A person who is accquainted with the peculiar construction of the platform at a railway station does not have imposed upon him the necessity for a greater degree of caution than is incumbent upon all parties boarding a car. *Gulf, C. & S. F. R. Co.* v. *Fox*, (*Tex.*) 33 *Am. & Eng. R. Cas.* 543, 6 *S. W. Rep.* 569.

112. Failure to use ordinary diligence.—A person who, in broad daylight, while crossing a foot bridge at a railway station, strikes her head against a plank on which a porter was standing cleaning a lamp, is not entitled to go to the jury on a question of the negligence of the company. *Watkins* v. *Great Western R. Co.*, 37 *L. T.* 193, 25 *W. R.* 905, 46 *L. J. C. P. D.* 817.

Plaintiff's decedent left a station and attempted to cross a side track between cars of a standing train, which had been separated and were two or three feet apart, but when he was between the cars a train was backed down and the cars were shoved together, causing his death. The decedent appeared to be in full possession of his faculties, and there was nothing to prevent the train from having been seen and heard. *Held*, that there was such contributory negligence as would prevent a recovery, though there may have been negligence on the part of the company. *Bertelson* v. *Chicago, M. & St. P. R. Co.*, 5 *Dak.* 313, 40 *N. W. Rep.* 531.—APPROVING Chicago, R. I. & P. R. Co. *v.* Houston, 95 U. S. 702; Schofield *v.* Chicago, M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. Rep. 1125; Holland *v.* Chicago, M. & St. P. R. Co., 18 Fed. Rep. 247; Rogstad *v.* St. Paul, M. & M. R. Co., 31 Minn. 208, 17 N. W. Rep. 287.

Persons standing on a platform, waiting for a train, are required to give reasonable attention to their personal safety; and if they fail to do so, and stand so as to be struck by trains, there can be no recovery. *Chicago, B. & Q. R. Co.* v. *Mahara*, 47 *Ill. App.* 208.

The neglect of a company to provide suitable lights at a station does not relieve a passenger from the duty of exercising ordinary care while in and about the same. *Sargent* v. *St. Louis & S. F. R. Co.*, 58 *Am. & Eng. R. Cas.* 184, 114 *Mo.* 348, 21 *S. W. Rep.* 823, 19 *L. R. A.* 460.

113. Right to assume safety of premises, etc.—A passenger, on leaving a train at night, has a right, within reasonable limits, to rely upon the presumption that the company has done its duty, and that the platform of its depot is safe. *Louisville, N. A. & C. R. Co.* v. *Lucas*, 119 *Ind.* 583, 21 *N. E. Rep.* 968.

It is not contributory negligence to assume that it will be safe to go through an open passage left by a railway company to give access to its depot, even though the track ends near by and is not protected by snubbing posts. *Grand Rapids & I. R. Co.* v. *Martin*, 41 *Mich.* 667.

Where a passenger is injured on leaving a station, by obstructions in a passageway which was there by the recognition and assent of the company, and held out by it as one of the passageways for the entrance and exit of passengers, the passenger is justified in using it, regardless of who met the expense of keeping it in repair. *Delaware, L. & W. R. Co.* v. *Trautwein*, 41 *Am. & Eng. R. Cas.* 187, 52 *N. J. L.* 169, 7 *L. R. A.* 435, 13 *N. J. L. J.* 72, 19 *Atl. Rep.* 178.—REVIEWING Beard *v.* Connecticut & P. R. R. Co., 48 Vt. 101.

It seems that under ordinary circumstances a traveler is justified in going upon a platform erected for the accommodation of passengers and in waiting there to take any passing train. *Dobiecki* v. *Sharp*, 8 *Am. & Eng. R. Cas.* 485, 88 *N. Y.* 203.—DISTINGUISHING Rigg *v.* Manchester, S. & L. R. Co., 12 Jur. N. S. 525; Watkins *v.* Great Western R. Co., 37 L. T. 193.

A passenger may instinctively regard a platform erected for passengers as a safe and proper place. *Archer* v. *New York*,

N. H. & H. R. Co., 106 *N. Y.* 589, 13 *N. E. Rep.* 318, 11 *N. Y. S. R.* 32, 885, 9 *Cent. Rep.* 233; *affirming* 36 *Hun* 644, *mem.*

Plaintiff wished to take passage on a palace car, but upon going to the door of the car she found it locked and entered a common car adjoining, where she left some baggage and wraps, and started for the depot platform to find the person having charge of the palace car; in stepping off the car she slipped and fell on a piece of ice which was on the platform. *Held*, that the fact of opening the doors of the cars was a notification to passengers to enter, and that the platform was safe and free from obstructions; and plaintiff was not chargeable with contributory negligence, if it would not have appeared to a reasonably prudent person that there was any danger in stepping on the platform. *Seymour* v. *Chicago, B. & Q. R. Co.*, 3 *Biss.* (*U. S.*) 43.

114. Illustrations of contributory negligence.—(1) *What is.*—On a station platform there were two doors, in close proximity to each other; the one had painted over it the words "for gentlemen," the other had over it the words "lamp room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and by mistake opened the door of the lamp room, and fell down stairs, and was injured. *Held*, that a nonsuit was proper. *Toomey* v. *London, B. & S. C. R. Co.*, 3 *C. B. N. S.* 146, 27 *L. J. C. P.* 39.

Plaintiff arrived at a station at night, where he had some acquaintance, and inquired for a privy of a stranger, who pointed in the direction of one on a river bank about fifty yards from the station. The station was well lighted, but the privy was not, and an intervening building obstructed the light from the station. In attempting to find it he fell down the bank of the river and was injured. *Held*, that he was guilty of contributory negligence in not making further inquiry. *Montgomery & E. R. Co.* v. *Thompson*, 77 *Ala.* 448, 54 *Am. Rep.* 72.

The wife of a railroad employé, in taking her husband his dinner, had occasion to cross half a dozen busy tracks that lay side by side. In stepping from behind cars that stood on one of the tracks she was struck and injured by a backing engine on the next track. *Held*, that whether or not the railroad company was negligent in running the engine at a prohibited rate of speed or in failing to ring its bell, the woman was not exercising ordinary care, and could not recover. *Pzolla* v. *Michigan C. R. Co.*, 19 *Am. & Eng. R. Cas.* 334, 54 *Mich.* 273, 20 *N. W. Rep.* 71.

Plaintiff, who represented a hotel, was running to meet an incoming train to solicit patronage, and attempted to move a baggage truck out of the way, but moved it near the edge of the platform, where the train struck it and forced it against him, causing the injury sued for. *Held*, such contributory negligence as to defeat a recovery, unless, under the rule of comparative negligence, the jury believe that the negligence of the company was gross in allowing the truck to remain where it was on the platform. *Illinois C. R. Co.* v. *Brookshire*, 3 *Ill. App.* 225.

In such case it appeared that the company had provided a safe and convenient approach to its station, by which plaintiff might have entered without encountering the truck; and that the truck stood on a place not intended for the use of the public. *Held*, that if the truck was in plaintiff's way he should have turned back and entered by the way provided by the company. *Illinois C. R. Co.* v. *Brookshire*, 3 *Ill. App.* 225. *Pzolla* v. *Michigan C. R. Co.*, 19 *Am. & Eng. R. Cas.* 334, 54 *Mich.* 273, 20 *N. W. Rep.* 71.

The fact that plaintiff had, on a certain day, by direction of the conductor, crossed a track, passing around a fence to do so, to take a train standing in an unusual place on a middle track, will not impose such liability on a railroad company as to excuse plaintiff from effects of his own negligence in taking, three days later, this unusual short cut, because he was late and mistakenly supposed that a train, standing on the same middle track, was the train he wished to take. Such facts do not show plaintiff to have been put in a sudden position of peril by the fault of defendant, so as to relieve him of the ordinary precaution devolving upon a prudent man. *Foreman* v. *Pennsylvania R. Co.*, 1 *Pa. Dist.* 233.

Plaintiff left a train at a station where there were two exits, one from the station building on a level with a street, and another on the other side, where stone steps had to be ascended to reach the street. Plaintiff, though acquainted with the premises, took the latter course, and fell and was injured by reason of ice on the steps. It appeared that his hands and arms were entirely free, and that he might have protected himself by grasping a rail leading from

top to bottom of the steps, but with full knowledge of the danger, he declined to do so. *Held*, that he was guilty of contributory negligence, and should be nonsuited. *Foster* v. *New York C. & H. R. R. Co.*, 2 *How. Pr. N. S.* (*N. Y.*) 416.

(2) *What is not.*—A passenger alighted from a train at night and in attempting to cross an intervening track to an eating-house was struck by a train running at a rapid rate in the opposite direction from that in which he had traveled. The intervening space was leveled, with the ties covered with dirt, and there was no evidence that he knew that there was another track. *Held*, that the court could not say, as a matter of law, that he was guilty of contributory negligence, especially where the evidence was somewhat conflicting. *Richmond & D. R. Co.* v. *Powers*, 56 *Am. & Eng. R. Cas.* 296, 149 *U. S.* 43, 13 *Sup. Ct. Rep.* 748.

Plaintiff went to a small station after night, bought his ticket, and upon the approach of his train walked across a platform, which was several feet above the ground, and in attempting to descend from it fell and was injured. He charged that the steps were defective and that the platform was not lighted. *Held*, that he could not be charged with contributory negligence in failing to call for a light or assistance, where he pursued the usual course of passengers at the station in attempting to reach trains. *Alabama G. S. R. Co.* v. *Arnold*, 30 *Am. & Eng. R. Cas.* 546, 80 *Ala.* 600, 2 *So. Rep.* 337.

A person who, in passing from a depot to a train, is obliged to cross an intervening track, is not guilty of contributory negligence in failing to look up or down the track to see whether there was any danger from an approaching train, and in approaching the train diagonally from the station platform, and before his train had come to a full stop. *Jewett* v. *Klein*, 27 *N. J. Eq.* 550; *affirming* 26 *N. J. Eq.* 474.

115. Failure to look and listen.*—A person who, on approaching a place where two railroad trains had met and were standing, and attempting to cross the tracks, without stopping to look and listen, is injured by one of the engines moving slowly behind him, is guilty of contributory negligence, which bars a recovery unless the persons in charge of the train are guilty of wilful or intentional wrong; and the mere failure to blow the whistle or ring the bell, as required by statute, is not such negligence. *East Tenn., V. & G. R. Co.* v. *Kornegay*, 92 *Ala.* 228, 9 *So. Rep.* 557.

A passenger who is waiting for a train on a branch road, and while standing on the track, thirty feet beyond the switch, looking for a train in one direction, is struck by an engine approaching from behind him, whose headlight can be seen from eighty to one hundred yards, is guilty of contributory negligence, which bars a recovery unless overcome by proof of gross negligence—that is, reckless, wanton or intentional negligence. *Ensley R. Co.* v. *Chewning*, 50 *Am. & Eng. R. Cas.* 46, 93 *Ala.* 24, 9 *So. Rep.* 458.

A person was walking along a side track when he was struck by a yard engine and killed. He was well acquainted with the locality, and placed himself in this position when the approaching engine was very near to him, without looking back to see if an engine was on the track. The engine was too close to him when he got near the track to be stopped. *Held*, that his negligence was so great as to preclude a recovery. *Austin* v. *Chicago, R. I. & P. R. Co.*, 91 *Ill.* 35.—APPROVED IN Maxey *v.* Missouri Pac. R. Co., 113 Mo. 1. QUOTED IN Lake Shore & M. S. R. Co. *v.* Blanchard, 15 Ill. App. 582.

Plaintiff was caring for cattle which were loaded for shipment, and were standing on the outside one of six parallel tracks, in the daytime. He had crossed the several tracks to procure water for the cattle and had returned to the fourth or fifth track, and upon hearing somebody call "Look out!" stopped on the track, and was struck by a moving engine. He was a young man of unimpaired sight and hearing, and there was nothing to prevent his seeing an approaching engine for a considerable distance either way. *Held*, that, as a matter of law, he was guilty of contributory negligence. *Rogstad* v. *St. Paul, M. & M. R. Co.*, 14 *Am. & Eng. R. Cas.* 648, 31 *Minn.* 208, 17 *N. W. Rep.* 287.—DISTINGUISHING Mark *v.* St. Paul, M. & M. R. Co., 30 Minn. 493. FOLLOWING Abbett *v.* Chicago, M. & St. P. R. Co., 30 Minn. 482. — APPROVED IN Bertelson *v.* Chicago, M. & St. P. R. Co., 5 Dak. 313, 40 N. W. Rep. 531.

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **231-285.**

Plaintiff, who had business with the freight department of a company, was struck by a car while standing on a track in the drilling yard of the company, with his back towards the only direction of danger. *Held*, that he was guilty of contributory negligence. *Diebold* v. *Pennsylvania R. Co.*, 50 *N. J. L.* 478, 12 *Cent. Rep.* 799, 14 *Atl. Rep.* 576.

Plaintiff testified that at about seven o'clock in the evening he stood on the platform of a ticket office. A train was going east. He looked down the t[illegible] eastward and saw no locomotive light [illegible] no train coming westward. Immediately after looking eastward he faced the other way and walked ten or fifteen feet to a pavement, intending to cross the north track and go around the caboose on the rear end of the train going eastward on the south track. As he stepped on the north track a train coming west struck him. He did not look just at this time. There was evidence that the engine of the train going west did not sound any alarm whistle or ring a bell. A witness for plaintiff testified that the west-bound train was standing in the depot, or a little below it, when plaintiff was on the platform, and that when he got on the track he was in the light of the headlight. *Held*, that the court was right in entering a nonsuit. *Carroll* v. *Pennsylvania R. Co.*, 2 *Pennyp.* (*Pa.*) 159.

A woman, who lived on the north side of a railroad, intending to take a train going east, went, in the daytime, down the passageway to the northerly platform, and found a freight train passing, which was going west. She waited until it had passed, looked east to see if any other train was coming, and saw none. Her attention was then attracted to the incoming train on which she was going, and knowing that, by the rules of the road, while one train was at a station another was not allowed to pass, and that one train was not allowed to follow another within five minutes, she, without looking again to see if a train was coming, stepped on the north track, attempted to cross at a place where there was no planking, and was struck by a train coming from the east, a few hundred feet behind the other freight train. *Held*, that there was no evidence to warrant a finding that plaintiff was in the exercise of due care, although for nearly twenty years persons coming from the north side had been accustomed to cross to the south platform in the place where plaintiff was attempting to cross. *Wheelwright* v. *Boston & A. R. Co.*, 16 *Am. & Eng. R. Cas.* 315, 135 *Mass.* 225.

Plaintiff was crossing defendant's yard where there were several tracks, and where he was familiar and knew of the frequency of trains, and stopped with a companion, with one foot resting on a rail, when there was plenty of room to stand safely between tracks, and was looking at a train passing on another track, when his foot was crushed by an engine passing on the track on which his foot rested. *Held*, that he was guilty of contributory negligence, and a nonsuit should have been granted. *Delaney* v. *Milwaukee & St. P. R. Co.*, 33 *Wis.* 67.

A station was on a side track, between which and the main track there was a centre platform for passengers. Plaintiff had come to the station to meet a friend, and was attempting to cross over the side track to reach the centre platform, when the engine and tender, which had been detached and switched onto the side track, ran over and injured him. Plaintiff was looking in the opposite direction from that from which the engine and tender were coming. It appeared that had he been looking he must have seen them before he attempted to cross, as it was only a second or two from the time he started to cross until he was struck, and there was no obstruction to his view. *Held*, that the accident was caused by his own negligence and want of care, and defendant was not liable. *Casey* v. *Canadian Pac. R. Co.*, 37 *Am. & Eng. R. Cas.* 172, 15 *Ont.* 574. —QUOTING Davey *v.* London & S. W. R. Co., 12 Q. B. D. 70; Com'r for Railways *v.* Brown, 57 L. T. 895.

116. Failure to heed warnings.—Where a person about to board a railroad train at night was warned of its approach to the station, could have heard it and could have seen its headlight for a long distance, but walked to the edge of the platform and was struck by the locomotive, he is chargeable with contributory negligence, whether intoxicated or not, and no recovery can be had. *Pennsylvania R. Co.* v. *Bell*, 122 *Pa. St.* 58, 15 *Atl. Rep.* 561.—FOLLOWING Carroll *v.* Pennsylvania R. Co., 12 W. N. C. 348.—FOLLOWED IN Marland *v.* Pittsburgh & L. E. R. Co., 123 Pa. St. 487.

117. Disobedience of rules.—Passengers cannot be supposed to be ignorant of the necessity and use of platforms, and when a platform, which they must know was

made for their use, is in plain sight, they cannot properly complain that they are not accommodated; they are required to conform to the reasonable business arrangements of the railroad. *Michigan C. R. Co.* v. *Coleman*, 28 *Mich.* 440, 12 *Am. Ry. Rep.* 59.

118. Taking unusual or improper way of ingress or egress.—Plaintiff, at his own request, was put off a train some distance from the depot on a dark night, but reached the depot in safety, and afterwards, instead of following the public road, relied on his knowledge of the locality and sought to follow a by-path which passed a pit on the land of the railroad, which he himself had formerly cleaned out. He missed the path, fell into the pit and was injured. *Held*, that he could not recover, although the underbrush had been cut by the railroad hands, while plaintiff was absent and without his knowledge, and a snag which was left in the pit caused the injury. *Central R. Co.* v. *Henderson*, 69 *Ga.* 715.

One who attempts to enter a station by a route not meant for passengers, and which is in fact shut off by a barbed wire fence, becomes a trespasser and assumes every risk which might possibly occur, and if he is killed on his way to the train which he intended to board, a nonsuit is unquestionably right, in an action to recover damages for his death. *Comly* v. *Pennsylvania R. Co.*, (*Pa.*) 12 *Atl. Rep.* 496.

Where a company maintains a proper and safe place for crossing from one track to another at a station, of which a passenger is aware, it is not liable for injuries sustained by a passenger who attempts to cross the tracks at an improper place, without any invitation from the company's employés. *Wilby* v. *Midland R. Co.*, 35 *L. T.* 244.

A company is not bound to maintain any but the usual and direct road for access and egress to and from its station; and a passenger taking an indirect road, which had not been appropriated to the purposes of a footway, cannot hold the company responsible for damages or accident occasioned thereby. *Walker* v. *Great Western R. Co.*, 8 *U. C. C. P.* 161.—DISTINGUISHING Martin *v.* Great Northern R. Co., 16 C. B. 179.

119. Going outside yard to board car.—A company is liable for injuries received by a passenger, seeking to board one of its trains at night, who finds no one to inform him how to reach the sleeping car attached to the train, which is left standing outside of the yards, and to which a sidewalk, erected by the company under a contract with the city, leads in a direct route, which the passenger follows, and from which he falls by reason of defective or insufficient lights at that part of the station approach. *Moses* v. *Louisville, N. O. & T. R. Co.*, 30 *Am. & Eng. R. Cas.* 556, 39 *La. Ann.* 649, 2 *So. Rep.* 567.

120. Walking on unlighted platform.—It is not only negligence, but recklessness, for a passenger who is staying at a railway station, on a dark night, when the platform lamp has been temporarily removed, to go out on the platform and walk to the end of it. *Reed* v. *Axtell*, 33 *Am. & Eng. R. Cas.* 503, 84 *Va.* 231, 4 *S. E. Rep.* 587.

Plaintiff, a female passenger, arrived at a station late at night, and declined the offer of an employé to conduct her to a hotel, preferring to spend the residue of the night at the station. While the station lamp was being trimmed she walked across the platform, and fell therefrom and was injured. *Held*, that she was guilty of contributory negligence, and could not recover. *Reed* v. *Axtell*, 33 *Am. & Eng. R. Cas.* 503, 84 *Va.* 231, 4 *S. E. Rep.* 587.

121. —— platform slippery with ice, etc.—A passenger has the right to assume that a platform, over which it is necessary to pass to reach the cars, is safe. His going thereon when there is ice and snow is not, of itself, contributory negligence. *Weston* v. *New York El. R. Co.*, 73 *N. Y.* 595; *affirming* 10 *J. & S.* 156.—APPLIED IN Van Ostran *v.* New York C. & H. R. R. Co., 35 Hun (N. Y.) 590. FOLLOWED IN Dobiecki *v.* Sharp, 8 Am. & Eng. R. Cas. 485, 88 N. Y. 203.

Plaintiff desired to enter a palace car, but finding the door locked, stepped back on the platform, in search of the person in charge of the palace car, and slipped and fell on a piece of ice on the platform. *Held*, that the company was not liable, if, having seen the ice, she could by reasonable care have avoided stepping on it. *Seymour* v. *Chicago, B. & Q. R. Co.*, 3 *Biss.* (*U. S.*) 43.

The plaintiff was obliged to use ordinary care and prudence in descending the steps and landing on the platform, and if at any moment it would have appeared to a reasonably prudent person that there was risk of danger to herself in proceeding, then, if she did proceed, it was at her own peril,

even though the defendant was guilty of negligence. *Seymour* v. *Chicago, B. & Q. R. Co.*, 3 *Biss.* (*U. S.*) 43.

But if, on the other hand, taking all the circumstances of the situation together, there would not have appeared to a reasonably prudent person any danger in descending the steps and going on the platform, then she cannot be said to be guilty of contributory negligence, though in fact injury followed what she did. *Seymour* v. *Chicago, B. & Q. R. Co.*, 3 *Biss.* (*U. S.*) 43.

The jury may take into consideration the degree of light, the time of day the fact that plaintiff saw the piece of ice, and the position she occupied when she first saw it. *Seymour* v. *Chicago, B. & Q. R. Co.*, 3 *Biss.* (*U. S.*) 43

122. Crossing track in front of moving train.*—A woman forty-seven years old, after purchasing a ticket, found it necessary to cross the track to a platform on the other side, in order to enter her train. She was notified of the approach of the train in time .o cross, and when almost across returned to the ticket office for a bundle which she had left, and then, after being warned of the danger, attempted to cross again, and was struck and killed. *Held*, that her death resulted from her own negligence, and there could be no recovery. *Baltimore & O. R. Co.* v. *State*, 21 *Am. & Eng. R. Cas.* 202, 63 *Md.* 135.—QUOTED IN Baltimore & Y. Turnpike Road *v.* Cason, 72 Md. 377.

A woman, having opportunity to make inquiries about the train she was to take, failed to do so, and then attempted in broad daylight to cross the tracks in front of an approaching train, which she saw, and which was only a short distance away, and was struck by the engine and injured, the company having made no provision for and held out no invitation to her to cross where she did. *Held*, that she could not recover. *Young* v. *Old Colony R. Co.*, 156 *Mass.* 178, 30 *N. E. Rep.* 560.—FOLLOWED IN Connolly *v.* New York & N. E. R. Co., 158 Mass. 8.

A person is not warranted in assuming that trains will not cross each other at a station, and in shutting his eyes and walking ahead on that assumption. *Connolly* v. *New York & N. E. R. Co.*, 158 *Mass.* 8, 32 *N. E. Rep.* 937.—FOLLOWING Debbins *v.* Old Colony R. Co., 154 Mass. 402; Young *v.* Old Colony R. Co., 156 Mass. 178; Tyler *v.* Old Colony R. Co., 157 Mass. 336.

No presumption of negligence arises from the crossing of a track at a railroad station, in order to get to and take passage upon a train on another track, when that is the only way by which such trains can be reached; nor is it necessarily negligent to start across before the train which the passenger intends to take has come to a full stop. *Kohler* v. *Pennsylvania R. Co.*, 135 *Pa. St.* 346, 19 *Atl. Rep.* 1049.

A., without giving notice of his intention to return, left a train on the east track to check his baggage in the station west of the tracks. On coming out of the station his train had started, and a train on the west track was moving up in plain sight. This train had waited for the train on the east track to start, before it moved up in the opposite direction. A. ran across the west track in front of the train to board the train on the east track, and by one of the trains was fatally injured. *Held*, that, as a matter of law, he was guilty of contributory negligence. *Chaffee* v. *Old Colony R. Co.*, 52 *Am. & Eng. R. Cas.* 366, 17 *R. I.* 658, 24 *Atl. Rep.* 141.

123. Jumping in front of moving train — Leaving team unhitched.—Leaving his young team unhitched and unattended near the track, plaintiff crossed the track and went upon the depot platform, whence he could see the track westward but not eastward. No regular train was due. Hearing some one say a train was coming, he jumped to reach his team. An engine was passing from the east, without warning, at thirty miles an hour, and as plaintiff jumped from the platform he landed on the forward part of the engine, and was injured. He had jumped first upon a lower platform, from which he could have seen the engine had he looked, but he testified that he neither saw nor heard anything. *Held*, that he was guilty of contributory negligence. *Olson* v. *Chicago, M. & St. P. R. Co.*, 81 *Wis.* 41, 50 *N. W. Rep.* 412, 1096.—DISTINGUISHED IN Schmolze *v.* Chicago, M. & St. P. R. Co., 83 Wis. 659.

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*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT. **313-329**; CONTRIBUTORY NEGLIGENCE, **36, 37.**

Contributory negligence in persons who are injured by cars being moved about station, and especially by detached cars, see note, 18 L. R. A. 65.

124. Going under car.*—Where a person in going to a railroad depot finds a freight train across the sidewalk, and is told by the freight conductor to pass under the end of a freight car, and while passing under is injured, section 54 of the railroad and warehouse law has no application to the case. That section applies only to climbing, stepping, standing upon, clinging to, or in any way attaching one's self to a locomotive engine or car, either stationary or in motion on the track. *Chicago, B. & Q. R. Co.* v. *Sykes*, 2 *Am. & Eng. R. Cas.* 254, 96 *Ill.* 162; *reversing* 1 *Ill. App.* 520.

125. Passing between cars.†—Plaintiff's declaration showed that he received a personal injury in attempting to pass between cars of a freight train, to which was attached an engine, with steam up, and which was liable to start at any moment, and without permission or notice to any one in charge of the freight train, or having authority over it, to reach a passenger train standing on the other side. *Held*, that it showed such negligence on his part as would preclude a recovery. *Chicago & N. W. R. Co.* v. *Coss*, 73 *Ill.* 394.

126. Voluntarily assuming or going into place of danger.‡—It is contributory negligence in one (1) to attempt to reach a depot along the right of way in the face of a train which he knew was liable to start at any moment; (2) to persist in such attempt after the train has started, and to attempt to make a given point in advance of the train; (3) to attempt to board a moving train. *French* v. *Detroit, G. H. & M. R. Co.*, 89 *Mich.* 537, 50 *N. W. Rep.* 914.

A person standing within a space of three feet between a railroad track and a raised platform while a train passes, thinking that there is sufficient room to stand without being struck by the cars, and who is injured by the passing train, is guilty of contributory negligence, and cannot recover for the injuries so received, notwithstanding his dangerous position was seen by the employés of the company, if the negligence of the company was not wilful or wanton. *Esrey* v. *Southern Pac. Co.*, 88 *Cal.* 399, 26 *Pac. Rep.* 211.

127. Intoxication — Proximate cause.*—Where plaintiff sues for an injury received when about to enter a car, it is unimportant whether he was drunk or not, unless it be shown that the intoxication contributed to the injury. *Houston & T. C. R. Co.* v. *Reason*, 61 *Tex.* 613.

7. Procedure in Actions for Injuries.

128. Who may be sued — Party defendant. — A person while passing along the platform of the station of defendant company, in order to get to the adjoining station of another company, and injured through the negligence of one of the defendant's servants, is entitled to recovery. *Tebbutt* v. *Bristol & E. R. Co.*, 40 *L. J. Q. B.* 78, 23 *L. T.* 772, *L. R.* 6 *Q. B.* 73, 19 *W. R.* 383.

And such person may recover although he was on such platform for the purpose of passing from the terminus of a second company to the booking office of a third, the stations of the three companies adjoining and the passengers of each company being in the habit of passing directly from one to the other. *Tebbutt* v. *Bristol & E. R. Co.*, *L. R.* 6 *Q. B.* 73, 19 *W. R.* 383, 40 *L. J. Q. B.* 78, 23 *L. T.* 772.

129. —— lessee company.—Where a union depot, with the yard or grounds annexed, is the property of two companies, a third company, having acquired by lease the right to use the property in common with them, for the arrival and departure of its trains, with the use of the waiting rooms, ticket office, baggage room, etc., is liable to passengers and the public generally, in relation to the property, as if it were the owner in fee. *Montgomery & E. R. Co.* v. *Thompson*, 77 *Ala.* 448, 54 *Am. Rep.* 72.

And the lessee company owes the same duty to passengers of the lessor company lawfully at the depot or on the ground as it does to its own. *Haff* v. *Minneapolis & St. L. R. Co.*, 4 *McCrary* (*U. S.*) 622, 14 *Fed. Rep.* 558.

130. Recovery over against mail contractor.—Defendant was under a contract with the government to carry the mails between a certain station in a city

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* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **312.**

† See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **308–311.**

‡ See also CONTRIBUTORY NEGLIGENCE, **32–35.**

* See also CONTRIBUTORY NEGLIGENCE, **27**; CROSSINGS, INJURIES TO PERSONS, ETC., AT, **212**; CARRIAGE OF PASSENGERS, **353.**

and the post-office, and left some sacks on a sidewalk at the side of the station, over which a passenger fell and was injured. The railroad company was held liable for the injury, and brought an action over against defendant. *Held*, that the company was not a joint tort feasor with defendant so as to prevent a recovery. *Old Colony R. Co.* v. *Slavens*, 38 *Am. & Eng. R. Cas.* 382, 148 *Mass.* 363, 19 *N. E. Rep.* 372.

131. Pleading—Complaint.—Plaintiff sued for an injury received in stepping from a train to a passenger station, and charged in his complaint that the platform "had been suffered to get out of repair and wholly unsuitable for the reception of passengers," and then recited that it had been allowed to settle down in the centre, which caused plaintiff to slip and fall. *Held*, that such complaint does not sufficiently charge negligence. *Pennsylvania Co.* v. *Marion*, 27 *Am. & Eng. R. Cas.* 132, 104 *Ind.* 239, 3 *N. E. Rep.* 874.—QUOTED IN Texas & P. R. Co. *v.* Miller, 79 Tex. 78.

132. —— replication.—To an action for assault and battery defendant pleaded that he was the station agent of a railroad company, and that the alleged assault was necessarily committed in removing plaintiff from the station house, where he persisted in remaining after defendant had requested him to leave. Plaintiff replied, setting forth the obligation of the company as a common carrier, and alleging that he went into the station house and there purchased a ticket to another station, and that while he was waiting for the train, defendant committed the assault. *Held*, on special demurrer—(1) that the replication was insufficient, because it did not allege that the train on which he intended to go, and the departure of which he was then awaiting, was expected soon to leave; (2) that it was not necessary to allege in the replication that plaintiff went into the station house with the purpose of traveling upon the cars, but that it was sufficient if it appeared that such purpose was formed after his entry and before the assault. *Harris* v. *Stevens*, 31 *Vt.* 79.

133. Evidence — Admissibility.*—In an action to recover for injuries received at a station, by being struck by an incoming train, plaintiff claimed to have been misled by information that the train which struck him was late, whereas in fact it was on time, or nearly so, and that acting upon such information, he was crossing the track when it suddenly ran upon and struck him. *Held*, that it was competent, to rebut any inference of contributory negligence that might arise from the circumstances of the accident, to introduce declarations of strangers to the record, made in his presence, that the train was late. *Lake Shore & M. S. R. Co.* v. *Herrick*, 50 *Am. & Eng. R. Cas.* 25, 49 *Ohio St.* 25, 29 *N. E. Rep.* 1052.

Where it is material to establish that plaintiff was at the station to take passage on a train, a declaration made by him as he left his house on his way to the station, that he was going to another station on the same railway, is competent evidence to establish his character as a passenger. *Lake Shore & M. S. R. Co.* v. *Herrick*, 50 *Am. & Eng. R. Cas.* 25, 49 *Ohio St.* 25, 29 *N. E. Rep.* 1052.

The condition of the crossing at the time of the accident, whether thronged with people or otherwise, is a material circumstance, and evidence tending to prove its condition in this respect is competent. *Lake Shore & M. S. R. Co.* v. *Herrick*, 50 *Am. & Eng. R. Cas.* 25, 49 *Ohio St.* 25, 29 *N. E. Rep.* 1052.

134. —— sufficiency.—The evidence showed that three servants of a company, a brakeman and two section foremen, in removing a trunk from the station platform, which was covered with ice, to a baggage car, slid it on the ice, and out of a straight line, and against plaintiff, who was standing in plain view upon the platform. *Held*, that the evidence was sufficient to prove culpable negligence on the part of the servants. *Atchison, T. & S. F. R. Co.* v. *Johns*, 34 *Am. & Eng. R. Cas.* 480, 36 *Kan.* 769, 14 *Pac. Rep.* 237.

In such case, as the servants were then on the company's premises, performing this duty for the company, in the presence of other servants, and as they had performed similar services on prior occasions, it will be presumed that they were acting within the scope of the authority given to them by the company. *Atchison, T. & S. F. R. Co.* v. *Johns*, 34 *Am. & Eng. R. Cas.* 480, 36 *Kan.* 769, 14 *Pac. Rep.* 237.

Plaintiff was approaching a station at night, and fell on the platform and was injured. The only question in dispute was

* Injuries to passengers about platforms. Admissibility of evidence as to similar accidents at other stations, see 47 AM. & ENG. R. CAS. 528, *abstr.*

whether the platform and approaches were sufficiently lighted. Upon this point there was some conflict of evidence, but there was sufficient evidence to sustain a finding against the defendant. *Held*, that the verdict should not be disturbed. *Groll* v. *Prospect Park & C. I. R. Co.*, 22 *N. Y. S. R.* 656, 51 *Hun* 643, 4 *N. Y. Supp.* 80.

135. — burden of proof.—Where a passenger sues for an injury by reason of a defective walk near a station, he has the burden of proof to show that the walk where he received the injury was constructed by the company, and was in its possession and control as an approach to the station. *Quimby* v. *Boston & M. R. Co.*, 69 *Me.* 340.

136. Instructions—Proper.—In an action for damages for ejection of one not a passenger from a station house, an instruction that "to find for plaintiff it must appear from the evidence that the agent used more force than was reasonably necessary," and that by reason of the excessive force plaintiff was injured, and they were advised that it was their duty to consider the resistance made by plaintiff, and the force used, and all the circumstances, and the conduct of the parties—*held*, unobjectionable. *Johnson* v. *Chicago, R. I. & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 206, 58 *Iowa* 348, 12 *N. W. Rep.* 329.—QUOTED IN Louisville, C. & L. R. Co. *v.* Sullivan, 16 Am. & Eng. R. Cas. 390, 81 Ky. 624.

An instruction that a company, in constructing a platform for the use of passengers, impliedly represents to the public that it is reasonably safe and sufficient for such purpose, and that it is its duty to make it so that it may be used safely in approaching and leaving trains in any way in which passengers might reasonably and with reasonable care be expected to approach and leave trains, is unobjectionable. *Pennsylvania Co.* v. *Marion*, 123 *Ind.* 415, 7 *L. R. A.* 687, 23 *N. E. Rep.* 973.

And it is not error to instruct the jury that although the passenger may have previously known of the condition of the platform, and knew its condition at the time he stepped upon it, he was not required to abandon the use of it and seek some other place of approaching and leaving the train, and that if he used care proportioned to the known danger and was injured by reason of such defect, he would not be barred from recovery. *Pennsylvania Co.* v. *Marion*, 123 *Ind.* 415, 7 *L. R. A.* 687, 23 *N. E. Rep.* 973.

An instruction to a jury that if the platform was defective and plaintiff was injured by reason of said defects they would find for the plaintiff is not error, when accompanied by the qualification that, if plaintiff's own negligence contributed to the injury, or if it was caused by the negligence of a fellow-servant, he could not recover. *Bonner* v. *Glenn*, 79 *Tex.* 531, 15 *S. W. Rep.* 572.

137. — improper.—In an action for personal injuries, which, it is alleged, were received because of a defective platform, an instruction is erroneous which assumes and affirmatively asserts that it was negligence for defendant to permit a hole to remain in such platform. *James* v. *Missouri Pac. R. Co.*, 107 *Mo.* 480, 18 *S. W. Rep.* 31.

Where the negligence declared on is the failure of a company to light its platform properly, and permitting mail bags to be thrown upon it, over which plaintiff stumbled and fell, and the company relies on plaintiff's contributory negligence as a defense, it is error to instruct the jury that it was not plaintiff's duty to anticipate obstructions on the platform, that she had the right to believe that the platform was safe, and that if she did not discover the mail bags, and the company's officers and servants failed to warn her of them, then she was not guilty of negligence. *Sargent* v. *St. Louis & S. F. R. Co.*, 58 *Am. & Eng. R. Cas.* 184, 114 *Mo.* 348, 21 *S. W. Rep.* 823, 19 *L. R. A.* 460.

Plaintiff was injured by falling from a station platform at night. He was at the time walking up the platform, which was incumbered with freight and insufficiently lighted, towards a train upon which he intended to take passage. The court charged that if at the time he was going along, using his senses, with ordinary care, and fell off by a stumble, that was not a lack of ordinary care, because different people have different temperaments, and one can do safely what another cannot; and that the company had no right to demand extraordinary care from any one. *Held*, that this instruction was erroneous, inasmuch as the jury might infer from it that the company was liable for the result of any casualty on the platform, only provided the party suffering it was at the time using his senses, good or bad. *Renneker* v. *South Carolina R. Co.*, 18 *Am. & Eng. R. Cas.* 149, 20 *So. Car.* 219.

138. — prayers properly refused.—In an action for injuries received upon alighting from a train upon a defective platform, a request to submit to the jury the following interrogatory: "If plaintiff did not look to see where she was stepping when she alighted, what reason or excuse was there for her not doing so?" does not comply with the requirement of the statute providing that the jury, in case they render a general verdict, may be required "to find specially upon particular questions of fact," because the determination of what would have been a reason or excuse for not looking necessarily involved a question of law; therefore, such request was properly refused. *Ohio & M. R. Co.* v. *Stansberry*, 56 *Am. & Eng. R. Cas.* 285, 132 *Ind.* 533, 32 *N. E. Rep.* 218.

It was not error to refuse to instruct the jury that "if there was a hole in the platform at the point where plaintiff alighted, and if in the exercise of ordinary care in alighting she could and should have seen it, and she could by seeing it have avoided any injury, and she failed to see it, you must find for defendant," since such instruction would cast upon the passenger the use of a degree of care in looking for defects which she was not required to exercise. *Ohio & M. R. Co.* v. *Stansberry*, 56 *Am. & Eng. R. Cas.* 285, 132 *Ind.* 533, 32 *N. E. Rep.* 218.

An instruction that "if there is an apparent defect in the appliances with which they [the passengers] come in contact, or which are in use, they must look; and unless some reasonable excuse is given, they are guilty of negligence if they do not look," was properly refused as an incorrect statement of the law, placing a passenger in the same relation to the railroad company as its servant occupies. *Ohio & M. R. Co.* v. *Stansberry*, 56 *Am. & Eng. R. Cas.* 285, 132 *Ind.* 533, 32 *N. E. Rep.* 218.

139. Questions of fact—Company's negligence.—In an action by a passenger against a railroad for negligence in not maintaining a suitable station, resulting in injury to the passenger, where there is conflicting evidence, the case should be left to the jury, under proper instructions. *Pennsylvania R. Co.* v. *Green*, 140 *U. S.* 49, 11 *Sup. Ct. Rep.* 650.

Plaintiff was driving along a private way through defendant's yard, which was commonly used by teams in going to and from an elevator, and which crossed a large number of tracks. His view of the main track used by passenger trains was obstructed by freight cars standing upon the next track, which had been opened at the crossing of the private way to form a passage for teams. Plaintiff was about to cross the main track. He did not stop, but listened for the approach of trains. Hearing no signal, he attempted to cross, but was struck by an engine, which had just left the passenger station, and was proceeding at a speed of ten or twelve miles an hour. There was evidence that there was no signal given of its approach. *Held*, that the question of the negligence of both the plaintiff and defendant was properly submitted to the jury. *Pearce* v. *Humphreys*, 34 *Fed. Rep.* 282.

140. — proximate cause.—Where there is evidence tending to show that the fall and injury of plaintiff immediately followed his leaving a ticket office to take a train, it cannot be affirmed on the evidence, as matter of law, that the absence of a light was not the proximate cause. *Alabama G. S. R. Co.* v. *Arnold*, 30 *Am. & Eng. R. Cas.* 546, 80 *Ala.* 600, 2 *So. Rep.* 337.—DISTINGUISHING Henry *v.* St. Louis, K. C. & N. R. Co., 76 Mo. 288, 43 Am. Rep. 762.

Plaintiff, a woman seventy-two years old, was put off at defendant's depot in the night, when the station building was closed and unlighted, and there was no one to give her information. After wandering around for an hour or more, on the company's grounds, attempting to find the way to the house where she was to stop, she returned to the station, and in trying to reach one end of the platform where she would be better protected from a cold wind fell and was injured. *Held*, that the questions whether or not the absence of light, or of any one to give information, was negligence, and if so, whether such negligence was the proximate cause of the injury, were for the jury. *Patten* v. *Chicago & N. W. R. Co.*, 32 *Wis.* 524.—REVIEWED IN Evans *v.* St. Louis, I. M. & S. R. Co., 11 Mo. App. 463.

141. — negligence as to safety of platform and premises.—A brakeman was caught between moving cars and the platform, and received injuries from which he died. The declaration charged negligence in building the platform too near the track, there being only ten inches between the two. *Held*, that the question whether the platform was properly constructed was for

the jury. *Chicago, R. I. & P. R. Co.* v. *——*, 11 *Ill. App.* 104.

Plaintiff, while on a platform, was struck by a mail pouch, but claimed that the injury was increased by his heel resting in a small hole in the platform. *Held*, that it should have been left to the jury to determine whether the hole was dangerous or not, regard being had to the uses to which the platform was put, and whether defendant failed to exercise that care with reference to the hole which a person of ordinary prudence would have exercised under similar circumstances. *James* v. *Missouri Pac. R. Co.*, 107 *Mo.* 480, 18 *S. W. Rep.* 31.

Plaintiff, who was injured on leaving a station, charged that it was not properly constructed for passengers, as it was high, with no railing around it. *Held*, that the question whether it was properly constructed, considering the place, was for the jury. *Stafford* v. *Hannibal & St. J. R. Co.*, 22 *Mo. App.* 333.

Plaintiff, while waiting for a train on an elevated road, at night, went along a dimly lighted passage in search of a urinal and fell from the unprotected edge of the platform and was injured. The evidence showed that the architect's plans called for a guard-rail at the place, but it had not been erected. *Held*, that the question of the company's negligence was for the jury. *Jarvis* v. *Brooklyn El. R. Co.*, 40 *N. Y. S. R.* 825, 16 *N. Y. Supp.* 96; *affirmed in* 133 *N. Y.* 623, *mem.*, 30 *N. E. Rep.* 1150, 44 *N. Y. S. R.* 932.

It is a question of fact for the jury whether the construction of an unusually high depot platform, the edge of which is four feet from the platform of a car, is dangerous or not. *Gulf, C. & S. F. R. Co.* v. *Fox*, (*Tex.*) 33 *Am. & Eng. R. Cas.* 543, 6 *S. W. Rep.* 569.

142. —— negligence in lighting premises.—In an action for injury to a passenger owing to the negligent managing and lighting of the company's station, defendant having rested its defense on the ground that the accident was entirely owing to the want of ordinary care on the part of the plaintiff and that there was no negligence on the part of the company, the judge properly left it to the jury whether the accident occurred from the negligence of the company, or whether it was caused entirely by plaintiff's contributory negligence. *Martin* v. *Great Northern R. Co.*, 16 *C. B.* 179, 3 *C. L. R.* 817, 1 *Jur. N. S.* 613.—QUESTIONED IN Cornman *v.* Eastern Counties R. Co., 4 H. & N. 781, 29 L. J. Ex. 94.

Where there was evidence that plaintiff's wife was injured in stepping from a train upon an unlighted platform, the court properly submitted to the jury as a ground of recovery the negligence of the defendant company in failing to provide proper lights for its passengers in leaving the cars at night, although no witness testified directly that the lack of lights contributed to the injury, or that the accident would not have occurred had the platform been properly lighted. *Eddy* v. *Still*, 3 *Tex. Civ. App.* 346, 22 *S. W. Rep.* 525.

143. —— contributory negligence.—Where the testimony only shows that plaintiff after leaving a ticket office and while crossing a platform was cautioned to "Look out for the steps," and that by crossing the platform obliquely he missed the steps and thereby sustained injuries, the question of proximate contributory negligence is for the jury. (Stone, C.J., dissenting.) *Alabama G. S. R. Co.* v. *Arnold*, 35 *Am. & Eng. R. Cas.* 466, 84 *Ala.* 159, 4 *So. Rep.* 359, 5 *Am. St. Rep.* 354.

Plaintiff was unloading freight from a car on a side track, when he heard an approaching engine, but did not know what track it was on; but out of caution he undertook to dismount, and in doing so set his foot on a link in the drawhead on a car on the same track and near the one that he was unloading, when a car of which he had no notice struck the one on which his foot rested, causing it to be crushed. *Held*, that he was not chargeable, as a matter of law, with negligence. *Watson* v. *Wabash, St. L. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 114, 66 *Iowa* 164, 23 *N. W. Rep.* 380.

Plaintiff, a woman fifty-two years old, arrived at a station for the purpose of taking passage before dark, but the train did not arrive until after dark. After dark she had occasion to leave the station to seek accommodations not provided by the company, and in attempting to leave the platform she fell and was injured. The platform was about three feet high, and not lighted, but there was enough natural light that both the platform and the ground could be indistinctly seen, and plaintiff believed they were nearly on the same level, and attempted to step off. *Held*, that the question of her

contributory negligence was properly left to the jury. *Missouri Pac. R. Co.* v. *Neiswanger*, 39 *Am. & Eng. R. Cas.* 471, 41 *Kan.* 621, 21 *Pac. Rep.* 582.—NOT FOLLOWING Reed *v.* Axtell, 84 Va. 231; Forsyth *v.* Boston & A. R. Co., 103 Mass. 510.

Defendant company had an overhead trestle or passage for passengers, and also a ground passage. Plaintiff was injured while using the overhead passage, by reason of broken steps in the approach thereto. Defendant had a right to prohibit the use of the trestle, and there was a conflict of evidence as to whether defendant had posted a warning and erected a rope, notifying persons not to use the trestle. *Held*, that the question of plaintiff's negligence was properly left to the jury. *Baltimore & O. R. Co.* v. *Rose*, 27 *Am. & Eng. R. Cas.* 125, 65 *Md.* 485, 4 *Atl. Rep.* 899.

Crossing a railroad track without looking to see if a train is coming is not conclusive proof of a want of care; and if it appears that there is a double track, and a person has just bought a ticket for a train which is to pass upon the further track, and the station agent says to him "The train is coming, we will cross over," and he attempts to follow the agent, upon the premises of the company, to take his place in the train, which meanwhile has arrived, and, in crossing over the nearer track for that purpose is struck by a train coming from the other direction, and partially behind him, which he did not look for or see until too late to save himself, it is proper to submit to the jury the question whether he was careless. *Warren* v. *Fitchburg R. Co.*, 8 *Allen* (*Mass.*) 227.—APPROVED IN Caswell *v.* Boston & W. R. Corp., 98 Mass. 194. DISTINGUISHED IN Forsyth *v.* Boston & A. R. Co., 103 Mass. 510; Van Ostran *v.* New York C. & H. R. R. Co., 35 Hun (N. Y.) 590; Pittsburgh, C. & St. L. R. Co. *v.* Krouse, 30 Ohio St. 222.

Plaintiff had bought a ticket and was standing near the edge of the platform awaiting the train which he intended to take, but where it was necessary to cross the track, and was struck by a broken step projecting from the platform on the side of a car in another train, which approached from behind without signals. *Held*, that the question whether he exercised due care was properly left to the jury. *Sonier* v. *Boston & A. R. Co.*, 141 *Mass.* 10, 6 *N. E. Rep.* 84.

Whether or not a passenger used an ordinary degree of care while walking in and about a poorly lighted station is for the jury. *Sargent* v. *St. Louis & S. F. R. Co.*, 58 *Am. & Eng. R. Cas.* 184, 114 *Mo.* 348, 21 *S. W. Rep.* 823, 19 *L. R. A.* 460.

A railroad company constructed a platform for passengers between two tracks about six feet apart. Plaintiff, intending to take passage on a train, and finding the platform crowded with passengers, attempted to pass near the edge, and was struck by a rapidly moving train. *Held*, that the question of his want of care was properly left to the jury. *Union Pac. R. Co.* v. *Sue*, 25 *Neb.* 772, 41 *N. W. Rep.* 801.

144. Nominal damages.—In an action for ejecting plaintiff from the ladies' waiting room, it appeared that plaintiff was an improper character, had before used indecent language at the station, had for a long time prior to the act complained of been lounging about the station, and moreover had arrived at the station two hours in advance of the arrival of the train upon which she claimed that she intended to take passage. The ejecting was accomplished without undue force. *Held*, that plaintiff was not entitled to more than nominal damages. *Beeson* v. *Chicago, R. I. & P. R. Co.*, 13 *Am. & Eng. R. Cas.* 45, 62 *Iowa* 173, 17 *N. W. Rep.* 448.

145. Excessive damages. — In attempting to pass from a station to a train, plaintiff, a female passenger, was so injured in her spine as to paralyze her lower limbs and permanently disable her. *Held*, that a verdict for $5500 would not be disturbed as excessive. *Taylor* v. *Pennsylvania Co.*, 50 *Fed. Rep.* 755.

Plaintiff attempted to pass between cars at a station and was caught and injured by their being moved. His pelvic bone was crushed; his thigh was broken in two places; his leg was broken, and he was confined to his bed for ten weeks, suffering much of the time intense pain. On recovery his leg was two inches shorter, and he was otherwise seriously and permanently injured. *Held*, that a verdict for $15,000 could not be said to be excessive. *Louisville, N. O. & T. R. Co.* v. *Thompson*, 64 *Miss.* 584, 1 *So. Rep.* 840.

VI. JOINT USE BY TWO OR MORE COMPANIES.

146. Generally.—A depot and track used in common by two companies (in a city where their lines connect), though be-

longing to one of them exclusively, may be considered as belonging to each relatively to its own operations and business. Each must protect its own passengers from the other's negligence, so long as passengers are in their proper places, but not when they are out of place. *Central R. & B. Co.* v. *Perry*, 58 *Ga.* 461, 16 *Am. Ry. Rep.* 122.—DISTINGUISHED IN Georgia R. & B. Co. *v.* Friddell, 79 Ga. 489.

A terminal station was jointly occupied by two companies, under an agreement which secured to both companies an equal interest in the use of the joint passenger station. One of them entered into an agreement with a third company by which it was proposed to introduce its passenger traffic into the joint station, and with that view a junction of the two lines of railway was proceeded with. In an application for interdict, at the instance of the company co-proprietor of the joint station, against this agreement being carried into effect—*held*, that this introduction into the joint station of the traffic of a third railway, although for a short distance it passed along the line of one of the co-proprietors of that station, was a colorable attempt to give to the third the use and benefit of the joint station, which a co-proprietor had a right to resist. *North British R. Co.* v. *Edinburgh & G. R. Co.*, 16 *Sc. Sess. Cas.* (*2d Series*) 250, 2 *Ry. & C. T. Cas.* 21.

147. Under Massachusetts statutes.—Mass. statute of 1871, ch. 343, requiring certain railroad corporations to unite in a passenger station in a certain city, at one of two specified places, to be determined by commissioners appointed by the supreme court; to extend their tracks in that city to the union station, and after the extension to discontinue portions of their present locations, is constitutional and valid, being a reasonable exercise of the right reserved to the legislature to amend, alter or repeal the charters of the corporations. *Mayor, etc., of Worcester* v. *Norwich & W. R. Co.*, 109 *Mass.* 103.—FOLLOWING Fitchburg R. Co. *v.* Grand Junction R. & D. Co., 4 Allen 198; Com. *v.* Eastern R. Co., 103 Mass. 254.

So far as the above statute relates to the establishment of a union passenger station in said city, the legislature intended to deal exclusively with the railroad corporations named in section 1, being the parties in interest on which it had conferred the right of eminent domain in respect to the railroads to be united in the station, and which were bound to exercise that right in performing the award of the commissioners to determine its location; and with the city within which the right was to be exercised; and made no provision, and was bound to make none, for notice to other parties whose interests were subordinate and derivative. *Mayor, etc., of Worcester* v. *Norwich & W. R. Co.*, 109 *Mass.* 103.

Under the above statute, the board has the power, in authorizing one railroad corporation to take a portion of the location of another, to do so on condition that the latter shall have the right to use a track of the former, subject to reasonable regulations to be established by the board. *Providence & W. R. Co.* v. *Norwich & W. R. Co.*, 22 *Am. & Eng. R. Cas.* 493, 138 *Mass.* 277.

148. Under English Railways Clauses Act.—It is doubtful whether the power reserved to the public by the Railways Clauses Act, 1845, § 92, to use the "railway" with engines and carriages upon payment of tolls, includes the power of using stations. *Midland R. Co.* v. *Ambergate, N. & B. & E. J. R. Co.*, 10 *Hare* 359.

149. Platforms — Personal injuries. — Where one company has the right to use a station platform belonging to another company, it is its duty to see that the platform is safe for passengers, without any regard to the arrangement between the two companies. *Seymour* v. *Chicago, B. & Q. R. Co.*, 3 *Biss.* (*U. S.*) 43.

Where a company discharges a passenger in the night-time at the crossing of another railroad, and the stations of the two companies are connected by an unlighted platform, so constructed as to lead the passenger to believe that it is designed for the use of travelers in passing from one station to the other, and the passenger, in going with due care from one station to the other, falls through an unguarded hole in the platform and is injured, the carrier is liable, although the negligence of the other company concurred in causing the injury. *Louisville, N. A. & C. R. Co.* v. *Lucas*, 119 *Ind.* 583, 21 *N. E. Rep.* 968. *Lucas* v. *Pennsylvania Co.*, 120 *Ind.* 205, 21 *N. E. Rep.* 972.—QUOTED IN Pennsylvania Co. *v.* Marion, 123 Ind. 415.—*Wabash, St. L. & P. R. Co.* v. *Wolff*, 13 *Ill. App.* 437.

A joint judgment cannot be sustained against different companies unless there is

some concert of action between all the companies, or concurrent neglect of a common duty resting on all. One company owned a track and platform, but ran no trains. A second company had the right to run trains on the road and to use the platform, and in doing so piled freight on the platform so as to leave a very narrow space between it and the track. A third company, which had the right to use the track but not the platform, in running a train over the track, struck and killed a person who was on the platform for the purpose of removing freight. *Held*, that the companies were not jointly liable. *Chicago & W. I. R. Co.* v. *Rolvink*, 31 *Ill. App.* 596.

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I. ENACTMENT.

1. In general. — Ill. Constitution of 1848, art. 3, § 23, provided that "every bill shall be read on three different days in each house, and every bill having passed both houses shall be signed by the speakers of their respective houses." A bill designated by number, and entitled "An act to amend an act entitled 'An act to incornorate the Illinois Grand Trunk railway,'" duly passed the lower house, but in its passage through the senate, and in the messages between the two houses notifying each other of its passage, the word "Illinois" was dropped from its title, but it was always designated by its proper number. It was duly signed by the presiding officer of each house. *Held*, that it was constitutionally passed. *Walnut* v. *Wade*, 3 *Am. & Eng. R. Cas.* 36, 103 *U. S.* 683.

The word "house," as used in Mich. Const. of 1835, art. 12, § 2, means the members present doing business, there being a quorum, and not a majority of all the members elected; and an act of incorporation passed by two thirds of the members present, there being a quorum, is constitutional. *Southworth* v. *Palmyra & J. R. Co.*, 2 *Mich.* 287.

The validity of an enrolled statute, providing for the issue of bonds of the state in aid of a railroad, authenticated in the manner pointed out by law, by the certificate of the presiding officers of the two houses of assembly, that it passed over the governor's veto by the constitutional majority, cannot be impeached by the journals of the houses showing a departure from the forms prescribed by the Constitution in the reconsideration of the bill. *Pacific R. Co.* v. *Governor*, 23 *Mo.* 353.

The creation of a board of engineers to superintend certain work in changing railroad tracks on streets of a city is not in violation of N. Y. Const., art. 10, § 2, relating to the appointment of certain officers; neither is it in violation of art. 1, § 9, which requires the assent of two thirds of the members elected to each branch of the legislature to every bill appropriating public moneys or property for local or private purposes. A provision that the work shall be paid for by local taxation is not appropriating money, within the meaning of the Constitution. *People ex rel.* v. *Havemeyer*, 3 *Hun* (*N. Y.*) 97, 16 *Abb. Pr. N. S.* 219, 4 *T. & C.* 365, 47 *How. Pr.* 494.

The public moneys referred to in the above section are those belonging to the state, and not those raised by local taxation for an improvement. *People ex rel.* v. *Havemeyer*, 3 *Hun* (*N. Y.*) 97, 16 *Abb. Pr. N. S.* 219, 4 *T. & C.* 365, 47 *How. Pr.* 494.

2. Approval by governor.—Where a law is signed by the speakers of both houses, and approved by the governor, it will be presumed to have been passed in conformity with all the requirements of the Constitution, and that it is valid, until the presumption is overcome by legitimate proof, clear and convincing in its character. *Larrison* v. *Peoria, A. & D. R. Co.*, 77 *Ill.* 11.

The charter of a railroad company provided that it should be null and void if the road was not commenced and finished within certain fixed dates. When the time had well run the legislature passed a subsequent act, which recited that it was necessary to extend the time, but the section relating to the extension as printed actually shortened the time. *Held*, that, as the section sealed and approved by the governor was different from the act as it passed the legislature, it was null and void; but this would not affect other portions of the act, which were distinct and severable, and regularly passed. *Berry* v. *Baltimore & D. P. R. Co.*, 41 *Md.* 446, 7 *Am. Ry. Rep.* 399.

By the Railway Act, § 151, the by-laws of every railroad company regulating the tolls to be taken on such road, in the special act respecting which a provision has been inserted that such railroad should be subject to the provisions of any general act relating to railroads, shall be subject to the approval of the governor in council, and no by-law of any railroad or railway in this province by which any tolls are to be imposed or altered * * * shall have any force or effect until the same has been approved and sanctioned by the governor in council. *Scott* v. *Midland R. Co.*, 33 *U. C. Q. B.* 580.

3. Entries in legislative journals. —An original bill to authorize county subscriptions to railroads provided that the county court should submit the question of subscription to a popular vote upon the joint application of the president and directors of the company and 100 voters. The manuscript journal of the house showed that the bill was amended by substituting the word "or" for "and," so as to authorize a popular vote upon the application of

either the company or of 100 voters. The entry in the printed journal as to this amendment was unintelligible, and neither journal said anything more of the amendment. The bill was passed and transmitted to the senate, and there passed and was sent to the governor. The enrolled bill as signed by the governor had the word "and" in place of "or." In a contention that the bill signed by the governor and enrolled was not the same bill passed by the house and senate—*held*, that as the Constitution did not require amendments of bills to be entered upon the journals, the court will presume that the house receded from its amendment, and hold that the enrolled bill was the one passed. *Chicot County* v. *Davies*, 40 *Ark.* 200.

The journals of the senate showed that senate bill No. 453, "An act to incorporate the Peoria, Atlanta & Danville railroad company," was introduced, read a first and second time, and referred to a committee, and that the committee to whom was referred senate bill No. 453, "An act to incorporate the Peoria, Atlanta & Decatur railroad company," reported back the same with amendments, and that the same was engrossed for a third reading and finally passed upon the call of the ayes and noes. *Held*, that the proof failed to raise even a doubt of the passage of the bill, and that these entries failed to show that there were two bills pending of the same number, and that the number showed its identity. *Larrison* v. *Peoria, A. & D. R. Co.*, 77 *Ill.* 11.—OVERRULED IN Binz *v.* Weber, 81 Ill. 288.

Where an act amending a charter has been duly authenticated and published, the presumption is that all the constitutional solemnities and prerequisites necessary to its validity have been complied with; but when it is clearly made to appear that the bill, or a section of it, has never in fact received the legislative assent, a court is bound to look, not only behind the printed statute book, but beyond the forms of authentication of the bill as recorded. *Berry* v. *Baltimore & D. P. R. Co.*, 41 *Md.* 446.

Such statute having the proper forms of authentication cannot be impeached or questioned upon merely parol evidence; but the journals of the two houses, in connection with other proper evidence, may be examined to aid in arriving at a correct conclusion as to what was the action of the legislature. *Berry* v. *Baltimore & D. P. R. Co.*, 41 *Md.* 446.

4. Publication and circulation.—The publication and circulation by the secretary of state of the railroad law of 1852, under a resolution passed by the general assembly, in advance of the publication of the revised statutes of that year, constituted a publication and circulation of such law "by authority," within the meaning of the Constitution. *Bravard* v. *Cincinnati, H. & I. R. Co.*, 115 *Ind.* 1, 14 *West. Rep.* 817, 17 *N. E. Rep.* 183.

The Md. constitutional requirement as to publication of statutes and the time for which such publication is to be made is mandatory and not merely directory, and the two months of publication mean calendar and not lunar months. *Baltimore & D. P. R. Co.* v. *Pumphrey*, 74 *Md.* 86, 21 *Atl. Rep.* 559.

5. When a statute takes effect.—An act providing for loaning the credit of the state to railroads was passed by the general assembly July 21, 1868, and two days thereafter each house, by a concurrent resolution, adjourned to meet on the third Tuesday in November, 1868, and did meet on that day, and continued in session until April 10, 1869, when both houses adjourned *sine die*. *Held*: (1) that, there being no special provision in the act as to when it should take effect, it did not become operative, or take effect as a law, for any purpose, until "ninety days from the expiration of the session at which it was passed" (Const. 1868, art. 5, § 22); (2) that the session that passed the act expired on April 10, 1869, when both houses adjourned *sine die*; and that the act did not take effect until ninety days from that date. *State* v. *Little Rock, M. R. & T. R. Co.*, 31 *Ark.* 701.—QUOTING Wheeler *v.* Chubbuck, 16 Ill. 361; St. Joseph & D. C. R. Co. *v.* Buchanan County Court, 39 Mo. 485; South Ottawa *v.* Perkins, 4 Cent. L. J. 442. REVIEWING Iroquois County Sup'rs *v.* Keady, 34 Ill. 293; St. Louis *v.* Alexander, 23 Mo. 483.

A railroad charter provided that it should be in force from and after the filing of a certain resolution therein described with the secretary of state. The Constitution of the state provided that "general" laws should only be in force after their publication. *Held*: (1) that the word "general" as used in the Constitution was synonymous with the word public; (2) that the charter in its

leading features was a private statute, though certain features which related to municipal aid to the road, and other matters, might be in the nature of a public statute. *Burhop* v. *Milwaukee*, 21 *Wis.* 257.

II. CONSTITUTIONALITY. VALIDITY.

6. Legislative control over railroads. — Railroad corporations are *quasi* public corporations dedicated to the public use; and the grant and acceptance of such charters creates a *quasi* public trust, and clothes the public with an interest in the use of the roads, which can be controlled by the public to the extent of the interest granted therein. *McCoy* v. *Cincinnati, I., St. L. & C. R. Co.*, 13 *Fed. Rep.* 3.—FOLLOWING Munn *v.* Illinois, 94 U. S. 126.

The legislature has power to determine in what manner a railroad company, whose charter is subject to the duties, liabilities and restrictions of Mass. Rev. St. ch. 44, shall exercise its franchise, and to make changes in the level, grade and connections thereof, and to direct the construction of a new connecting track, if this is necessary in order to preserve the continuity of the road; and to provide in what manner and under whose supervision the work shall be done, and how paid for. *Fitchburg R. & D. Co.* v. *Grand Junction R. Co.*, 4 *Allen* (*Mass.*) 198.

The legislature has authority in respect to *quasi* public corporations, such as railroads, and may, by general law, regulate, direct and define their privileges. *Spader* v. *New York El. R. Co.*, 3 *Abb. N. Cas.* (*N. Y.*) 467. *McGowan* v. *Wilmington & W. R. Co.*, 27 *Am. & Eng. R. Cas.* 64, 95 *N. Car.* 417.

Where a company has acquired a right of way, the manner of operating the road is within legislative control, and a statute authorizing the use of steam as a motive power for operating the road on a certain street is not in violation of that provision of the United States Constitution that no state can deprive any person of life, liberty or property without due process of law, or that provision of the state Constitution which provides substantially the same. *People* v. *Long Island R. Co.*, 60 *How. Pr.* (*N. Y.*) 395, 9 *Abb. N. Cas.* 181.

The New York statute authorizing railroad companies to acquire land provides that the company "shall be entitled to enter upon, take possession of and use the said land for the purposes of its incorporation during the continuance of its corporate existence"; and the title to the land being thus limited to its use for the purposes of the railroad enterprise, it is necessarily subject to the exercise of all those powers reserved to the legislature to which the franchises of the corporation are subject. *Albany Northern R. Co.* v. *Brownell*, 24 *N. Y.* 345.—DISAPPROVING Miller *v.* New York & E. R. Co., 21 Barb. 513. FOLLOWING Mohawk & H. R. Co. *v.* Archer, 6 Paige (N. Y.) 87.

The legislature has power to compel railroad corporations to discharge the obligations which they owe to the public, by reasonable statutory regulations, because of their *quasi* public nature, and because they exercise and enjoy rights and franchises granted by the public. *McGowan* v. *Wilmington & W. R. Co.*, 27 *Am. & Eng. R. Cas.* 64, 95 *N. Car.* 417.

And it may determine what constitutes abuses, and what laws will correct them, and what remedies may be necessary to enforce such laws. *Houston & T. C. R. Co.* v. *Harry*, 18 *Am. & Eng. R. Cas.* 502, 63 *Tex.* 256.

There is a marked difference between railroad corporations and purely private corporations. The former may be called *quasi* public corporations; and the legislature has over their employment of their property, devoted to a use in which the public has an interest, a control which it does not have over the employment of the property of a purely private corporation. The legislature can generally exercise no control which is forbidden by the charter of a purely private corporation. *Laurel Fork & S. H. R. Co.* v. *West Va. Transp. Co.*, 25 *W. Va.* 324.

Railroad corporations which devote their property to a use in which the public has a direct interest, in effect grant to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as they maintain the use; but they may withdraw the grant by discontinuing the use. *Laurel Fork & S. H. R. Co.* v. *West Va. Transp. Co.*, 25 *W. Va.* 324.

7. Delegation of legislative power. —After obtaining the approval of the railroad commissioners, a company abandoned a station; but the legislature subsequently passed an act, upon the petition of the in-

habitants of the place, providing that the company should stop its trains at the station if the inhabitants should, within six months, erect a station house and convey the same to the company. *Held*, that the statute was not void as an attempt to delegate legislative power to individuals. *State* v. *New Haven & N. Co.*, 43 *Conn.* 351.

Conn. Act of 1889, ch. 220, relating to grade crossings, provides that the directors of every company shall apply for the removal of at least one grade crossing each year for every sixty miles of road; * * * and if the directors of any company shall fail so to do the commissioners shall order such crossing or crossings removed. *Held*, that the statute is not unconstitutional because it authorizes the railroad commissioners to determine their own jurisdiction. *New York & N. E. R. Co.'s Appeal*, 62 *Conn.* 527, 26 *Atl. Rep.* 122.

A statute conferring on a commissioner authority to regulate the charges of railroads for transportation of passengers and freight is not a delegation of legislative power forbidden by the Constitution of Florida. *McWhorter* v. *Pensacola & A. R. Co.*, 37 *Am. & Eng. R. Cas.* 566, 24 *Fla.* 417, 12 *Am. St. Rep.* 220, 2 *L. R. A.* 504, 5 *So. Rep.* 129.

Kentucky Act of March, 1850, incorporating defendant company, and authorizing certain cities and counties to hold stock in the company, is not in violation of any provision of the state Constitution in force at the date of its passage. *Slack* v. *Maysville & L. R. Co.*, 13 *B. Mon.* (*Ky.*) 1.

Neither does the act of Feb., 1851, amending defendant's charter, violate that provision of the state Constitution adopted in 1850 which restricts the power of the legislature to authorize debts to be contracted on behalf of the state, in so far as said amendment authorizes the creation of a debt to pay for municipal stock. *Slack* v. *Maysville & L. R. Co.*, 13 *B. Mon.* (*Ky.*) 1.

The provision of N. Y. Act of 1884, ch. 439, § 3, that "at a point where a street * * * or traveled way is crossed at the same level by a railroad * * * the supreme court or county court may, upon application * * * order * * * that gates shall be erected across such street * * * and that a person be stationed to open and close such gates when an engine or train passes" is constitutional; it is not in violation of the constitutional provision vesting legislative powers exclusively in the legislature (N. Y. Const. art. 3, § 1), as it does not give to the court legislative powers, but makes the erection and operation of the gates provided for dependent upon their necessity, to be ascertained and determined in the manner provided; and when such an order is made, said act is effectual to enforce compliance. *People* v. *Long Island R. Co.*, 134 *N. Y.* 506, 31 *N. E. Rep.* 873, 47 *N. Y. S. R.* 648; *affirming* 58 *Hun* 412, 34 *N. Y. S. R.* 715, 12 *N. Y. Supp.* 41.—DISTINGUISHING Barto *v.* Himrod, 8 N. Y. 483.

Although the statute does not in express terms declare that it shall be the duty of a railroad company to obey an order so made by the court, this is to be implied. *People* v. *Long Island R. Co.*, 134 *N. Y.* 506, 31 *N. E. Rep.* 873, 47 *N. Y. S. R.* 648; *affirming* 58 *Hun* 412, 34 *N. Y. S. R.* 715, 12 *N. Y. Supp.* 41.

8. Uniformity of operation.—Under Cal. Constitution, a law of a general nature must have a uniform operation; therefore an act exempting particular cases from the operation of a general law is unconstitutional. In an action to enjoin the removal of a street-car track, plaintiffs claimed under the act of April 1, 1874, § 17, authorizing them to construct a street railway on a certain avenue, and defendant under a grant of right of way by the board of supervisors. *Held*, that the section referred to was unconstitutional, being an attempt to exempt the corporation from the operation of the general law of March 29, 1870, and therefore destructive of its uniform operation. *Omnibus R. Co.* v. *Baldwin*, 57 *Cal.* 160.—DISTINGUISHING California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398. FOLLOWING San Francisco *v.* Spring Valley Water Works, 48 Cal. 493; Waterloo Turnpike Road Co. *v.* Cole, 51 Cal. 381.

Iowa Act of March 26, 1860, chartering a railroad between designated points, as the beneficiary of a land grant from the general government, is not in conflict with the state Constitution, art. 3, § 30, providing that the legislature shall not pass local or special laws in certain enumerated cases, "and in all other cases where a general law can be made applicable." *Clinton* v. *Cedar Rapids & M. R. R. Co.*, 24 *Iowa* 455.—DISTINGUISHED IN Portland & W. V. R. Co. *v.* Portland, 27 Am. & Eng. R. Cas. 353, 14 Oreg. 188.

Iowa Code, § 1307, does not contravene the fourteenth amendment to the Constitution of the United States because it subjects railroad companies to liabilities and penalties to which other persons and corporations are not subjected. *Bucklew* v. *Central Iowa R. Co.*, 64 *Iowa* 603, 21 *N. W. Rep.* 103.—FOLLOWING McAunich *v.* Mississippi & M. R. Co., 20 Iowa 338.—FOLLOWED IN Central Trust Co. *v.* Sloan, 23 Am. & Eng. R. Cas. 398, 65 Iowa 655; Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 38 N. W. Rep. 520.

Mich. Act No. 202 of 1889, which fixes a maximum charge for the transportation of passengers on railroads upon the basis of their gross earnings per mile, and which in so doing distinguishes between railroads located in the Upper Peninsula and those in the Lower Peninsula, is constitutional. *Wellman* v. *Chicago & G. T. R Co.*, 45 *Am. & Eng. R Cas.* 249, 83 *Mich.* 592, 47 *N. W. Rep.* 489.—FOLLOWING Dow *v.* Beidelman, 125 U. S. 680.

9. Partial or discriminating legislation.—A statute requiring a particular railroad company to keep a watchman at a certain turnpike crossing is not invalid on the ground that it is partial or discriminating legislation *Kentucky C. R. Co.* v. *Com.*, 49 *Am. & Eng. R. Cas.* 312, [illegible] *Ky.* 64, 17 *S. W. Rep.* 196.

The rights of every individual must stand or fall by the same general law that governs every member of the body politic in the land, under similar circumstances, and therefore a partial law which proposes to affect or destroy the rights of particular persons, or a particular class of persons, is not the law of the land. *Atchison & N. R. Co.* v. *Baty*, 6 *Neb.* 37, 15 *Am. Ry. Rep.* 63.

10. Due process of law.—N. Y. Laws of 1886, ch. 271, providing for the sale of the rights of a certain company to run its cars on the streets of New York city, the proceeds of such sale to be paid to the city, is in violation of the constitutional prohibition against changing the ownership of property without due process of law, it being an attempt to transfer such rights by mere force of the statute, without the consent or knowledge of the lawful owners. *People* v. *O'Brien*, 36 *Am. & Eng. R. Cas.* 78, 111 *N. Y.* 1, 18 *N. E. Rep.* 692, 19 *N. Y. S. R.* 173; *reversing* 10 *N. Y. S. R.* 596, 45 *Hun* 519.—REFERRING to New York & O. M. R. Co. *v.* Van Horn, 57 N. Y. 473.

11. Vested rights.—It is not within the competency of even the legislative power to deprive any person of a vested right by means of a declaratory act, yet where no right has been already secured under the former act, the legislature may declare its meaning by a subsequent law, and this will be held to be the meaning of the first law from the beginning, for no wrong is thereby inflicted, since no right has become vested. *Washington, A. & G. R. Co.* v. *Martin*, 7 *D. C.* 120.

In 1863 congress passed an act touching the admission of a Virginia company into the District of Columbia, but the Virginia company never accepted the act. *Held*, that it never acquired any rights under it, and therefore sustained no injury from the passage of the declaratory act of 1866. *Washington, A & G. R. Co.* v *Martin*, 7 *D. C.* 120.

The mayor and aldermen of a city filed a petition under Mass. Act of 1890, ch. 428, for the abolition of certain grade crossings. Commissioners were appointed, and, after the filing of their report and a motion to confirm the same, and before the court had made any final decree, the statute of 1892, ch. 311, was passed, which provided that no change should be made in the grade of the public ways in the city, where the same are now crossed by one or more railroads at grade, without the consent of the city council expressed by vote duly recorded, and that before a final decree a copy of such vote certified by the city clerk shall be filed in the case. No vote was passed by the city council and no certificate filed in the case. The judge ruled that the statute of 1892 was not within the power of the legislature, and that the consent of the city council was not necessary to a final decree in the case, and made a final decree confirming the report. *Held*, that the proceeding could not be considered as a suit for the determination of private vested rights of which the parties could not be deprived except by a taking for a public use and the payment of reasonable compensation; that it was merely a *quasi* judicial proceeding for enforcing the laws regulating a subject within the control of the legislature, and that the statute was valid. *In re Mayor, etc., of Northampton*, 158 *Mass.* 299, 33 *N. E. Rep.* 568.—QUOTING New London Northern R. Co. *v.* Boston & A. R. Co., 102 Mass. 386.

Congress has the constitutional power to charter railroads and to grant them rights of way over public lands, and to exempt such easements from taxation; and after it has granted such charters, rights acquired thereunder cannot be affected by legislation. *Northern Pac. R. Co.* v. *Carland*, 17 *Am. & Eng. R. Cas.* 364, 5 *Mont.* 146, 3 *Pac. Rep.* 134.

12. What laws impair the obligation of contracts.—Where a corporation has made contracts valid at the time they were made, the state cannot unmake them or impose other or different terms on the corporation, to its injury and for the benefit of other contracting parties. *Coast-Line R. Co.* v. *Mayor, etc., of Savannah*, 30 *Fed. Rep.* 646.

Where a state authorizes a company to mortgage lands which have been granted it by the general government, and the mortgage has been foreclosed, the state cannot abridge the rights of purchasers of the road by subsequent legislation. *Vicksburg, S. & P. R. Co.* v. *Sledge*, 41 *La. Ann.* 896, 6 *So. Rep.* 725.

An act of the legislature, the effect of which is to make a loan of money become due before the time fixed in the contract, cannot be enforced. *Randolph* v. *Middleton*, 26 *N. J. Eq.* 543.

A railroad acquired lands not necessary for the use of the road, and afterwards mortgaged the same. Afterwards a law was passed appointing a commissioner to sell such lands as were not necessary for the use of the road, and providing that upon the mortgagees releasing the same, their mortgages should be ratified as to all other property of the railroad. The commissioner reported the lands to be sold, and the mortgagees released the same. *Held*, that this was an executed grant on the part of the state, making a subsequent law to reopen the matter for mistakes of the commissioner unconstitutional, as impairing the obligation of a contract. *Drew* v. *New York & E. R. Co.*, 81* *Pa. St.* 46.

Vermont Act of 1857, p. 23, No. 16, so far as it provides for the appointment of trustees annually, in case a railroad is in the hands of trustees under a mortgage, impairs the obligations contained in a railroad mortgage in which the trusts are specified, and the manner of perpetuating the same, and in this respect it is repugnant to that provision of the Constitution of the United States which prohibits a state legislature from passing any law to impair the obligation of a contract. *Fletcher* v. *Rutland & B. R. Co.*, 39 *Vt.* 633.

13. What laws do not impair the obligation.—A state cannot, by any act of its own, by any expression of the legislative will, or by any agency whatever, lessen, change, impair or destroy the legal obligation of contracts into which it has entered; but, in proposing an adjustment of its liabilities, and of claims and demands against it, the general assembly has undoubted power to declare that only particular liabilities, or special claims and demands, shall be adjusted; its powers in this respect being the same as those of an individual debtor to provide for the adjustment, security, or payment of particular debts, omitting others of equal or greater obligation. *State ex rel.* v. *Cobb*, 7 *Am. & Eng. R. Cas.* 147, 64 *Ala.* 127.

Where a railroad charter provides that it may be altered, amended or repealed at any time, a subsequent statute requiring the company to build and maintain certain highway crossings is not unconstitutional as impairing the obligation of the contract between the state and the company. *Boston & M. R. Co.* v. *York County Com'rs*, 32 *Am. & Eng. R. Cas.* 271, 79 *Me.* 386, 4 *N. Eng. Rep.* 657, 10 *Atl. Rep.* 113.—REVIEWED IN Chicago & N. W. R. Co. *v.* Chicago, 140 Ill. 309.

The legislature of Missouri had the constitutional right to pass the act of Feb. 16, 1865, entitled "An act to provide for the completion of the North Missouri railroad and its west branch," and to release the first mortgage lien and pledge of the income of the road reserved to the state by the act of Dec. 23, 1852. *Answer to Questions by Governor*, 37 *Mo.* 139.

New York Laws of 1886, ch. 143, providing for the taxation of stock corporations for the privilege of organizing, is not, in its application to corporations framed under earlier laws providing that purchasers at mortgage foreclosure sales can become incorporated bodies, a violation of the constitutional inhibition against laws impairing the obligation of contracts. *People ex rel.* v. *Cook*, 36 *Am. & Eng. R. Cas.* 256, 110 *N. Y.* 443, 18 *N. E. Rep.* 113; *affirming* 47 *Hun* 467.—FOLLOWING Memphis & L. R. R. Co. *v.* Railroad Com'rs, 112 U. S. 609.

A limitation upon the right of non-resi-

dents to bring actions against foreign corporations does not impair the obligation of contracts. *Central R. & B. Co.* v. *Georgia C. & I. Co.*, 32 *So. Car.* 319, 11 *S. E. Rep.* 192, 638.

In 1838 the state of Tennessee established a bank in its own name, and pledged its faith and credit to give indemnity for all losses arising from any deficiency in the funds appropriated as capital. At that time the Constitution of the state provided that suits might be brought against the state "in such manner and in such courts as the legislature may by law direct." In 1855 a statute was passed providing that actions might be instituted against the state the same as against individuals, but no power was given the courts to enforce a judgment; but in 1865 this law was repealed. Subsequently a railroad company was made a party to a proceeding to wind up the bank, and asked for a decree, under the indemnity clause of the act creating the bank, against the state for the amount of a certain debt due from the bank to the company. *Held*, that the statute repealing the one authorizing the state to be sued was not void as impairing the obligation of a contract. (Swayne and Strong, JJ., dissenting.) *Memphis & C. R. Co.* v. *Tennessee*, 101 *U. S.* 337.—FOLLOWED IN Baltzer *v.* State, 104 N. Car. 265, 10 S. E. Rep. 153; South & N. Ala. R. Co. *v.* Alabama, 101 U. S. 832.

14. No such constitutional prohibition in Canada.—In Canada, where no constitutional prohibition exists against the passage of laws impairing the obligation of contracts, the legislature may by statute compel bondholders of a railroad to accept an arrangement or compromise made when the corporation is in financial embarrassment, for the benefit of all the bondholders, and accepted by a majority of them. Such statutes are on a footing with bankrupt acts, and cannot be said to deprive any person of his property without due process of law. *Canada Southern R. Co.* v. *Gebhard*, 14 *Am. & Eng. R. Cas.* 581, 109 *U. S.* 527, 3 *Sup. Ct. Rep.* 363.—DISTINGUISHED IN Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. Rep. 782. QUOTED IN Gates *v.* Boston & N. Y. A. L. R. Co., 24 Am. & Eng. R. Cas. 143, 53 Conn. 333.

15. Statutes impairing the obligation of corporate franchises.—Where a law passed previous to the formation of a corporation, or which it afterwards accepts, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties, does not impair any corporate right, or otherwise violate the Ala. Constitution. *Mobile & M. R. Co.* v. *Steiner*, 61 *Ala.* 559.

The construction and maintenance of highways and bridges is a public burden which the general assembly has a right to apportion as it deems best. So where a company has constructed its road in a city, and built certain bridges to the acceptance of the city authorities, a subsequent act of the legislature ordering the company to widen the bridges as public convenience may require is not unconstitutional as impairing the obligation of the contract between the state and the company. *English* v. *New Haven & N. Co.*, 32 *Conn.* 240.—APPROVED IN Burritt *v.* New Haven, 42 Conn. 174.

16. Retrospective laws.—The legal tender act is constitutional as to debts contracted before its passage. *Knox* v. *Lee*, 12 *Wall.* (*U. S.*) 457.—FOLLOWED IN Norwich & W. R. Co. *v.* Johnson, 15 Wall. (U. S.) 195. REVIEWED IN Baltimore & O. R. Co. *v.* State, 36 Md. 519.

Under Colorado Constitution retrospective laws are prohibited. Therefore where a statute gives a right of action against a company through whose misconduct or negligence death has been caused, and suit has been brought and judgment recovered, the repeal of the statute while the case is pending in the supreme court on appeal cannot relate back so as to destroy the right of action or prevent the supreme court from acting in the case. *Denver, S. P. & P. R. Co.* v. *Woodward*, 4 *Colo.* 162. See also *Denver, S. P. & P. R. Co.* v. *Woodward*, 4 *Colo.* 1.

Where a railroad charter reserves to the legislature the right to alter or amend the same, a subsequent general statute relating to railroads, and imposing additional burdens upon companies in the way of fencing their tracks, is not unconstitutional. *Suydam* v. *Moore*, 8 *Barb.* (*N. Y.*) 358.

Pa. Act of April 11, 1862, giving the supreme court original jurisdiction of a court of chancery "in all cases of mortgages given by corporations," is constitutional; and it is no objection that the law was passed after the date of the mortgage

in litigation. *McCurdy's Appeal*, 65 *Pa. St.* 290.

A legislative act, passed after a railway company has compensated the owner of land for the right to cross it, which requires the company to construct crossings within his inclosures, cannot be enforced. It would be otherwise if the right of way were obtained after the passage of such a law. In the latter event the right of way would be presumed to have been acquired with reference to the law. *Gulf, C. & S. F. R. Co.* v. *Rowland*, 35 *Am. & Eng. R. Cas.* 286, 70 *Tex.* 298, 7 *S. W. Rep.* 718.

17. Local or special laws. — Kan. Act of 1871, ch. 124, relating to defendant company and the southern branch of the Union Pacific railway company, and which purports to convey and extend to the entire roads of these companies all the rights they then possessed as to a part of their roads, and which attempts to give a right of way over all lands as fully as that enjoyed over other lands under other acts of the legislature, is in violation of Kan. Constitution, art. 12, § 1, providing that the legislature shall pass no special act conferring corporate powers. *Roberts* v. *Missouri, K. & T. R. Co.*, 43 *Am. & Eng. R. Cas.* 532, 43 *Kan.* 102, 22 *Pac. Rep.* 1006.

Mo. Act "to provide for the assessment and collection of taxes on bridges owned by joint-stock companies, and property and franchises owned by telegraph and express companies," is not a special law within the meaning of the constitutional inhibition against the passage of local or special laws. *State ex rel.* v. *St. Louis, K. C. & N. R. Co.*, 79 *Mo.* 420; *affirming* 9 *Mo. App.* 532.

New Jersey Act of May 3, 1880, providing that any company whose road at a seaside resort is not more than four miles in length shall not be subject to the provisions of the act of Feb. 12, 1874, which provides for the appointment of a receiver for a road that fails to run its trains for ten days, is in violation of the state Constitution, art. 4, § 7, providing that the legislature shall not pass any private, special or local law granting to any corporation, association or individual any exclusive privilege, immunity or franchise. *In re Delaware Bay & C. M. R. Co.*, (*N. J.*) 11 *Atl. Rep.* 261; *adhered to on rehearing in* 11 *Atl. Rep.* 737.

A bill may be passed giving a private railroad corporation the right to use a new or different motive power, provided the right be not exclusive. *In re New York El. R. Co.*, 70 *N. Y.* 327, 3 *Abb. N. Cas.* 401; *affirming* 7 *Hun* 239, *mem.*—FOLLOWED IN People *v.* Brooklyn, F. & C. I. R. Co., 9 Am. & Eng. R. Cas. 454, 89 N. Y. 75; In re Third Ave. R. Co., 43 Am. & Eng. R. Cas. 222, 121 N. Y. 536, 24 N. E. Rep. 951, 31 N. Y. S. R. 693.

The provision of N. Y. Act of 1885, ch. 554, authorizing the construction of an "illustrative section" of an elevated railroad on some street in the city of New York, is in conflict with the state Constitution, art. 3, § 18, prohibiting any local or private bill granting any corporation, association or individual the right to lay down railroad tracks; and it is also unconstitutional in that it makes no provision for compensation to abutting owners, or owners of the fee of the street. *People ex rel.* v. *Loew*, 102 *N. Y.* 471, 2 *N. Y. S. R.* 52; *affirming* 39 *Hun* 490.

In 1867 defendant company was chartered to construct a bridge. By chapter 392 of 1885, under a pretense of extending the time for the completion of the bridge, the company was authorized to construct a railway. *Held*, that the legislature had the power to waive a forfeiture for not completing the bridge as originally required; but the attempt to authorize it to construct a railroad was in violation of that provision of the state Constitution which prohibits the legislature from granting, by private or local bills, the right to lay down railroad tracks, or to provide for building bridges and chartering companies for such purpose. *In re New York & L. I. Bridge Co.*, 54 *Hun* 400, 27 *N. Y. S. R.* 503, 7 *N. Y. Supp.* 445; *affirming* 21 *N. Y. S. R.* 858, 5 *N. Y. Supp.* 77.

Pa. Act of May 8, 1876, repealing the limitations contained in charters of passenger railway companies in cities of the first class, restricting them to the use of horse power, relates to a subject proper for municipal classification, and does not transgress the prohibition of article 3, § 7, of the Constitution, as a local or special law amending or extending the charter of a corporation. *Reeves* v. *Philadelphia Traction Co.*, 152 *Pa. St.* 153, 25 *Atl. Rep.* 516; *reversing* 1 *Pa. Dist.* 506.—DISTINGUISHING Weinman *v.* Wilkinsburg & E. L. Pass. R. Co., 118 Pa. St. 192. QUOTING Paving, etc., of Wyoming St., 137 Pa. St. 494.

18. The police power, generally.—All general laws and police regulations af-

fecting corporations are binding upon them without their assent. *New York & N. E. R. Co.'s Appeal*, 62 *Conn.* 527, 26 *Atl. Rep.* 122.—APPLYING New York & N. E. R. Co. *v.* Waterbury, 60 Conn. 1; Bulkley *v.* New York & N. H. R. Co., 27 Conn. 479; English *v.* New Haven & N. Co., 32 Conn. 240; Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 264.

The police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state. *Missouri Pac. R. Co.* v. *Finley*, 38 *Kan.* 550, 16 *Pac. Rep.* 951.

The state has reserved to itself the right to enact police laws necessary to secure the lives and property of its citizens. Among the powers thus reserved, and which must inhere in the state, is that of prescribing reasonable regulations for the government of railroad corporations in regard to the manner in which they shall exercise their corporate franchises in running their trains, so as to avoid danger to the lives and property of its citizens; and every railroad accepts its charter subject to such power. *Lake Shore & M. S. R. Co.* v. *Cincinnati, S. & C. R. Co.*, 30 *Ohio St.* 604, 16 *Am. Ry. Rep* 291.—REVIEWING Toledo, P. & W. R. Co. *v.* Deacon, 63 Ill. 91.

19. What statutes are valid exercises of the police power.—Dak. Special Laws of 1885, ch. 17, § 16, exempting ten counties of the territory from the operation of the Code Civ. Pro. § 747, as amended by ch. 115 of 1883, declaring owners liable for all damages done by their stock while trespassing "upon the lands of another," is valid. Such exemption is within the police power of the legislature. *Sprague* v. *Fremont, E. & M. V. R. Co.*, 6 *Dak.* 86, 50 *N. W. Rep.* 617.

Missouri statute of 1881 requiring the erection of depots and waiting rooms at railroad crossings is a legitimate exercise of the police power of the state. *State ex rel.* v. *Kansas City, Ft. S. & G. R. Co.*, 32 *Fed. Rep.* 722.—FOLLOWING State *v.* Wabash, St. L. & P. R. Co., 83 Mo. 144.

The statute enacted for the protection of cattle against contagious diseases, having for its object protection of the cattle of Kansas from the disease known as Texas, splenic or Spanish fever, is justified as a police regulation, and therefore is not in contravention of any provision of the Constitution of the United States. *Missouri Pac. R Co.* v. *Finley*, 38 *Kan.* 550, 16 *Pac. Rep.* 951.

Ill. Act of Feb. 25, 1854, exempting the Galena & Chicago Union railroad from the operation of the general law requiring all railroads to ring a bell or sound a whistle at road or street crossings, is not unconstitutional. The legislature may withdraw a police regulation as well as impose it. *Galena & C. U. R. Co.* v. *Dill*, 22 *Ill.* 265.

Ill. Act of May 29, 1879, requiring all regular passenger trains to stop at county seat stations long enough to receive and let off passengers with safety, is not a regulation of interstate commerce, and therefore inhibited by the Constitution of the United States, though the line of the road may pass through different states. Such a law is but a proper exercise of the police power of the state. *Chicago & A. R. Co.* v. *People*, 13 *Am. & Eng. R. Cas.* 42, 105 *Ill.* 657.

Ind. Act of March 9, 1889, requiring railroad authorities to write upon a blackboard in each passenger depot at which there is a telegraph office, at least twenty minutes before the schedule time for the arrival of each passenger train stopping at such station, the fact whether such train is on time, and if late, how much, and providing a penalty for the violation of the act, is constitutional. *State* v. *Indiana & I. S. R. Co.*, 133 *Ind.* 69, 32 *N. E. Rep.* 817.—FOLLOWED IN State *v.* Pennsylvania Co., 133 Ind. 700.

Sections 1167, 1168, Tenn. Code, in force in 1865, relating to injuries to persons and property by the operation of trains, are valid and constitutional as police regulations. *Louisville & N. R. Co.* v. *Burke*, 6 *Coldw.* (*Tenn.*) 45.

20. What statutes are not justified under the police power.—Illinois Act of 1855, making railroad companies liable for all expenses of a coroner and his inquest, and the burial of all persons who may die on its cars, or who may be killed by collision or other accident occurring to such cars, or otherwise, is unconstitutional and void, so far as it attempts to make such companies liable in cases where they have violated no law or have been guilty of no negligence. *Ohio & M. R. Co.* v. *Lackey*, 78 *Ill.* 55. — APPROVED IN Denver & R. G. R. Co. *v.* Outcalt, 2 Colo. App. 395. DISTINGUISHED IN Grissell *v.* Housatonic R. Co., 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137;

Sullivan *v.* Oregon R. & N. Co., 19 Oreg. 319. FOLLOWED IN Cateril *v.* Union Pac. R. Co., 2 Idaho 540; Bielenberg *v.* Montana Union R. Co., 38 Am. & Eng. R. Cas. 275, 8 Mont. 271.

Police regulations, established by the legislature for the convenience merely of the public or travelers on railroads, cannot be upheld against individuals or private corporations. *State* v. *Noyes*, 47 *Me.* 189. — CRITICISED AND EXTENDED IN Boston & M. R. Co. *v.* York County Com'rs, 32 Am. & Eng. R. Cas. 271, 79 Me. 386, 4 N. Eng. Rep. 657, 10 Atl. Rep. 113.

21. Statutes affecting remedies only.*—Cal. Act of April 14, 1863, § 1, providing for the enforcement in a justice's court of penalties against a railroad for overcharging upon fares, is not unconstitutional as infringing upon the original jurisdiction of the district courts; its constitutionality cannot be tested by the provisions of the Practice Act. *Reed* v. *Omnibus R. Co.*, 33 *Cal.* 212.— FOLLOWED IN Smith *v.* Omnibus R. Co., 36 Cal. 281.

Ga. Act of 1854 relating to remedies for all injuries caused by a railroad is constitutional, and is not repealed by the act of 1856 relating to injuries caused by the running of locomotives or cars. *Muscogee R. Co.* v. *Neal*, 26 *Ga.* 120.—FOLLOWING Jones *v.* Central R. & B., 18 Ga. 247.

It is not in violation of that clause of the Constitution which requires civil suits to be tried in the county of the residence of the defendant for the general assembly to prescribe by law that suits against railroad companies may be brought and tried in the county where the injury has been done or where a contract has been made or is to be performed. *Georgia R. & B. Co.* v. *Oaks*, 52 *Ga.* 410, 7 *Am. Ry. Rep.* 143.—APPROVING Davis *v.* Central R. & B. Co., 17 Ga. 336.

The right to a particular remedy is not a vested right, unless in those special cases where the remedy is part of the right itself. Aside from this exception the state has complete control over remedies, provided that in changing the remedy it does not impair the pre-existing right. *Musgrove* v. *Vicksburg & N. R. Co.*, 50 *Miss.* 677.

N. Car. Act of 1887, ch. 33, placing the burden of proving contributory negligence on the defendant, only affects the remedy and impairs no vested right; and it was, therefore, competent for the legislature to pass the statute. *Wallace* v. *Western N. C. R. Co.*, 41 *Am. & Eng. R. Cas.* 212, 104 *N. Car.* 442, 10 *S. E. Rep.* 552.

22. Statutes regulating commerce.—Illinois Railroad Act, § 87, to prevent unjust discriminations in rates, is not unconstitutional as an attempt to regulate interstate commerce, when applied to a shipment from the state to another state. Where the carriage is for a gross sum, it implies that the charge is proportionate for every part of the distance, and the offense may be complete before the state line is reached. *Wabash, St. L. & P. R. Co.* v. *People*, 105 *Ill.* 236. — FOLLOWING People *v.* Wabash, St. L. & P. R. Co., 104 Ill. 476.

Iowa Act of 1862, ch. 169, provided that railroad companies should annually fix rates for the transportation of passengers and freights, and should cause a printed copy of such rates to be posted at all stations and depots, and provided a penalty for charging a higher rate. *Held*, that this was not an attempt to regulate commerce among the states, within the meaning of the federal Constitution, but was valid as a police regulation. *Chicago & N. W. R. Co.* v. *Fuller*, 17 *Wall.* (*U. S.*) 560.—QUOTED IN Little Rock & Ft. S. R. Co. *v.* Hanniford, 49 Ark. 291, 5 S. W. Rep. 294.

Minnesota Act of March 7, 1887, creating a railroad and warehouse commission, providing that the rates charged by railroad companies shall be equal and reasonable, and conferring power upon the commission to find, on the filing with it by a railroad company of copies of its schedule of rates, that any part thereof is unequal or unreasonable, and to compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," is unconstitutional, as a deprivation of property without due process of law, in that it fails to provide for any hearing, for summons or notice to the company, or for any opportunity for the company to introduce witnesses before the commission. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 42 *Am. & Eng. R. Cas.* 285, 134 *U. S.* 418, 10 *Sup. Ct. Rep.* 702. See also *Munn* v. *Illinois*, 94 *U. S.* 113.

23. —— interstate commerce.—Illinois Act of April 25, 1871, entitled "An act

*Change in the remedy for the enforcement of a contract, see note, 14 AM. & ENG. R. CAS. 33.

to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this state," is not repugnant to the Constitution of the United States. *Munn* v. *Illinois*, 94 *U. S.* 113. But see *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 42 *Am. & Eng. R. Cas.* 285, 134 *U. S.* 418, 10 *Sup. Ct. Rep.* 702.

Grain warehouses which are situate and carry on business entirely within a state may be termed instruments of interstate commerce, but they are not such commerce themselves because they transfer grain from one road to another which may run into other states; and until congress acts in reference to their interstate relations the regulations of the state government may be enforced. *Munn* v. *Illinois*, 94 *U. S.* 113.

The enforcement of the proviso to Illinois Act of 1855, § 25, relating to the fencing and operating of railroads, which requires all regular passenger trains to stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety, in respect to mail trains running through this state into other states, will not conflict with § 8, art. 1, of the Constitution of the United States, which confers upon congress the power to regulate commerce among the states; nor is such proviso invalid as interfering with the carrying of the mails. *Illinois C. R. Co.* v. *People*, 143 *Ill.* 434, 33 *N. E. Rep.* 173.

Ind. Act requiring notice of the arrival of trains is operative only when the company or person operating the railroad possesses the information, or the means of conveying such information to the point where it is to be noted, and the fact that to carry out the law, as required by the statute, would necessitate the transmission of knowledge belonging to the master by a servant to a servant of the same master in another state does not impose any restrictions on the freedom of commerce, and would not be an interference with interstate commerce, for the reason that the act of the servant or servants is the act of the master, and a person cannot carry on commerce with himself. *State* v. *Indiana & I. S. R. Co.*, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

Md. Acts of 1832, ch. 175, 1836, ch. 261, 1844, ch. 103, 1845, ch. 370, 1852, ch. 328, in so far as they provide that the Baltimore & Ohio railroad company shall pay semi-annually to the treasurer of the state, for its use, one fifth of the whole amount that may be received by the company for the transportation of passengers between Washington and Baltimore, are not in conflict with the Constitution of the United States. *State* v. *Baltimore & O. R. Co.*, 34 *Md.* 344.

Defendant was organized as a corporation, under the statutes of several states, to operate a continuous line of road running through those states, which had previously been operated by the consolidated corporations. It was claimed that those statutes, so far as they authorized the consolidation in adjoining states, were repugnant to the provision of the U. S. Constitution, art. 1, § 8, sub. 3, conferring on congress the power to regulate commerce with foreign nations and among the several states. *Held*, untenable; that in the absence of any legislation by congress upon the subject, the power so to legislate existed in the states. *Boardman* v. *Lake Shore & M. S. R. Co.*, 4 *Am. & Eng. R. Cas.* 265, 84 *N. Y.* 157.

Tenn. statute of March 24, 1875, in so far as it abrogates all common-law remedies for the wrongful exclusion of a passenger from the cars of a railroad company, is unconstitutional as to railroads running between two or more states, it being a regulation of interstate commerce. *Brown* v. *Memphis & C. R. Co.*, 5 *Fed. Rep.* 499.

24. Statutes regulating freight charges.*—Iowa Act of March 23, 1874, entitled "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different roads of this state," is not in conflict with the state Constitution, art. 1, § 4, providing that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens"; nor is it a regulation of interstate commerce. *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 *U. S.* 155, 16 *Am. Ry. Rep.* 169.

Arkansas Act. of Feb. 27, 1885, which prohibits charging or collecting a greater amount of freight than is charged in the bill of lading, and providing a penalty for refusing to deliver goods upon payment or tender of the amount as charged in the bill

* Freight charges; constitutionality of statutes regulating, see notes, 21 Am. & Eng. R. Cas. 50; 18 *Id.* 486; 35 *Id.* 518.

Statutes prohibiting overcharges, see note, 21 Am. & Eng. R. Cas. 47.

of lading, operates upon all persons in a general or uniform way who come within its class, and is not unconstitutional as being special legislation. *Little Rock & Ft. S. R. Co.* v. *Hanniford*, 49 *Ark.* 291, 5 *S. W. Rep.* 294.

The provisions of Pa. Act of June 4, 1873, so far as they attempt to regulate freight charges on goods transported from this state to foreign countries or to other states, are unconstitutional, the subject being within the exclusive jurisdiction of congress and forbidden to the states. *Wigton* v. *Pennsylvania R. Co.*, 20 *Phila.* (*Pa.*) 184.—QUOTING Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 570. REVIEWING Hall *v.* De Cuir, 95 U. S. 485.

25. Statutes regulating passenger fares and tickets—Ticket brokers.—Under a Constitution conferring upon the legislature power to alter or revoke charters thereafter granted, and to correct abuses and excessive charges by railroad companies, a statute limiting the maximum fare for the carriage of passengers within a state to three cents a mile is not a taking of property without due process of law within the meaning of the prohibition in the federal Constitution, in the case of a corporation reorganized on the sale of a railroad under a decree of foreclosure after the adoption of the state Constitution, although the operation of the statute will reduce the net yearly income of the company to less than one and a half per cent. on the original cost of the road, and only slightly over two per cent. on the bonded debt, there being no evidence to show how much the bonds cost, or the amount of the capital stocks reorganized, or the sum paid for the road at the foreclosure sale. *Dow* v. *Beidelman*, 34 *Am. & Eng. R. Cas.* 322, 125 *U. S.* 680, 8 *Sup. Ct. Rep.* 1028.—FOLLOWING Chicago, B. & Q. R. Co. *v.* Iowa, 94 U. S. 155.—FOLLOWED IN Georgia R. & B. Co. *v.* Smith, 128 U. S. 174; Wellman *v.* Chicago & G. T. R. Co., 83 Mich. 592.

A statute dividing railroad companies into classes, according to the length of the roads operated, and fixing a different limit for passenger fares for each class, does not deny a corporation the equal protection of the laws within the meaning of the prohibition in the federal Constitution. *Dow* v. *Beidelman*, 34 *Am. & Eng. R. Cas.* 322, 125 *U. S.* 680, 8 *Sup. Ct. Rep.* 1028.—FOLLOWING Illinois C. R. Co. *v.* Illinois, 108 U. S. 541.

Ark. Act of April 4, 1887, providing a maximum schedule of charges for the carriage of passengers by railroads, and classifying railroads according to their length, operates uniformly on each class, and is not therefore special legislation within the constitutional prohibition. *Dow* v. *Beidelman*, 49 *Ark.* 325, 5 *S. W. Rep.* 297.

Ill. Act of April 19, 1875, requiring railroad companies and others to provide ticket agents with certificates of their authority, forbidding unauthorized persons to sell tickets, and requiring the redemption of unused tickets and coupons, is not invalid as a violation of Ill. Const. art. 2, § 2, prohibiting the taking of property without due process of law, but is the legitimate exercise by the legislature of the police powers of the state. *Burdick* v. *People*, 58 *Am. & Eng. R. Cas.* 28, 149 *Ill.* 600, 36 *N. E. Rep.* 948.

Neither does the act violate Ill. Const. art. 4, § 22, providing that special laws shall not be passed granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, since the requirements that tickets shall only be sold by authorized agents is merely a police regulation as to the manner in which the business of the carrier shall be conducted, and the restrictions conducting the selling of tickets are only such restraints as the government may justly prescribe. *Burdick* v. *People*, 58 *Am. & Eng. R. Cas.* 28, 149 *Ill.* 600, 36 *N. E. Rep.* 948.

Nor is the second section of the act prohibiting the unauthorized sale of tickets entitling the holder to travel on any railroad "whether the same be situated within or without the limits of this state," in contravention of U. S. Const. art. 1, § 8, cl. 8, conferring upon congress the power to regulate commerce among the states, since the duty which the act imposes upon carriers and their agents in no wise interferes with the freedom of interstate travel. *Burdick* v. *People*, 58 *Am. & Eng. R. Cas.* 28, 149 *Ill.* 600, 36 *N. E. Rep.* 948.

Nor is the act in contravention of the provisions of the state or federal Constitutions forbidding the impairment of the obligation of contracts by legislation, as to tickets issued by a railroad company eighteen years after the passage of the act. *Burdick* v. *People*, 58 *Am. & Eng. R. Cas.* 28, 149 *Ill.* 600, 36 *N. E. Rep.* 948.

Minn. Laws 1893, ch. 66, entitled "An act to regulate the sale and redemption of trans-

portation tickets of common carriers and to provide punishment for the violation of the same," is not unconstitutional, either as "class legislation" granting special privileges to carriers, or as a delegation of the police power of the state to grant licenses to engage in a business, or as an interference with interstate commerce, or (at least as to tickets purchased after the passage of the act) as depriving a citizen of his property "without due process of law." *State* v. *Corbett*, 58 *Am. & Eng. R. Cas.* 35, 57 *Minn.* 345, 59 *N. W. Rep.* 317.

If a business, as that of common carriers, is a proper subject of police regulation, so are its incidents and accessories; as, for example, the issue and sale of transportation tickets. *State* v. *Corbett*, 58 *Am. & Eng. R. Cas.* 35, 57 *Minn.* 345, 59 *N. W. Rep.* 317.

The regulation of tolls on bridges and turnpike roads, and fares on railroads and ferries, which are used for communication and commerce between states, is part of the powers reserved to the states, and is not delegated to the general government. *Hudson County Chosen Freeholders* v. *State*, 24 *N. J. L.* 718; *affirming* 23 *N. J. L.* 206.

New York Act of 1875, ch. 600, reducing the rate of fare for carrying passengers on street railways in the city of Buffalo, is a valid exercise of the police power of the state, and is not rendered unconstitutional by the fact that a contract existed between two companies for the interchange of traffic at the rates of fare which existed previous to its enactment. *Buffalo East Side R. Co.* v. *Buffalo St. R. Co.*, 37 *Am. & Eng. R. Cas.* 200, 111 *N. Y.* 132, 19 *N. E. Rep.* 63, 19 *N. Y. S. R.* 574.—QUOTING Munn *v.* Illinois, 94 U. S. 124; Sinking Fund Cases, 99 U. S. 747.

Pa. Act of May 6, 1863, and its amendment of April 10, 1872, which prohibit the sale of railroad tickets except by the agents of the companies, and make a violation of the act a misdemeanor, are constitutional. State legislatures have the right to pass such acts. *Com.* v. *Wilson*, 14 *Phila.* (*Pa.*) 384. — QUOTING Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465.

26. Fence and stock laws, generally.*—An act of the legislature requiring pre-existing railroad companies to fence their roads, and making them liable for stock killed by reason of a neglect to fence, is not unconstitutional. *Galena & C. U. R. Co.* v. *Crawford*, 25 *Ill.* 529.—FOLLOWING Ohio & M. R. Co. *v.* McClelland, 25 Ill. 140.

Illinois Act of 1879, making railway corporations liable for attorney's fees in addition to the damage sustained by the owners of stock by killing or injuring the same through a neglect to fence their roads and keep the same in repair, is not unconstitutional as being special legislation, in singling out one class of corporations alone. *Peoria, D. & E. R. Co.* v. *Duggan*, 20 *Am. & Eng. R. Cas.* 489, 109 *Ill.* 537, 50 *Am. Rep.* 619.

The legislature may, by general laws, impose such obligations and restrictions upon railroads in regard to their business and for the security of public interests as materially to affect their profits. The requirement of cattle-guards at farm crossings, as a part of a division fence between adjoining occupants, falls legitimately within legislative authority. So, too, it is but a proper security for the lives of domestic animals, which forms a proper subject of legislation. And it is but a reasonable security to others against a dangerous business, which the legislature may justly require. *Thorpe* v. *Rutland & B. R. Co.*, 27 *Vt.* 140.—FOLLOWING Nelson *v.* Vermont & C. R. Co., 26 Vt. 717. QUOTING Galena & C. U. R. Co. *v.* Loomis 13 Ill. 548.—REVIEWED IN Com. *v.* Chesapeake & O. R. Co., 27 Gratt. (Va.) 344.

27. Statutes imposing absolute liability for killing stock.*— An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when under the general law of the land no one else is so liable under such circumstances, does not provide the "due process of law" provided for in the Constitution of the United States, and is therefore void. *Cateril* v. *Union Pac. R. Co.*, 2 *Idaho* 540, 21 *Pac. Rep.* 416.—FOLLOWING Cairo & F. R. Co. *v.* Parks, 32 Ark. 131; Zeigler *v.* South & N. Ala. R. Co., 58 Ala. 595; Ohio & M. R. Co. *v.* Lackey, 78 Ill. 55.—FOLLOWED IN Jensen *v.* Union Pac. R. Co., 6 Utah 253.—*Bielenberg* v. *Montana*

*See also ANIMALS, INJURIES TO, **1-28.**

Constitutionality of fence laws, see note, 22 AM. & ENG. R. CAS. 564.

Validity of statutes imposing criminal liability upon officers for negligent killing of stock, see note, 31 AM. & ENG. R. CAS. 579.

*See ANIMALS, INJURIES TO, **6, 31, 126, 238, 239, 281.**

Union R. Co., 38 *Am. & Eng. R. Cas.* 275, 8 *Mont.* 271, 2 *L. R. A.* 813, 20 *Pac. Rep.* 314.—DISTINGUISHING Thorpe *v.* Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Rodemacher *v.* Milwaukee & St. P. R. Co., 41 Iowa 302; Ohio & M. R. Co. *v.* McClelland, 25 Ill. 140; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580. FOLLOWING Cairo & F. R. Co. *v.* Parks, 32 Ark. 131; Zeigler *v.* South & N. Ala. R. Co., 58 Ala. 595; Ohio & M. R. Co. *v.* Lackey, 78 Ill. 55, 20 Am. Rep. 259.—APPROVED IN Denver & R. G. R. Co. *v.* Outcalt, 2 Colo. App. 395; Oregon R. & N. Co. *v.* Smalley, 1 Wash. 206. DISTINGUISHED IN Sullivan *v.* Oregon R. & N. Co., 19 Oreg. 319. FOLLOWED IN Thompson *v.* Northern Pac. R. Co., 8 Mont. 279.

Ill. Act of 1865, which makes railroad companies liable for damage to any individual and for stock killed in any incorporated city or town, where their trains are run at a greater speed than is permitted by the ordinances thereof, is constitutional. *Chicago, R. I. & P. R. Co.* v. *Reidy*, 66 *Ill.* 43.

28. Statutes making appraisement of damages in stock-killing cases final.*—Montana statute of Feb. 23, 1881, to provide for the payment of stock killed or injured by railroads, as amended March 2, 1883, which provides for an appraisement which is conclusive evidence of the value of the stock, is unconstitutional as an attempt to deprive railroad companies of the right of trial by jury. *Graves* v. *Northern Pac. R. Co.*, 19 *Am. & Eng. R. Cas.* 436, 5 *Mont.* 556, 51 *Am. Rep.* 81.

That provision of Tenn. Act of 1891, ch. 101, is valid which authorizes the appraisement of the damages done to live stock by three freeholders appointed by a justice of the peace at the instance of the owner, and makes their report *prima facie* evidence of the value of the stock injured or killed. This is a mere regulation as to evidence, which it was competent for the legislature to make. *Illinois C. R. Co.* v. *Crider*, 91 *Tenn.* 489, 19 *S. W. Rep.* 618.

29. Statutes imposing liability for injuries caused by fire.†—Conn. Act of 1881, ch. 92, provides that where an injury is done to "a building or other property" by fire from a locomotive, the company shall be liable, and sha.. have an insurable interest in such property. *Held*, that the statute is not unconstitutional, (1) either as denying to railroads the equal protection of the law; (2) or in taking their property without due process of law; (3) or by impairing their charter contracts which authorize them to use fire in their locomotives. *Grissell* v. *Housatonic R. Co.*, 32 *Am. & Eng. R. Cas.* 349, 54 *Conn.* 447, 4 *N. Eng. Rep.* 85, 9 *Atl. Rep.* 137.

The term "buildings or other property," as used in the above statute, includes fences and forest trees; and it is no objection that the property is not such as is ordinarily insurable. The statute creates an insurable interest, which is not dependent on the question whether an insurer can be found to take the risk. *Grissell* v. *Housatonic R. Co.*, 32 *Am. & Eng. R. Cas.* 349, 54 *Conn.* 447, 4 *N. Eng. Rep.* 85, 9 *Atl. Rep.* 137.

The statute is valid in its application to railroad companies which had taken the land for their road and paid the assessed damages before the act was passed. This is especially so where the charter of such a railroad company contains a provision that it may be altered at the pleasure of the general assembly, and that it shall be subject to all general laws that may be enacted. *Grissell* v. *Housatonic R. Co.*, 32 *Am. & Eng. R. Cas.* 349, 54 *Conn.* 447, 4 *N. Eng. Rep.* 85, 9 *Atl. Rep.* 137.—QUOTING Hooksett *v.* Concord R. Co., 38 N. H. 242.

Neither is the above statute invalid because it selects railroad corporations only and places upon them an extraordinary risk. The object of the law is based upon the fact that such corporations run their trains over narrow strips of land controlled by them, and thereby subject all combustible property to an extraordinary hazard. *Grissell* v. *Housatonic R. Co.*, 32 *Am. & Eng. R. Cas.* 349, 54 *Conn.* 447, 4 *N. Eng. Rep.* 85, 9 *Atl. Rep.* 137.

Under N. H. Rev. St. ch. 142, § 8, making railroad companies liable for all damages which result to persons or property by fire or steam from their locomotives, and giving such companies an insurable interest in property along their roads, it is not necessary, in order to hold a company liable, that the fire which destroyed the property should be communicated directly from the locomotive. So where a company fires its own bridge, and the fire is communicated thence to plaintiff's bridge three and one half rods

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* See ANIMALS, INJURIES TO, **8.**

† Constitutionality of statutes imposing liability for fires, see 38 AM. & ENG. R. CAS. 332, *abstr.* See also FIRES, **33.**

distant, the company is liable. *Hooksett* v. *Concord R. Co.*, 38 *N. H.* 242.

For construction and validity of similar statutes, see *Hart* v. *Western R. Co.*, 13 *Metc.* (*Mass.*) 99. *Chapman* v. *Atlantic & St. L. R. Co.*, 37 *Me.* 92.

30. Statutes allowing attorney's fees.*—Kan. Laws 1874, ch. 94, § 2, giving "a reasonable attorney fee" to the plaintiff, in case of a recovery, for the prosecution of his suit against a railroad corporation for the value of stock killed or injured, is constitutional. Such provision is in the nature of a penalty, and is not beyond the power of the legislature. *Kansas Pac. R. Co.* v. *Mower*, 16 *Kan.* 573, 9 *Am. Ry. Rep.* 400.

Mich. Act No. 234, Laws of 1885, allowing a plaintiff, in a suit against a railroad company to recover damages for killing cattle, to tax as a part of his costs an attorney's fee of $25, is unconstitutional. *Wilder* v. *Chicago & W. M. R. Co.*, 70 *Mich.* 382, 38 *N. W. Rep.* 289, 14 *West. Rep.* 627. *Lafferty* v. *Chicago & W. M. R. Co.*, 71 *Mich.* 35, 15 *West. Rep.* 198, 38 *N. W. Rep.* 660.

Mississippi Act of March 9, 1882, which provides for a reasonable attorney's fee for the appellee, where an appeal is taken from a judgment in an action against a corporation, and affirmed, is unconstitutional as discriminating against a class and failing to give personal equality before the law. *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 20 *Am. & Eng. R. Cas.* 555, 60 *Miss.* 641.—REVIEWING South & N. Ala. R. Co. *v.* Morris, 65 Ala. 193.—APPROVED IN Smith *v.* Louisville & N. R. Co. 21 Am. & Eng. R. Cas. 157, 75 Ala. 449.

That provision of Tenn. Act of 1891, ch. 101, is valid which makes railroads wrongfully refusing to pay an appraisement fixing the value of live stock killed or injured liable for plaintiff's attorney fee, in addition to other damages, in any suit brought to recover the damages withheld. This is not obnoxious class legislation. It is an exercise of the police power of the state. But no fee is recoverable unless the appraisement is sustained. *Illinois C. R. Co.* v. *Crider*, 91 *Tenn.* 489, 19 *S. W. Rep.* 618.—APPROVING Missouri Pac. R. Co. *v.* Humes, 115 U. S. 523. DISTINGUISHING St. Louis, I. M. & S. R. Co. *v.* Williams, 31 Am. & Eng. R. Cas. 555, 49 Ark. 492; Wilder *v.* Chicago & W. M. R. Co., 35 Am. & Eng. R. Cas. 162, 70 Mich. 382.

But the amount of such attorney's fee must, like other damages, be fixed by the jury or the court sitting as a jury. The provision of the act requiring the fee to "be fixed by the court trying the case" is construed as providing for jury trial of this question, thereby saving the act from unconstitutionality. *Illinois C. R. Co.* v. *Crider*, 91 *Tenn.* 489, 19 *S. W. Rep.* 618.

Neither is the above act unconstitutional as vicious "class legislation" although its provisions confer benefits upon a limited class, to wit, owners of live stock, and impose burdens upon a limited class, to wit, unfenced railroads. These classes are natural and not arbitrary. *Illinois C. R. Co.* v. *Crider*, 91 *Tenn.* 489, 19 *S. W. Rep.* 618.

31. Statutes in aid of the rebellion.—Miss. Act of Dec. 7, 1863, "to enable the railroad companies of this state to pay the moneys borrowed by them," was in aid of the rebellion, by supplying an exhausted treasury with the means of prosecuting the war then being waged for the avowed purpose of subverting the government of the United States. The state treasurer had no authority to receive either Confederate or state treasury notes from the railroads in payment of the money borrowed by them before secession. *Mississippi C. R. Co.* v. *State*, 46 *Miss.* 157.

32. Statutes abridging the privileges and immunities of citizens.—Georgia Code, § 3033, providing that in all cases where passengers are injured the presumption shall be against the company, being simply declaratory of the common law, is not a statute abridging the privileges and immunities of a citizen, in violation of U. S. Const. art. 14. *Augusta & S. R. Co.* v. *Randall*, 34 *Am. & Eng. R. Cas.* 439, 79 *Ga.* 304, 4 *S. E. Rep.* 674.

33. Laws passed at extra sessions.—The Illinois Act of Feb. 9, 1854, entitled "An act to amend an act entitled 'An act to incorporate the Macomb, Vermont & Bath railroad,' approved Feb. 11, 1853," is not so far foreign to the object embraced by the act of Feb. 11, 1853, as to authorize the court in holding it not to be an amendment of the last-named act, and therefore void, as not being embraced in the purposes in the governor's call of the special session of the legislature of 1854. *Ross* v. *Chicago, B. & Q. R. Co.*, 77 *Ill.* 127.

*See also ANIMALS, INJURIES TO, 9, 584.

The state Constitution declares that "the general assembly shall have no power, when convened in extra session by the governor, to act upon subjects other than those specially designated in the proclamation by which the session is called." Const. 1875, art. 4, § 55. *Held*, that the "act to provide for the prevention of accidents to railroad employés, and others, by requiring that switches, frogs, and guard-rails be properly blocked," passed at the extra session of 1887, p. 14, is unconstitutional, the subject thereof not having been so designated in the proclamation by the governor. *Wells* v. *Missouri Pac. R. Co.*, 110 *Mo.* 286, 19 *S. W. Rep.* 530.

The constitutional provision above quoted —*held*, mandatory. *Wells* v. *Missouri Pac. R. Co.*, 110 *Mo.* 286, 19 *S. W. Rep.* 530.

34. Statutes embracing more than one subject, or subjects not expressed in the title.— (1) *In general.** —A substantial, not a literal, conformity of a law to its title is required by the Constitution. The title indicating that a railroad is to run into and through a named town, and the body of the act providing for running it into and through the corporate limits, or within one mile of the court-house, on certain conditions, the title covers the matter of the enactment. *Macon & B. R. Co.* v. *Gibson*, 85 *Ga.* 1, 11 *S. E. Rep.* 442.

In the adoption of Ind. Constitution, art. 4, § 19, two purposes were had in view: (1) to have the title indicate the subject-matter of the act; (2) to promote the codification of the statutes. *Indiana C. R. Co.* v. *Potts*, 7 *Ind.* 681.

1 Ind. Rev. St. 1852, ch. 102, § 25, is not void as not being properly included within the title of the act of which it is a part. *Indiana C. R. Co.* v. *Potts*, 7 *Ind.* 681.

If the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provision of the Constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in the title (N. Y. Const. art. 3, § 16), is complied with. The degree of relationship of each provision is not essential if it legitimately tends to the accomplishment of the general purpose. *People ex rel.* v. *Havemeyer*, 3 *Hun* (*N. Y.*) 97, 16 *Abb. Pr. N. S.* 219, 4 *T. & C.* 365, 47 *How. Pr.* 494.

(2) *Amendments.*—Mich. Act No. 148 of 1855, as amended (How. St. Mich. ch. 94), is not unconstitutional because the original act only provides for the carriage of freight, while as amended it provides for the transportation also of passengers. *Detroit City R. Co.* v. *Mills*, 46 *Am. & Eng. R. Cas.* 608, 85 *Mich.* 634, 48 *N. W. Rep.* 1007.—QUOTING Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516.

Minn. Sp. Laws 1865, ch. 10, amending ch. 19, Laws of 1862, entitled "An act to facilitate the construction of a railroad from Winona westerly by way of St. Peter," is in conflict with the state Constitution, art. 4, § 27, providing that "no law shall embrace more than one subject, which must be expressed in its title," and is void. *Winona & St. P. R. Co.* v. *Waldron*, 11 *Minn.* 515 (*Gil.* 392).

An act was entitled "An act to amend an act entitled 'An act to incorporate the Louisiana & Missouri River railroad company,' by increasing the amount of the capital stock of said company, defining more explicitly the power of the board of directors to fix the western terminus of the road, authorizing the location and construction of a branch road, and conferring upon said board the necessary powers to carry into effect the several objects contemplated by this charter; and also by striking out sections 11, 18, 27, 30, and 31 of said act." The act itself did not speak of the repeal of the original act, or any part of it, or any modification or amendment of it, nor did it mention the original act at all. *Held*, that said act could not create a new corporation under the prohibition in the Constitution against special legislation; that the title is no part of the act, and that the language of its title alone could not operate as a repeal or amendment of the original act; and that such parts of the acts as are not expressed in the title are void. *State ex rel.* v. *Saline County Court*, 51 *Mo.* 350, 3 *Am. Ry. Rep.* 149.— DISTINGUISHED IN State ex rel. *v.* Sullivan County Court, 51 Mo. 522. FOLLOWED IN State *v.* Callaway County Court, 51 Mo. 395.

The title of "An act entitled 'A supplement to an act entitled "An act to authorize the formation of railroad corporations and regulate the same,"' approved April 2, 1873," which supplement was approved March 31, 1882, does not express the sub-

* Title of act indicating object of law, see note, 5 AM. & ENG. R. CAS. 387.

Sufficiency of title of legislative acts concerning railroads, see note, 51 AM. & ENG. R. CAS. 30.

ject of the legislation, but is vague and misleading, and therefore the act is void. *New York & G. L. R. Co.* v. *Montclair Tp.*, 47 *N. J. Eq.* 591, 21 *Atl. Rep.* 493.

The body of the act imposes upon railroad companies the duty of repairing bridges over public roads, and empowers the court of chancery to decree a specific performance of this duty. The supplement of March 31, 1882, mentioned in the title, deals with a subject entirely foreign to this; it provides for a reduction of the capital stock of railroad companies under certain conditions. *New York & G. L. R. Co.* v. *Montclair Tp.*, 47 *N. J. Eq.* 591, 21 *Atl. Rep.* 493.

N. J. Act of March 11, 1880, which amends section 17 of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same" (Rev., p. 930), is free from constitutional infirmity in its title and is sufficiently broad in its terms to confer power upon railroad corporations chartered by special law. *Stockton* v. *Central R. Co.*, 51 *Am. & Eng. R. Cas.* 1, 50 *N. J. Eq.* 52, 24 *Atl. Rep.* 964.

New York Act of 1885, ch. 311, amending and consolidating the various acts relating to New York city, and known as "The Consolidation Act," is not unconstitutional for the reason that its title does not contain a reference to the acts amended by it. *People ex rel.* v. *Coleman*, 21 *N. Y. S. R.* 178, 51 *Hun* 640, 4 *N. Y. Supp.* 417.

(3) *Consolidation.* — Tennessee Act of March 24, 1877, entitled "An act to amend the law in relation to the consolidation of railways," does not violate the provision of the state Constitution which requires that statutes shall embrace but one subject, which must be expressed in the title, because it provides that such corporations shall not create mortgages or other liens which shall be superior to judgments and decrees for materials furnished or labor performed on the roads in the state, or for damages to persons or property in the operation of the road. *Frazier* v. *East Tenn., V. & G. R. Co.*, 40 *Am. & Eng. R. Cas.* 358, 88 *Tenn.* 138, 12 *S. W. Rep.* 537.

(4) *Construction of tracks, motive power, etc.*—New Jersey Act of March 14, 1870, authorizing the Paterson & Little Falls Horse & Steam railroad company to construct a railroad in the city of Paterson, is not unconstitutional as failing to express its object in its title. *Paterson R. Co.* v. *Grundy*, 51 *N. J. Eq.* 213, 26 *Atl. Rep.* 788.

New York Act of April 19, 1859, is entitled "An act to provide for the closing of the entrances of the tunnel of the Long Island railroad company in Atlantic street, in the city of Brooklyn, and restoring said street to its proper grade, and for the relinquishment by said company of its right to use steam power within said city." *Held*, that a provision in the statute for compensation to the company for relinquishing its right to use steam was not in conflict with that provision of the state Constitution that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. *People ex rel.* v. *Lawrence*, 41 *N. Y.* 137; *affirming* 36 *Barb.* 177.

New York Act of 1870, ch. 147, was entitled "An act to provide for the relief of the city of Rochester, and the New York Central & Hudson River railroad company in said city." The body of the act related to the elevation of the company's tracks, the closing, widening, and changing the grade of streets, and the payment of the expenses thereof. *Held*, that the object of the statute was sufficiently expressed in the title. *Wilson* v. *New York C. & H. R. R. Co.*, 2 *N. Y. Supp.* 65, 39 *Hun* 651, *mem.*

Pennsylvania Act of March 13, 1872, which purports to authorize certain companies to lay additional tracks and to declare quarterly dividends, violates the provisions of the state Constitution that statutes shall contain but one subject, which shall be clearly expressed in the title. *Philadelphia Pass. R. Co.* v. *Union Pass. R. Co.*, 9 *Phila.* (*Pa.*) 495.

A part of a statute which authorizes a company to extend its road to a designated place is not so foreign to the object expressed in the title of the act as to make it unconstitutional, the title being "An act for the relief of the Houston & Texas Central railway company." *Houston & T. C. R. Co.* v. *Odum*, 2 *Am. & Eng. R. Cas.* 503, 53 *Tex.* 343.

(5) *Employés, laborers and injured persons.*—Under Iowa Act of 1862, ch. 169, entitled "An act in relation to the duties of railroad companies," it is proper to provide for the liabilities of such companies to persons who may be injured by the negligence of the company, as the "liabilities" of companies are only means of enforcing the "duties" indicated in the title. *McAunich* v. *Mississippi & M. R. Co.*, 20 *Iowa* 338.—DISTINGUISHING Sullivan *v.* Mississippi &

M. R. Co., 11 Iowa 421.—FOLLOWED IN Bucklew *v.* Central Iowa R. Co., 64 Iowa 603. QUOTED IN Thomas *v.* Wabash, St. L. & P. R. Co., 40 Fed. Rep. 126, 7 L. R. A. 145. REVIEWED IN Iowa R. Land Co. *v.* Soper, 39 Iowa 112.

Neb. Act of March 3, 1881, giving a laborer and material-man a lien upon a railway for materials furnished and labor performed on such railway, does not contain more than one subject and is not in conflict with the Constitution. *Kansas City & O. R. Co.* v. *Frey*, 30 *Neb.* 790, 47 *N. W. Rep.* 87.

Va. Act of March 21, 1877, amended April 2, 1879, entitled "An act to secure payment of wages or salaries to certain employés of railway, steamboat and other corporations, providing that employés and persons furnishing to such companies supplies, cars and engines shall have a prior lien on the franchise, gross earnings and real and personal property of such companies, is, as to the cars and engines, void, being repugnant to the Constitution, art. 5, § 15, which requires that "no law shall embrace more than one object, which shall be expressed in the title." *Fidelity I. T. & S. D. Co.* v. *Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 559, 86 *Va.* 1, 13 *Va. L. J.* 309, 9 *S. E. Rep.* 759.

(6) *General incorporation acts.*—Where an act is entitled "An act to provide a general law for the incorporation of railroads, and to regulate the same," its object is single, being to provide a general law for the incorporation of railroads, and the words "and to regulate the same" mean only to regulate the railroads incorporated under the act. Therefore, where it is provided in the body of the act that its provisions shall apply to railroads already incorporated, to that extent it embraces more than one subject-matter, and one not indicated by the title. *Augusta City Council* v. *Port Royal & A. R. Co.*, 74 *Ga.* 658.

Section 38 of Ind. Act for the incorporation of railroad companies is constitutional, its provisions being matter properly connected with the subject of the title of such act within the meaning of the state Const. art. 4, § 19. *Shipley* v. *Terre Haute*, 4 *Am. & Eng. R. Cas.* 345, 74 *Ind.* 297.

Mich. amendatory Act of 1867, p. 107, § 66, to the general railroad law, is not unconstitutional for the reason that its object is not sufficiently expressed in the title. Although the title is not as specific as might be desirable, it cannot be said that it does not express the object of the law. *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.

An act "to revise the laws providing for the incorporation of railroad companies" does not violate the constitutional requirement that the object of every law shall be expressed in its title, if it includes the substantial provisions of a former law imposing a liability upon railway companies for injuries resulting from neglect to fence the track. *Continental Imp. Co.* v. *Phelps*, 47 *Mich.* 299, 11 *N. W. Rep.* 167.

An act entitled "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this state," is not unconstitutional on the ground that the title provides for more than one object, its object being to bring together the legislation concerning the creation and management of railroads. *Toledo, A. A. & G. T. R. Co.* v. *Dunlap*, 5 *Am. & Eng. R. Cas.* 378, 47 *Mich.* 456, 11 *N. W. Rep.* 271.

An act whose title is "An act to provide for the formation of certain corporations under general laws" is sufficiently expressive of the subject of the act, which embraces powers given to corporations formed thereunder, including the power to certain corporations to build connecting railroads and other means of transportation. *Ex parte Bacot*, 50 *Am. & Eng. R. Cas.* 597, 36 *So. Car.* 125, 15 *S. E. Rep.* 204.—DISTINGUISHING Connor *v.* Green Pond, W. & B. R. Co., 23 So. Car. 427.

The title of an act, which is "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railroads, maintaining and operating the same; for prescribing and defining the duties, and limiting the powers of such corporations when so organized," sufficiently indicates that provisions in the act apply to existing railroad corporations, and, therefore, section 37 of the act is not unconstitutional, the act not embracing more than one object, the regulation of all railroad corporations, and that object being sufficiently expressed in the title. *Chesapeake & O. R. Co.* v. *Patton*, 9 *W. Va.* 648.

(7) *Jurisdiction.*—The title of Tex. Act of March 21, 1874, "An act to fix the jurisdic-

tion in certain cases," sufficiently expresses the object of the first section of said act in enacting "that hereafter any public or private corporation, including railroad companies, * * * may be sued in any court in this state having jurisdiction of the subject-matter, and in any county where the cause of action or part thereof accrued, or in any county where such corporation has an agency or representative, or in the county in which the principal office of such corporation is situated." *Breen* v. *Texas & P. R. Co.*, 44 *Tex.* 302.—REVIEWED IN Houston & T. C. R. Co. *v.* Graves, 50 Tex. 181.

The above act is operative, and is the law of the state as to venue in such cases. *Breen* v. *Texas & P. R. Co.*, 44 *Tex.* 302.

(8) *Killing or injuring live stock.*—The title of an act was as follows: "An act to require the section-masters of railroads to give notice of the killing or injury of live stock by the trains or locomotives of railroads in Tennessee; to provide for the appointment of appraisers to ascertain and fix the value of such stock, or the amount of injury thereto, and to provide for the collection of such appraisements; to make railroad companies liable for all damages by reason of the killing or injury of live stock upon or near their unfenced tracks by their moving trains, cars, or engines." *Held*, that the subject of the act is fully expressed in the last clause. The preceding clauses of the title were unnecessary, but embracing only particulars germane to and included in the general subject expressed in the last clause, they do not vitiate the title or the act. *Illinois C. R. Co.* v. *Crider*, 91 *Tenn.* 489, 19 *S. W. Rep.* 618.

(9) *Municipal subscriptions.*—An act was entitled "An act to authorize the city of Quincy to create the indebtedness referred to in the twenty-fourth section of the schedule of the Constitution, to provide for the payment thereof, and validating acts of said city relating thereto." The act authorized the city to subscribe to the capital stock of a railroad company, and to issue evidences of indebtedness therefor. *Held*, that the nature and true scope of the act were indicated by the title, and that was sufficient. *Quincy, M. & P. R. Co.* v. *Morris*, 84 *Ill.* 410, 16 *Am. Ry. Rep.* 494.

The fourth section of Ill. Act approved March 4, 1869, entitled "An act to incorporate the Dixon & Quincy R. R. Co.," assumes to confer on townships power to subscribe to the capital stock of or to make donations to said company, and provides for elections to decide as to such subscriptions or donations, for taxation for the payment of the same if voted, and for the issue of bonds to represent the same, etc. *Held*, that the section does not embrace a subject not expressed in the title of the act, within the meaning of the Constitution of 1848, declaring that "no private or local law shall include more than one subject, and that shall be embraced in the title," and is therefore not unconstitutional. The provisions in such section are so far germane to the subject expressed in the title as to be fairly embraced therein. *Abington* v. *Cabeen*, 12 *Am. & Eng. R. Cas.* 581, 106 *Ill.* 200.—APPROVING San Antonio *v.* Lane, 32 Tex. 405. DISAPPROVING Giddings *v.* San Antonio, 47 Tex. 548; San Antonio *v.* Gould, 34 Tex. 49. EXPLAINING Middleport *v.* Ætna Life Ins. Co., 82 Ill. 562; Welch *v.* Post, 99 Ill. 471. QUOTING Schuyler County Sup'rs *v.* People ex rel., 25 Ill. 181; O'Leary *v.* Cook County, 28 Ill. 534; Phillips *v.* Covington & C. Bridge Co., 2 Metc. (Ky.) 219. REVIEWING Belleville & I. R. Co. *v.* Gregory, 15 Ill. 20; Firemen's Benevolent Assoc. *v.* Lounsbury, 21 Ill. 511.

Kentucky Act of Feb. 3, 1869, is entitled "An act to amend the charter of the Shelbyville railroad company, and to authorize certain counties to take stock in the same." On March 11, 1870, this statute was amended by an act entitled "An act to amend an act entitled 'An act to amend the charter of the Shelbyville railroad company, and to authorize certain counties to take stock in the same.'" The body of the statutes created a railroad district out of a county, and authorized it to subscribe to stock, and provided for a vote of the people, and the manner of holding and voting the stock. *Held*, that the statutes were not unconstitutional in not being sufficiently expressed in the title. *Kreiger* v. *Shelby R. Co.*, 84 *Ky.* 66; *writ of error dismissed for want of jurisdiction in* 125 *U. S.* 39, 8 *Sup. Ct. Rep.* 752.

The title of an act was "An act to facilitate the construction of the New York & Oswego Midland railroad, and to authorize towns to subscribe to the capital stock thereof"; and the provisions of the statute gave effect to the objects and purposes disclosed in the title. *Held*, that it was not a violation of the constitutional prohibition, however nu-

merous or various its provisions might be. *People x rel.* v. *Morgan*, 65 *Barb.* (*N. Y.*) 473.

West Virginia Act of February 25, 1870, authorizing plaintiff company to extend its road through defendant county, and authorizing the county to subscribe to the capital stock of the railroad, is not repugnant to a provision in the state Constitution that no law shall embrace more than one object, which shall be expressed in the title. *Baltimore & O. R. Co.* v. *Jefferson County*. 29 *Fed. Rep.* 305.

(10) *Street railways.* — Georgia Act of Sept. 3, 1887, entitled "An act to amend an act establishing a new charter for the city of Atlanta," contained a provision that street railroads might be required to pave a certain portion of the streets on which their tracks were laid. *Held*, that this provision was not inconsistent with the title of the act so as to make it unconstitutional. *Atlanta* v. *Gate City St. R. Co.*, 80 *Ga.* 276, 4 *S. E. Rep.* 269. — QUOTING Hope *v.* Mayor, etc., of Gainesville, 72 Ga. 248.

N. Y. Act of 1874, ch. 448, entitled "An act for the relief of Park Avenue railroad company, in the city of Brooklyn, and to authorize the extension of its tracks through certain streets and avenues in said city," expresses the subject sufficiently for the purposes of said constitutional provision. The subject, *i. e.*, the relief of the company, necessarily includes provisions removing restrictions upon its powers and giving it greater powers. *In re Prospect Park & C. I. R. Co.*, 67 *N. Y.* 371, 15 *Am. Ry. Rep.* 102; *affirming* 8 *Hun* 30.

New York Act of 1868, ch. 842, entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn * * * by means of pneumatic tubes to be constructed beneath the surface," is not violative of the provision of the state Constitution, art. 3, § 16, prohibiting the passage of any local or private bill embracing more than one subject, and requiring that to be expressed in the title. *Astor* v. *Arcade R. Co.*, 113 *N. Y.* 93, 20 *N. E. Rep.* 594, 22 *N. Y. S. R.* 1, 2 *L. R. A.* 789; *affirming* 48 *Hun* 562, 1 *N. Y. Supp.* 174, 16 *N. Y. S. R.* 141.

The provision of the above act authorizing the formation of a corporation for the purpose of carrying out its objects and purposes in the manner specified in the general manufacturing act, clothing it with the powers and privileges conferred, and subjecting it to the duties and obligations imposed by said act, so far as not inconsistent with the provisions of said act of 1868, is a matter fairly embraced within the title, and a corporation so formed is an appropriate instrumentality to accomplish the declared purposes. *Astor* v. *Arcade R. Co.*, 113 *N. Y.* 93, 20 *N. E. Rep.* 594, 22 *N. Y. S. R.* 1, 2 *L. R. A.* 789; *affirming* 48 *Hun* 562, 1 *N. Y. Supp.* 174, 16 *N. Y. S. R.* 141.

The act of 1873, ch. 185, declared in its title to be "supplemental to and amendatory of" said act of 1868, the title to which is quoted, with the addition of the words "and to provide for the transportation of passengers in said tubes," is violative of said constitutional provision, as it authorizes the construction of underground railways by the corporation organized under the original act, with authority, upon obtaining the requisite consents, to propel its cars by steam or any other motive power, and thus to transform itself into a railroad corporation. *Astor* v. *Arcade R. Co.*, 113 *N. Y.* 93, 20 *N. E. Rep.* 594, 22 *N. Y. S. R.* 1, 2 *L. R. A.* 789; *affirming* 48 *Hun* 562, 1 *N. Y. Supp.* 174, 16 *N. Y. S. R.* 141. *Bailey* v. *New York Arcade R. Co.*, 1 *N. Y. Supp.* 304, 48 *Hun* 621, 16 *N. Y. S. R.* 1007; *affirmed in* 113 *N. Y.* 615, *mem.*, 20 *N. E. Rep.* 594, 22 *N. Y. S. R.* 1.

New York Act of April 11, 1873, is entitled "An act to authorize the Bleecker Street & Fulton Ferry railroad company * * * to extend their railroad tracks through certain streets and avenues in the city of New York." *Held*, that it was proper under this title to incorporate provisions governing the use and management of the road and authorizing the company to lease its road. *Central Crosstown R. Co.* v. *Twenty-third St. R. Co.*, 54 *How. Pr.* (*N. Y.*) 168. — QUOTED IN Gere *v.* New York C. & H. R. R. Co., 19 Abb. N. Cas. (N. Y.) 193.

An act of the legislature entitled "An act relating to the Ridge Avenue Passenger railway company," which provides for the consolidation of other companies under that name, and releases the new company from liability for keeping pavements in repair, is in conflict with the provision of the Pa. Constitution providing that "no bill shall be passed * * * containing more than one subject, which shall be clearly expressed in the title." *Ridge Ave. Pass. R. Co.* v.

Philadelphia, 124 *Pa. St.* 219, 16 *Atl. Rep.* 741.—REVIEWED IN Binghamton *v.* Binghamton & P. D. R. Co., 41 N. Y. S. R. 83, 61 Hun 479, 16 N. Y. Supp. 225.

Pa. Act of March 8, 1872, entitled "An act relating to the Ridge Avenue Passenger railway company," is unconstitutional and void, in so far as it affects the rights of the city of Philadelphia and reduces the rate of taxation of dividends of said company for city purposes, its title disclosing no intent to alter the city's rights. *Philadelphia* v. *Ridge Ave. R. Co.*, 54 *Am. & Eng. R. Cas.* 319, 142 *Pa. St.* 484, 21 *Atl. Rep.* 982.

The title of Pa. Act of May 14, 1889, providing for the incorporation and government of street-railway companies, is defective, but perhaps not fatally bad. *Gillette* v. *Chester & M. R. Co.*, 2 *Pa. Dist.* 450.

(11) *Taxation.* — A corporation, other than a railroad company paying taxes on its gross receipts, whose business it is to own or possess railroad freight cars, which are used and run by railroad companies in Michigan, organized under its laws, in whose possession they chanced to be from time to time for transporting freight from points within to points without, and from points without to points within, the state, and paying for the use thereof a definite sum per mile for the distance traveled over their respective lines, is subject to be taxed under Act No. 152 of 1883, entitled "An act to provide for the taxation of persons, co-partnerships, associations, car-loaning companies, corporations and fast freight lines engaged in the business of running cars over any of the railroads of this state, and not being exclusively the property of any railroad company paying taxes on their gross receipts." The business so conducted is within the title of the act. *Fargo* v. *Auditor-General*, 22 *Am. & Eng. R. Cas.* 216, 57 *Mich.* 598, 24 *N. W. Rep.* 538.

Tennessee Act of 1877, ch. 16, entitled "An act declaring the mode and manner of valuing the property of telegraph companies for taxation, and of taxing sleeping cars," is not unconstitutional as embracing more than one subject in its title. It embraces only the subject of taxation, though relating to the taxation of two classes of property. *Gibson County* v. *Pullman Southern Car. Co.*, 42 *Fed. Rep.* 572.

(12) *Various illustrations.* — Illinois Act of May 24, 1877, entitled "An act to facilitate the carriage and transfer of passengers and property by railroad companies," provided in the body of the act that all companies terminating on any navigable river bordering the state might own the necessary boats to transfer their freights and passengers, but withheld the privilege of condemning property for landings, and limited its application to companies which should own their own landings. *Held*, that the title was not sufficiently broad to include such provisions; and it was, therefore, in conflict with a provision of the state Constitution that acts should embrace but one subject, which should be expressed in the title. *Thomas* v. *Wabash, St. L. & P. R. Co.*, 40 *Fed. Rep.* 126, 7 *L. R. A.* 145. — NOT FOLLOWING Chicago, B. & Q. R. Co. *v.* Iowa, 94 U. S. 155. QUOTING McAunich *v.* Mississippi & M. R. Co., 20 Iowa 343.

Defendant company was sued for certain levee or wharfage dues, and claimed exemption under Louisiana resolution of March, 1869, entitled "A joint resolution in relation to the New Orleans, Mobile & Chattanooga railroad company, a corporation of the state of Alabama." *Held*, that the exemption claimed by the company was sufficiently expressed in the title of the resolution to make it valid. *New Orleans* v. *New Orleans, M. & C. R. Co.*, 27 *La. Ann.* 414.

Titles to statutes must embrace only one object, under Mich. Const. art. 4, § 20. *Held*, that the title "An act in relation to mortgages against preferred stock in, and the delivery of goods by, railway companies," is not clearly in violation of this requirement, as the whole act concerns railways. *Attorney-General* v. *Joy*, 16 *Am. & Eng. R. Cas.* 643, 55 *Mich.* 94, 20 *N. W. Rep.* 806.

A statute entitled "An act for the sale of the Pacific railroad, and to foreclose the state's lien thereon, and to amend the charter thereof," is not in conflict with a provision of the Mo. Constitution that "no law * * * shall relate to more than one subject, and that shall be expressed in the title." *Woodson* v. *Murdock*, 22 *Wall.* (*U. S.*) 351.

New York Act of March 28, 1850, "for the relief of the creditors of the Lockport & Niagara Falls railroad company," does not violate the provision of the state Constitution declaring that "no private or local bill, which may be passed by the legislature, shall embrace more than one sub-

ject, and that shall be expressed in the title." *Mosier* v. *Hilton*, 15 *Barb.* (*N. Y.*) 657.

Neither does the above act violate the Constitution, art. 8, § 1, providing that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws." The above act does not create a corporation. *Mosier* v. *Hilton*, 15 *Barb.* (*N. Y.*) 657.

35. Right to raise question of constitutionality.—Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of an act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature so to enact, the court must determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of a real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. *Chicago & G. T. R. Co.* v. *Wellman*, 49 *Am. & Eng. R. Cas.* 1, 143 *U. S.* 339, 12 *Sup. Ct. Rep.* 400; *affirming* 83 *Mich.* 592, 47 *N. W. Rep.* 489.

Where the action is between the state and a railroad company only, seeking to restrain the company from operating its road by the use of steam power, the question whether the statute which authorized such steam power is unconstitutional as impairing the obligation of contracts with the adjoining property owners cannot be raised. *People* v. *Brooklyn, F. & C. I. R. Co.*, 9 *Am. & Eng. R. Cas.* 454, 89 *N. Y.* 75; *affirming* 24 *Hun* 529, *mem.*

36. Unconstitutionality must be made plainly to appear.—A legislative act, within the sphere of legislative power, and not an encroachment upon the province of some other department of the government, will be upheld, unless clearly in conflict with some provision of the Constitution of the state or nation, or in violation of some private right thereby secured. *Wadsworth* v. *Union Pac. R. Co.*, 56 *Am. & Eng. R. Cas.* 145, 18 *Colo.* 600, 33 *Pac. Rep.* 515.

No statute will be pronounced unconstitutional unless clearly so, and every reasonable intendment will be made to sustain it. *Wells* v. *Missouri Pac. R. Co.*, 110 *Mo.* 286, 19 *S. W. Rep.* 530.

The supreme court of Texas will not hold unconstitutional the act requiring conductors of passenger trains to stop not less than five minutes at each station, unless it should plainly appear that the vested charter or other important rights of the railroad company were unduly prejudiced thereby. *Galveston, H. & S. A. R. Co.* v. *La Gierse*, 51 *Tex.* 189.

III. INTERPRETATION AND EFFECT.

In General

37. Ascertaining the legislative intent.*—The fact that the Constitution of a state uses the word "privilege" in one sense in one clause is no evidence that it is used in the same sense in every other clause; and were it used in but one sense throughout the Constitution, it would not follow that the legislature used it in the same sense in statutes subsequently passed. Even in the same statute a word is often used with distinctly different meanings, the courts giving to it in each instance the meaning which the legislature intended it to have in that particular connection. *Louisville & N. R. Co.* v. *Gaines*, 2 *Flipp.* (*U. S.*) 621, 3 *Fed. Rep.* 266.

An act of the legislature, passed for a general purpose, should not be construed as giving a right to accomplish that purpose by a method or plan which was clearly not within the contemplation of the legislature and unknown to it when the act was passed, and when from the nature of the case and the surrounding facts it is apparent that such method or plan, if known at that time, would not have been permitted, without the insertion in the act of other and additional provisions rendered appropriate and necessary in view thereof. *People's Rapid Transit Co.* v. *Dash*, 46 *Am. & Eng. R. Cas.* 114, 125 *N. Y.* 93, 26 *N. E. Rep.* 25, 34 *N. Y. S. R.* 595.

38. When the language is plain and clear the letter of the act must govern.—The state sold certain railroads

*Objects of the English statutes regulating railways, see note, 29 AM. & ENG. R. CAS. 59.

in which it was interested, for $900,000, $225,700 being paid in cash, leaving a balance due of $674,300. By a subsequent act it was provided that the balance "of $664,300" should be appropriated to building a branch road. *Held*, that, as the language of the statute was plain, the company constructing the branch road could not sue and recover the $10,000 difference between the balance unpaid and the balance appropriated to the branch road. *St. Louis & I. M. R. Co.* v. *Clark*, 53 *Mo.* 214, 12 *Am. Ry. Rep.* 480.

The letter of a statute must often yield to its spirit, where the legislative intent is manifest. Thus section 56 of New York General Railroad Act, as amended in 1854, which apparently imposes an absolute liability on companies for damages resulting from a failure to fence their tracks, was construed to impose a liability only where there is negligence. *Murray* v. *New York C. R. Co.*, 3 *Abb. App. Dec.* (*N. Y.*) 339, 4 *Keyes* 274.

Where the language of the legislature is clear, the courts will not look into its motive, purpose or policy in the enactment of a law. The only sound principle is to apply the maxim *ita lex scripta est*. *Randall* v. *Richmond & D. R. Co.*, 45 *Am. & Eng. R. Cas.* 507, 107 *N. Car.* 748, 12 *S. E. Rep.* 605.

39. Construing two or more provisions together.—Where the sections of a statute must be construed together as dependent and not as independent provisions, the invalidity of one part invalidates other parts. *Wadsworth* v. *Union Pac. R. Co.*, 56 *Am. & Eng. R. Cas.* 145, 18 *Colo.* 600, 33 *Pac. Rep.* 515.

Section 2203 of Ga. Code, relating to the liability of the principal for the trespass of the agent, must be construed with section 2961, relating to torts committed by a wife, child or agent, so as to harmonize the two and allow both to remain of force in the cases to which they apply. *Western & A. R. Co.* v. *Turner*, 28 *Am. & Eng. R. Cas.* 455, 72 *Ga.* 292, 53 *Am. Rep.* 842.

Tenn. Code, § 1166, and subsections are all one statute, and the words "these provisions" in § 1167 have reference to all the subsections of § 1166, and are not limited to subsection 5 in regard to obstructions on the road. *Louisville & N. R. Co.* v. *Gardner*, 1 *Lea* (*Tenn.*) 688.

Subsections 1 and 2 of § 13 of 14 & 15 Vict., c. 51, are distinct provisions, passed with different objects. The first is to compel the company to fence in its track, so that cattle may not get upon it and be injured by the trains; non-compliance renders it liable for any such injury, but this clause does not apply until the railway is in use. The second is to provide for the separation, not only of the track, but of all lands taken by the company, from the lands of adjacent proprietors, so that the latter may not be subject to trespasses by cattle escaping from the company's lands; this clause may apply before the railway is in operation, but not until six months after the company has taken the land and has been requested to fence it. *Elliott* v. *Buffalo & L. H. R. Co.*, 16 *U. C. Q. B.* 289.—FOLLOWED IN Ferguson *v.* Buffalo & L. H. R. Co., 16 U. C. Q. B. 296.

40. Statutes in pari materia.—What are known as the stock laws, embodied in Ga. Code, §§ 1449–54, are not in *pari materia* with §§ 3033–34, and do not modify or alter the rule of diligence to be observed in the running of trains; but the existence of a stock law in any locality is a fact which the jury may consider, in ascertaining the amount of care and diligence exercised by each of the parties to the transaction, and in apportioning the extent of the liability of the company, if any. *Central R. Co.* v. *Hamilton*, 23 *Am. & Eng. R. Cas.* 207, 71 *Ga.* 461.

Indiana Act of May 11, 1852, providing for the incorporation of railroad companies, and the act of June 18, 1852, establishing a Code of Civil Procedure, were passed at the same session of the legislature, and so far as they relate to the same subject-matter are to be construed in *pari materia*, and treated as one. *Swinney* v. *Ft. Wayne, M. & C. R. Co.*, 59 *Ind.* 205.

Where there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons and parties affected by such legislation. *Kansas Pac. R. Co.* v. *Wyandotte County Com'rs*, 16 *Kan.* 587.

41. Effect of contemporaneous official construction. — Where an interpretation has been placed upon a statute by the executive officers of the state charged

with the duty of enforcing it, and said interpretation has been acted upon by them long enough to become a rule of the department, it will not be disturbed, unless it is plainly against the law. The rule applied to the action of the state board of railroad commissioners in construing a "car load" of cordwood, as used in Mo. Rev. St. 1879, § 833, to be ten tons, instead of all a car can safely carry. *Rose v. Kansas City, St. J. & C. B. R. Co.*, 49 *Am. & Eng. R. Cas.* 499, 111 *Mo.* 18, 19 *S. W. Rep.* 541.

The uniform recognition, on the part of the officers of the state government, of the right to file articles of association of street-railroad companies under the general railroad act of 1850, and of the legality of this kind of corporations thus formed, is very considerable, if not controlling, weight in the interpretation of said act. *In re Washington St., A. & P. R. Co.*, 40 *Am. & Eng. R. Cas.* 588, 115 *N. Y.* 442, 22 *N. E. Rep.* 356, 26 *N. Y. S. R.* 504; *affirming* 52 *Hun* 311, 23 *N. Y. S. R.* 444, 5 *N. Y. Supp.* 355.

42. Statutes applicable to all railroads alike.—Kan. Laws of 1874, ch. 93, entitled "An act to define the liability of railroad companies in certain cases" (Gen. St. of 1880, p. 1251), applies to every railroad company organized in this state and to every railroad company doing business in this state; but its provisions do not include firms, partnerships or individuals having servants or employés engaged in work upon the road or trains of a railroad corporation. *Beeson v. Busenbark*, 44 *Am. & Eng. R. Cas.* 584, 44 *Kan.* 669, 25 *Pac. Rep.* 48.

Ky. Act of March 10, 1854, for the redress of injuries arising from the neglect or misconduct of railroad companies and others, is applicable to the proprietors of any kind of railroad, whether impelled by horse or steam power, or whether constructed with iron or other kind of rails. *Johnson v. Louisville City R. Co.*, 10 *Bush (Ky.)* 231.—DISTINGUISHING Louisville & P. R. Co. *v.* Louisville City R. Co., 2 Duv. 175.

Tex. Rev. St. art. 4278, as originally enacted, did not apply to urban, suburban and belt railways. As amended April 8, 1889 (Gen. Laws 1889, p. 21), it applies to all railways. *Mayor, etc., of Houston v. Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

43. Statutes not applicable to all railroads.—Pa. Act of Feb. 16, 1849, § 19, does not apply to passenger railways whose charters do not limit the time for completing their roads. *Philadelphia v. Thirteenth & F. St. Pass. R. Co.*, 8 *Phila. (Pa.)* 648.

The Railway Act of 1868, D., § 20, subsec. 4, gives an action against certain railway companies for neglect to carry goods, etc, but the act does not apply to the Great Western Railway Co., the defendants. By 34 Vict., c. 43 D., § 54, this subsection is amended by adding thereto the words "From which action the company shall not be relieved by any notice, condition, or declaration if the damage arises from any negligence or omission of the company or of its servants." By section 7 "the provisions of this act" are made applicable to every railway company. *Held*, that the subsection of the earlier act as thus amended did not apply to defendants; but that the effect of the later act was merely to add the newly enacted words to the subsection, and "the provisions of this act" therefore did not include the amendment. *Allan v. Great Western R. Co.*, 33 *U. C. Q. B.* 483.—DISTINGUISHED IN Scarlett *v.* Great Western R. Co., 41 U. C. Q. B. 211.

44. Acceptance of act conferring privilege or benefit.—An act passed in 1864 (Mo. Sess. Act, p. 478) authorized several railroad companies to connect their lines, and for that purpose granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873. *Held*, that this was an acceptance of the act, and that the acceptance was in time. *Atlantic & P. R. Co. v. St. Louis*, 66 *Mo.* 228; *reversing* 3 *Mo. App.* 315.

The trust created by Texas statute of Dec. 19, 1857, relating to the administration of the assets of sold-out railroads by continuing the directors of the road, is to be exercised collectively, and not as to individuals. So where there are ten trustees, or directors, a sale of property under a judgment had upon a citation served on only two of the ten is inoperative as to property not in the control of the two. *Witherspoon v. Texas Pac. R. Co.*, 48 *Tex.* 309.

45. Rule of strict construction.—Railway and canal acts are to be construed strictly against the parties obtaining them, and liberally in favor of the public. *Parker v. Great Western R. Co.*, 3 *Railw. Cas.* 563. *Stourbridge Canal Co. v. Wheeley*, 2 *B. & Ad.* 792, 1 *Ry. & C. T. Cas.* 22.

Where an act of parliament confers upon a landowner a private right creating a burden upon a railway, and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly. *Turner* v. *London & S. W. R. Co.*, *L. R.* 17 *Eq.* 561, 43 *L. J. Ch.* 430, 2 *Ry. & C. T. Cas.* 21.

In the construction of statutes made in favor of corporations or particular persons, and in derogation of common right, care should be taken not to extend them beyond their express words or their clear import. *Mayor, etc., of Macon* v. *Macon & W. R. Co.*, 7 *Ga.* 221.—REVIEWED IN Central R. Co. *v.* Collins, 40 Ga. 582.

Charters are to be construed most favorably to the state, and in grants by the public nothing passes by implication. Under the above rule of construction Maryland Act of 1831, ch. 330, § 8, which authorized plaintiff company to build a road from Baltimore to Washington city, and which expressly reserved the right to the state to incorporate another company for the same purpose, if plaintiff's road was not completed within a specified time—*held*, not to constitute a contract, by implication, upon plaintiff building its road, which would prohibit the state from authorizing the construction of another road between said cities. *Baltimore & O. R. Co.* v. *State*, 45 *Md.* 596.

Words and phrases in a statute, conferring upon a corporation its franchises and special privileges, which are ambiguous or admit of different meanings, must receive that construction which is most favorable to the public. *People* v. *Broadway R. Co.*, 48 *Am. & Eng. R. Cas.* 692, 126 *N. Y.* 29, 26 *Abb. N. Cas.* 407, 26 *N. E. Rep.* 961, 36 *N. Y. S. R.* 376; *reversing* 56 *Hun* 45, 29 *N. Y. S. R.* 343, 9 *N. Y. Supp.* 6.

Where it is alleged that an act of the legislature or of a municipality granting a franchise to a corporation creates an irrevocable contract, such act will be strictly construed in favor of the state or the municipality. *State ex rel.* v. *Hilbert*, 36 *Am. & Eng. R. Cas.* 118, 72 *Wis.* 184, 39 *N. W. Rep.* 326.

46. Penal statutes — Strict construction.—Ill. Rev. St. ch. 114, § 88, requiring companies to stop their trains at all stations advertised as places for receiving or discharging passengers, is a penal statute, and must be strictly construed; and to warrant the imposition of the punishment or fine provided, the proof must bring the accused company clearly within the provisions of the law. Courts have no power to extend such enactments to cases not clearly within their terms; nor can usage or custom be held to extend the terms of a penal statute. *Lake Erie & W. R. Co.* v. *People*, 42 *Ill. App.* 387.

The proviso in the Maryland Act of 1835, ch. 395, § 5, "that if the said Baltimore & Ohio railroad company shall not locate the said road in the manner provided for in this act, then, and in that case, they shall forfeit $1,000,000 to the state of Maryland, for the use of Washington county," though assented to by the company, does not constitute a contract, but a penalty, subject, as to its enforcement, to the will and pleasure of the legislature. *State* v. *Baltimore & O. R. Co.*, 12 *Gill & J.* (*Md.*) 399.

Where a statute is penal, "it should be strictly construed, and so as not to enlarge the liability it imposes; nor allow a recovery unless the party seeking it brings his case strictly within the terms or conditions authorizing it." *State* v. *Chicago, R. I. & P R. Co.*, 19 *Mo. App.* 104.

Tex. Act of May 6, 1882, as to railway companies, is a penal statute. In the first section it declares certain acts to be unlawful; in the second, it enjoins a duty; and in the third, it pronounces against the railway company a penalty for violating the previous sections. In the shipper's interest the act is remedial. *Schloss* v. *Atchison, T. & S. F. R. Co.*, 85 *Tex.* 601, 22 *S. W. Rep.* 1014.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Dwyer, 84 Tex. 198.

47. Remedial statutes. — A statute which gives to a person injured a remedy for the injury against the person injuring, and limits the recovery to the amount of loss sustained, or to cumulative damages, as compensation for the injury, is a remedial, not a penal, statute. Hence Conn. Gen. St. § 3554 is a remedial statute, and an action on it may be sustained in Rhode Island. *Gardner* v. *New York & N. E. R. Co.*, 17 *R. I.* 790, 24 *Atl. Rep.* 831.—DISTINGUISHING O'Reilly *v.* New York & N. E. R. Co., 16 R. I. 388.

48. Special acts.—Powers conferred on a railway company by a special act of the legislature are not affected by a subsequent act giving in general terms to other persons, for another public purpose, inconsistent powers. *London & B. R. Co.* v

Limehouse Dist. Board of Works, 3 *Kay & J.* 123, 26 *L. J. Ch.* 164.

Where a special act authorizing the formation of a railway provides that the company shall be liable to pay to certain canal companies, which would be injured by the proposed road, a certain price per share for all their shares "from and immediately after the opening of a railway" between the points proposed, the opening for public use of any portion of the line between such points renders the railway company liable to pay for the canal shares. *Grantham Canal Co.* v. *Ambergate, N. & E. & B. J. R. Co.*, 15 *Jur.* 991, 21 *L. J. Q. B.* 322.

Construction of a special act as to whether the line vested and rent became due on completion of any part or only on completion of the whole line. *Edinburgh & G. R. Co.* v. *Stirling & D. R. Co.*, 15 *Sc. Sess. Cas.* (*2d Series*) 48, 2 *Ry. & C. T. Cas.* 21.

Powers conferred upon a railway company by a special act to widen a branch railway and to build additional stations in London are not controlled by a later statute (the Metropolis Management Act) passed shortly after, establishing the distance required to be left between buildings and highways. *London & B. R. Co.* v. *Limehouse Dist. Board of Works*, 3 *Kay & J.* 123, 26 *L. J. Ch.* 164.

49. Private acts.—An act of assembly authorizing a certain railroad company to guarantee the bonds of any incorporated company, individual or firm engaged in any manufacture in any county through which said railroad company's line may pass, is a private and not a public act. *Timlow* v. *Philadelphia & R. R. Co.*, 99 *Pa. St.* 284.

An act which declares that loans and contracts previously made by any person with a particular corporation shall not be deemed usurious by reason of the corporation agreeing to pay more than legal interest, or giving its bonds or evidences of debt for more than was actually lent to it, is a private act. *Handy* v. *Philadelphia & R. R. Co.*, 1 *Phila.* (*Pa.*) 31.

Though the Ontario act, 31 Vict. c. 44, relating to preferential bonds issued under 27 Vict. c. 57, was in the nature of a private act, it sufficiently referred to plaintiff by referring to the class of bondholders to which he belonged, and he was therefore bound thereby. *Jones* v. *Canada C. R. Co.*, 46 *U. C. Q. B.* 250.

50. Statutes declaratory of the common law.—The Tennessee statutes to prevent accidents on railroads embody no more than the common law. It never was the legal right of a railroad company to refuse to use all possible means to stop its train and avoid an accident when any person, animal or other obstruction appeared on the track. *East Tenn., V. & G. R. Co.* v. *Humphreys*, 15 *Am. & Eng. R. Cas.* 472, 12 *Lea* (*Tenn.*) 200.

51. Provisos.—A proviso in a statute is generally intended to except something which would otherwise have been within it. The words "Provided, that nothing in this act contained shall be construed to exempt from taxation * * * any property acquired, or hereafter to be acquired, by virtue of the charter of the Great Northern railway company" are not of doubtful meaning. They contain an affirmative declaration that the acquisitions of the company (the International & G. N. R. Co.) through the latter were not to be included in the exemption. *Campbell* v. *Wiggins*, 85 *Tex.* 424, 21 *S. W. Rep.* 599.

52. Amendatory statutes.—Amendatory acts by which the time for completing a railroad is extended and enlarged are for the benefit of the corporation, and they are presumed to have been passed for the benefit of the stockholders. *San Antonio* v. *Jones*, 28 *Tex.* 19.

Both Tex. Rev. St. art. 279, and amended art. 4227, prescribe a penalty for the same act, the former, however, being applicable to all carriers and the latter to railway companies only. The intention of the legislature, in the amended article 4227, was to make a distinction as to railway companies and to affix a punishment for their misconduct in the particulars prescribed, less arbitrary in its nature and better adjusted to the wrong sought to be repressed. It was intended to cover the whole field as to railway companies, and to lay down the only rule for a recovery against them for the particular wrongs it points out. *St. Louis & S. W. R. Co.* v. *Kay*, 85 *Tex.* 558, 22 *S. W. Rep.* 665.—QUOTING Rogers *v.* Watrous, 8 Tex. 62.

53. Revising Statutes.—Where the legislature has revised a statute after a Constitution has been adopted, such a revision is to be regarded, *pro hac vice*, as a new enactment, and as a legislative construction that the statute so revised conforms to the

Constitution; and the courts should give some weight to, and rely with some degree of confidence on, such legislative construction. *St. Louis & S. F. R. Co.* v. *Evans & H. Fire Brick Co.*, 22 *Am. & Eng. R. Cas.* 517, 85 *Mo.* 307.

2. *Particular Statutes.*

54. Statutes regulating joint use of tracks.—Mass. Act of 1856, ch. 296, provided for the building of a bridge at the intersection of three railroads at a certain place, two of the companies being authorized to lower their tracks, and the other one to raise its, so that the others might pass under, and to change the curves and grades of certain highways and connecting tracks; and further directed that a certain portion of the work should be done by one of the companies, under the supervision of a commissioner appointed by the governor, who should apportion the cost of the work between the two companies. *Held*, in an action by one company to recover from the other a just proportion of the cost of such work, that the validity of the appointment of such commissioner could not be inquired into. *Fitchburg R. Co.* v. *Grand Junction R. & D. Co.*, 1 *Allen* (*Mass.*) 552, 4 *Allen* 198.

In such case it is no objection to the right of plaintiff company to maintain the action that it did not ask for the consent of county commissioners to make changes in the grade and construction of the roads of the two companies, or that such consent was given without being asked for. Plaintiff was expressly authorized, and required by the statute, to lower the surface of the two roads to the same level, and upon a true construction of the statute the consent of the county commissioners was not necessary, except as to certain public and private passageways which would be affected by the alteration of the railroads. *Fitchburg R. Co.* v. *Grand Junction R. & D. Co.*, 4 *Allen* (*Mass.*) 198.

Neither can plaintiff company be deprived of its right to recover a just and fair proportion of the expense of such work, the performance of which is expressly imposed upon it by statute, by the facts either that the statute was enacted upon its petition, or that the commissioner conducted himself with partiality toward plaintiff. *Fitchburg R. Co.* v. *Grand Junction R. & D. Co.*, 4 *Allen* (*Mass.*) 198.

Where the charters of all three of the railroad companies are subject to alteration, amendment or repeal at the pleasure of the legislature, an objection that plaintiff company cannot recover because the statute under which the work was done is unconstitutional, as being in violation of a contract, is not well taken. *Fitchburg R. Co.* v. *Grand Junction R. & D. Co.*, 4 *Allen* (*Mass.*) 198.

It is no answer to an action by a passenger against a carrier that the negligence or trespass of a third party contributed to the injury; and this rule is not affected by Mass. Act of 1851, ch. 128, authorizing certain companies, including defendant, to use a common track, and regulating the manner of such use and the liability for accidents on the same. *Eaton* v. *Boston & L. R. Co.*, 11 *Allen* (*Mass.*) 500.—REFERRED TO IN Gilman *v.* Eastern R. Co., 13 Allen 433.

55. Statutes relative to brakemen on trains. — So. Car. Gen. St. § 1499, which requires at least one trusty and skilful brakeman to every two passenger cars, and one to the last car on each freight train, does not apply to mixed trains. to such trains the usual and proper appliances are all that are necessary. *Joyner* v. *South Carolina R. Co.*, 29 *Am. & Eng. R. Cas.* 258, 26 *So. Car.* 49, 1 *S. E. Rep.* 52.

56. Statutes relative to bridges.—After the passage of 18 Vict. c. 176, plaintiff could not maintain an action against defendant company for unlawfully and wrongfully erecting a bridge across a creek, and impeding the navigation, for the statute expressly authorizes such erection and gives only a right to compensation for damage sustained. *Wismer* v. *Great Western R. Co.*, 17 *U. C. Q. B.* 510.

The Great Western R. Co. is bound by 16 Vict. c. 54, § 5, to maintain in repair a certain bridge which the statute allows the company to erect. *Hamilton & B. Road Co.* v. *Great Western R. Co.*, 17 *U. C. Q. B.* 567.

The above bridge forms part of a road leading into plaintiff's road. *Held*, that the loss of custom and tolls occasioned to plaintiff was not sufficient to enable it to maintain an action against defendant for allowing such bridge to fall out of repair. *Hamilton & B. Road Co.* v. *Great Western R. Co.*, 17 *U. C. Q. B.* 567.—DISTINGUISHING Streetsville Plank Road Co. *v.* Hamilton & T. R. Co., 13 U. C. Q. B. 600.

57. Statutes relative to connections, extensions, termini, etc.—Ga. Act of December 11, 1871, authorizes the Savannah & Thunderbolt company to run its railroad through the squares intersecting Abercorn street, Savannah. *Savannah & T. R. Co.* v. *Mayor, etc., of Savannah*, 45 *Ga.* 602, 3 *Am. Ry. Rep.* 36.

Under the New Jersey Acts of March 24, 1862, and of April 2, 1873, concerning the West Jersey railroad, the legal terminus of that road is not its junction with the tracks of the Camden & Amboy R. Co., but a place near the Delaware river. *State* (*West Jersey R. Co., Pros.*) v. *Receiver of Taxes*, 38 *N. J. L.* 299, 13 *Am. Ry. Rep.* 50.

By Pa. Act of April 18, 1853, and its supplement of April 11, 1862, authority is given to the Cleveland & P. R. Co. to build a railroad from Rochester, N. Y., to Pittsburgh. *In re Cleveland & P. R. Co.*, 2 *Pittsb.* (*Pa.*) 348.

Pa. Act of April 18, 1853, authorizes the Pittsburgh & Connellsville R. Co. to make its road to the Maryland line and to connect it with any road permitted by the state of Maryland. *Baltimore* v. *Pittsburgh & C. R. Co.*, 3 *Pittsb.* (*Pa.*) 20.

By Virginia Act of March 6, 1847, relating to the extension of the road of plaintiff company to the Ohio river at or near Wheeling, the company was subjected to the general act of March 11, 1837, regulating the incorporation of railroad companies. By section 25 of the latter act, companies were authorized to make branches or lateral roads in any direction whatever, not exceeding ten miles in length. *Held*, that the company had authority to make a connection with said river, or any railroad terminating on the opposite side, at any point between said city and the mouth of Grave creek, and such connection need not be made at said city. *Baltimore & O. R. Co.* v. *Wheeling*, 13 *Gratt.* (*Va.*) 40.

The statute 22 Vict. c. 116, § 11, allows the Great Western railway "to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States," when sanctioned by two thirds of the shareholders, and enacts "that the loan of seven hundred and fifty thousand dollars already made by the said company to the Detroit & Milwaukie railway company is hereby declared to be lawful." *Commercial Bank* v. *Great Western R. Co.*, 22 *U. C. Q. B.* 233.

58. Statutes relative to heating of cars.—New York Act of 1887, ch. 616 as amended in 1888, ch. 189, requiring and regulating the heating of cars, is a police regulation, and is not an infringement of interstate commerce or of the federal Constitution. *People* v. *New York, N. H. & H. R. Co.*, 29 *N. Y. S. R.* 172, 8 *N. Y. Supp.* 672, 55 *Hun* 409, 608; *affirmed in* 123 *N. Y.* 635, *mem.*, 25 *N. E. Rep.* 953.

59. Statutes relative to liability for personal injuries. — Mass. statute of 1887, ch. 270, § 1, cl. 3, which relates to accidents that happen "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad," seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements. *Thyng* v. *Fitchburg R. Co.*, 53 *Am. & Eng. R. Cas.* 535, 156 *Mass.* 13, 30 *N. E. Rep.* 169.—DISTINGUISHING Griffin *v.* Boston & A. R. Co., 148 Mass. 143.

The Ont. Workmen's Compensation for Injuries Act, 49 Vict. c. 28, applies to defendant company, notwithstanding it has been brought under the operation of the Government Railways Act of the Dominion. *Canada Southern R. Co.* v. *Jackson*, 17 *Can. Sup. Ct.* 316.

60. Statutes relative to posting of bulletin boards.—La. Act 118 of 1890, which requires all railroad companies throughout the state to put up bulletin boards in a conspicuous place, at all regular or way stations where they have a telegraph operator, and to keep posted thereon the time of the arrival and departure of all regular trains, on pain of a fine of not less than one hundred and not more than five hundred dollars for each violation of its provisions, "without just cause," "to be recovered in any court of competent jurisdiction within the parish where said violation may take place," is not a criminal statute in the sense of the jurisdictional articles of the Constitution relative to the appellate courts of the state; and the procedure indicated for the recovery of the fine imposed is civil and not criminal in character. *State ex rel.* v. *Judges*, 43 *La. Ann.* 1164, 10 *So. Rep.* 253.

Of such a proceeding the circuit courts of appeal have appellate jurisdiction, and pro-

hibition will not lie to restrain the judges thereof from hearing and adjudging such a cause. *State ex rel.* v. *Judges*, 43 *La. Ann.* 1164, 10 *So. Rep.* 253.

61. Statutes relative to time of completion of road.—The time to extend and construct the Baltimore & Ohio railroad into and within the District of Columbia, given by the act of Congress of March 2, 1831, ch. 84, was extended by the act of February 26, 1834, ch. 11, to another period of four years. *Baltimore & O. R. Co.* v. *Van Ness*, 4 *Cranch* (*U. S.*) 595.

If the act of 1831 expired by the limitation contained in section 5, it was revived by the act of February 26, 1834 *Baltimore & O. R. Co.* v. *Van Ness*, 4 *Cranch* (*U. S.*) 595.

The act of March 3, 1835, ch. 38, is not void because its title misrecites the date of the act to which it is supplementary; nor is it confined to the mere construction of the road, but gives authority also to condemn land for the use of the company; nor is it void because its title purports to be an act supplementary to an act which expired by its own limitation, it being revived by a subsequent act. *Baltimore & O. R. Co.* v. *Van Ness*, 4 *Cranch* (*U. S.*) 595.

While a self-executing forfeiture of the charter rights of urban, suburban and belt railways is not provided for, still they are subject to the laws, and courts may annul their charters for failure to observe the requirements of the law and to discharge their duty to the public. Until such judicial forfeiture the charters remain, although subject to forfeiture proceedings. *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

Under Tex. Rev. St. art. 4278, as amended, urban, etc., railway companies are required within twelve months from the date of their charters to complete a portion of their road and commence and continue the running of cars thereon. No self-executing condition of forfeiture is imposed upon such railways. *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

62. Statutes requiring fences and farm crossings.—The statutory regulations in regard to fencing railroad tracks and the construction of farm crossings for the use of adjoining landowners are police regulations, in the strict sense of that term, and apply with equal force to corporations whose tracks are already built as well as those thereafter constructed. They have reference to the public security, both as to persons and to property. *Illinois C. R. Co.* v. *Willenborg*, 26 *Am. & Eng. R. Cas.* 358, 117 *Ill.* 203, 7 *N. E. Rep.* 698, 57 *Am. Rep.* 862.—DISTINGUISHING Illinois C. R. Co. *v.* Bloomington, 76 Ill. 447; Chalcraft *v.* Louisville, E. & S. L. R. Co., 113 Ill. 86.

The preamble to 20 Vict. c. 143, which applies to defendant company the clauses of the Railway Act with respect to fences, has not the effect of extending its liability beyond that of other companies subject to the same provisions. *Wilson* v. *Northern R. Co.*, 28 *U. C. Q. B.* 274.

63. Various other statutes construed.—Ala. Code, §§ 2313-14, authorizing a plaintiff to establish the correctness of his demand by his own oath, where the amount in controversy does not exceed $300, does not apply to actions against corporations aggregate. *Yonge* v. *Mobile & O. R. Co.*, 31 *Ala.* 422.—FOLLOWED IN Alabama & T. R. R. Co. *v.* Oaks, 37 Ala. 694.

The Western Pacific railroad company and the Central Pacific company claimed certain bonds from the city and county of San Francisco, under California Act of April 22, 1863. On April 4, 1864, the legislature passed an act authorizing the board of supervisors to compromise and settle the claim, by virtue of which a settlement was made with the Central Pacific company, and the company released its claim for $600,000 of bonds, and accepted bonds of the city and county to the amount of $400,000, and the city and county released its right to stock in the company, and withdrew its subscription to the capital stock. *Held*, that such settlement was fully justified by the statute, and the city and county was authorized to compromise with the one company without compromising with the other. *People* v. *Coon*, 25 *Cal.* 635.

An act authorizing and empowering the board in which the corporate authority of a city is vested to convey to a railroad company "not to exceed five thousand acres of the land of the city, or such parcels thereof as they may deem advisable, and upon such terms and conditions as they may determine," even if mandatory, so far as the act of conveyance is concerned, vests the board with discretionary power as to the quantity to be conveyed and the terms of the conveyance. *San Diego* v. *San Diego & L. A. R. Co.*, 44 *Cal.* 106.

Defendant company leased its road for ninety-nine years, and afterwards, by Illinois Act of March 18, 1869, the lease was confirmed, and the lessee created a corporation of the state. Defendant was sued for the destruction of property by fire communicated from an engine of the lessee company. *Held*, that defendant was not liable. *St. Louis, A. & T. H. R. Co.* v. *Balsley*, 18 *Ill. App.* 79.

La. Act of January 20, 1830, § 9, incorporating the Pontchartrain railroad company, while it grants to that company a privilege on vessels or other property liable for the cost of warehousing, wharfage and transportation, imposes no personal liability on the owner for services rendered to a steamer while chartered to a third person. *Pontchartrain R. Co.* v. *Heirne*, 2 *La Ann.* 129.

The annual payment required to be made by the Western railroad corporation to the sinking fund under the act of 1839, ch. 9, § 3, determined. *Opinion of the Judges, etc.*, 5 *Metc.* (*Mass.*) 596.

By New Jersey Act of 1854 (Pamph. L. 388), supplementary to the act entitled "An act relative to the Delaware & Raritan canal and Camden & Amboy railroad and transportation companies," the true intent and meaning of the last act are declared to be "fully and effectually to protect, until the first day of January, 1869, the business of said joint companies from railroad competition between the cities of New York and Philadelphia." *Held*, that the grant of this exclusive privilege operated only to protect the through business from city to city, and not between intermediate places and over any and every part of the route between said cities. The franchise is exclusive only in regard to passengers and merchandise transported over the entire route. *Delaware & R. Canal Co.* v. *Camden & A. R. Co.*, 16 *N. J. Eq.* 321.

N. H. Act of July 3, 1847, amending the General Railroad Act of December, 1844, was intended to give a remedy for injuries and inconveniences occasioned by railroads in altering or obstructing highways, turnpikes, bridges and private ways, and not for other damages. *Clark* v. *Boston, C. & M. R. Co.*, 24 *N. H.* 114.

Pa. Act of Feb. 27, 1865, does not authorize the appointment of railroad police for corporations owning or using street passenger railways. *Allentown & B. Rapid Transit Co.*, 1 *Pa. Dist.* 430.—QUOTING Hestonville, M. & F. Pass. R. Co. *v.* Philadelphia, 89 Pa. St. 220. REVIEWING Shipley *v.* Continental R. Co., 13 Phila. (Pa.) 128; Gyger *v.* West Philadelphia Pass. R. Co., 26 W. N. C. (Pa.) 440.

Wisconsin Act of March 11, 1859, merely changed the name of the "Fox River Valley railroad company," with certain amendments to the company's charter, but did not create a new corporation. *Milwaukee & N. I. P. Co.* v. *Field*, 12 *Wis.* 340.

The above statute changed the name of the company to the "Milwaukee & Northern Illinois railroad company," and provided that all moneys received by the corporation should be faithfully and exclusively applied by the company under the new name to the construction of a certain designated portion of its road. *Held*, that this must be understood as referring to the road as established under the original charter. *Milwaukee & N. I. R. Co.* v. *Field*, 12 *Wis.* 340.

That part of a railroad charter which provides for the punishing of persons obstructing the trains of the company, and which empowers towns and villages to aid in its construction by issuing their bonds, is a public statute, though other portions of it be regarded as private. *Burhop* v. *Milwaukee*, 21 *Wis.* 257.

The effect of 37 Vict. c. 15, was to abolish the office of chief engineer of the Intercolonial railway, and for work performed and received on or after June 1, 1874, to dispense with the necessity of obtaining as a condition precedent to the payment for the same the certificate of said engineer in chief, in accordance with 31 Vict. c. 13, § 18. *Isbester* v. *Queen*, 7 *Can. Sup. Ct.* 696, 1 *Can. Exch.* 358.

64. Interpretation of particular statutes, words and phrases.—A law for regulating "all existing railroad corporations" is a general law, and its operation extends to and controls railroads incorporated after, as well as before, its passage, unless exception is provided in their charters. *Indianapolis & St. L. R. Co.* v. *Blackman*, 63 *Ill.* 117, 7 *Am. Ry. Rep.* 56.

The word "owner," as used in Minn. Act 1893, ch. 66, regulating the sale and redemption of tickets, includes all those who operate a railroad or steamboat in the transportation of passengers; as, for example, lessees, receivers and the like. *State* v. *Corbett*,

58 *Am. & Eng. R. Cas.* 35, 57 *Minn.* 345, 59 *N. W. Rep.* 317.

An amalgamation or consolidation of railroads implies acts which reduced the companies to a common interest; but where one makes a transfer of all its property for a consideration, and becomes absolutely extinguished, there is no consolidation, so as to make the existing company answerable for property in its hands coming from the other. So where a company was authorized by Missouri Act of 1863 to transfer and assign all of its assets, rights and privileges to another company, for a nominal consideration in money, and upon assuming certain debts, whereupon the company should cease to exist, the transferee company is not liable for the debts of the other company. *Powell* v. *North Mo. R. Co.*, 42 *Mo.* 63.—REVIEWED IN Chesapeake, O. & S. W. R. Co. *v.* Griest, 30 Am. & Eng. R. Cas. 149, 85 Ky. 619.

Tex. Act of July 4, 1887, was enacted for the purpose of prescribing rules by which the shipper would have the right to recover a penalty in case the carrier failed to furnish the cars at the time specified. For such purpose the contract must be made by the "superintendent or person in charge of transportation." This statute in no way limits the liability for damages for breach of a contract, in which case it is only necessary to show a valid contract and the extent of injury from its breach. *McCarty* v. *Gulf, C. & S. F. R. Co.*, 79 *Tex.* 33, 15 *S. W. Rep.* 164.

The concluding words of the Consolidated Railway Act, § 27, that "the defendants may prove that the same" (that is, the damage) "was done in pursuance of the authority of this act and the special act," should be read as meaning "in the course and prosecution of their business as a railway company, constituted in pursuance of," etc. *May* v. *Ontario & Q. R. Co.*, 26 *Am. & Eng. R. Cas.* 337, 10 *Ont.* 70.

IV. REPEAL, AND ITS EFFECT.

65. What amounts to a repeal.—Where two statutes are passed at the same session of the legislature, relating to railroad companies, if there is an irreconcilable conflict between the two, the one which is the later expression of the legislative will must prevail. *Swinney* v. *Ft. Wayne, M. & C. R. Co.*, 59 *Ind.* 205.

The Mich. General Railroad Law of 1855, and the acts amendatory thereto, were superseded by the General Railroad Law of 1871. *Continental Imp. Co.* v. *Phelps*, 47 *Mich.* 299, 11 *N. W. Rep.* 167.

Minn. Laws 1887, ch. 10, § 3, subd. *a*, being a part of an act entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers," is inconsistent with and so far supersedes Laws 1887, ch. 14, § 1, known as the Freedom of Traffic Act, as to operate as a repeal of said section. *State ex rel.* v. *St. Paul, M. & M. R. Co.*, 40 *Minn.* 353, 42 *N. W. Rep.* 21.—QUOTING State ex rel. *v.* Chicago, M. & St. P. R. Co., 38 Minn. 281. REFERRING TO Railway Transfer Co. *v.* Railroad & W. Commission, 39 Minn. 231.

The general purpose of the general corporation and railroad laws of 1855 (Mo. Rev. St. 1855, chs. 34 and 39), and of the general corporation law of 1845, was to confer certain powers and privileges and impose certain duties and liabilities in the absence of any stipulations or provisions inconsistent with those contained in special charters subsequently granted. Where such inconsistencies occur in subsequent legislation, it must be understood that previous restrictions were intended to be removed. *Scotland County* v. *Missouri, I. & N. R. Co.*, 65 *Mo.* 123.

The act incorporating defendant company and authorizing it to extend its road at any time repeals the act of 1849, § 19, as far as it applies to that act. *West End Pass. R. Co.* v. *Philadelphia City Pass. R. Co.*, 10 *Phila.* (*Pa.*) 75.

Tex. Rev. St. art. 279, prescribing a penalty against carriers for not receiving, etc., freight, was repealed as to railways by the act of April 2, 1887, amending article 4227. *St. Louis & S. W. R. Co.* v. *Kay*, 85 *Tex.* 558, 22 *S. W. Rep.* 665.

66. What does not.—Ala. Act of 1852, "to regulate and define the liability of railroad companies," does not conflict with the act of 1850 granting the right of way through Jackson county to the Nashville & Chattanooga railroad company. *Nashville & C. R. Co.* v. *Peacock*, 25 *Ala.* 229.—REFERRED TO IN Memphis & C. R. Co. *v.* Bibb, 37 Ala. 699, 1 Ala. Sel. Cas. 630.

Cal. Act of April 1, 1878, § 9, entitled "An act to create the office of commissioner

of transportation," is not repealed by the act of April 15, 1880, entitled "An act to organize and define the powers of the board of railroad commissioners." *Dyer* v. *Placer County*, 90 *Cal.* 276, 27 *Pac. Rep.* 197.

Ga. Act of 1869, repealing section 3 of the act of 1856, providing that railroad companies should be liable to their officers, agents and employés for injuries sustained by the negligence of their officers, agents and employés, did not repeal sections 2054 and 2980 of the old Code (1863). *Georgia R. & B. Co.* v. *Oaks*, 52 *Ga.* 410, 7 *Am. Ry. Rep.* 143.

Ill. Act of 1874, § 8, relating to the fencing and operation of railroads, does not necessarily operate as a repeal of paragraph 89 of section 1, art. 5, of the act relating to cities and villages, which gives a city power to extend any street, etc., under or through any railroad track, right of way or land of any railroad company, and provides that where no compensation is made to such company the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to impair its usefulness. *Chicago & N. W. R. Co.* v. *Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.

This paragraph confers the power on the city council to extend any street across the railroad right of way. It authorizes the city to obtain by condemnation the use of a part of the railroad right of way, "subject to the rightful use of the railroad company thereof." The provision which requires the railroad company to construct and maintain the crossing does not conflict with the provision which authorizes the city to use such crossing and specifies how such use may be obtained. *Chicago & N. W. R. Co.* v. *Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.

The authority conferred on the West Roxbury Railroad Co., by Mass. Act of 1856, ch. 201, to construct and maintain a railway over certain streets in West Roxbury, was not revoked or repealed by the act of 1858, ch. 38, § 10. *Dedham & W. R. R. Co.* v. *Metropolitan R. Co.*, 8 *Allen* (*Mass.*) 279.

Mich. Act 96 of 1859, relating to railway companies, was not repealed by the implied amendment of the General Railroad Law in Act 53 of 1873, or by its revision (Act 198 of 1873), which acts refer to companies organized under the General Railroad Law. *Attorney-General* v. *Joy*, 16 *Am. & Eng. R. Cas.* 643, 55 *Mich.* 94, 20 *N. W. Rep.* 806.

Mo. Act of March 10, 1871, amending a prior act entitled "An act to facilitate the construction of railroads in the state of Missouri," was not repealed by being omitted from the Compiled Laws of 1879. *Cape Girardeau County Court* v. *Hill*, 118 *U. S.* 68, 6 *Sup. Ct. Rep.* 951.

N. Y. Act of 1867, ch. 290, § 24, authorized certain towns to "widen, make, extend and improve a highway in said towns," and further provided that no railway or tramway should be laid thereon, except where it might cross the same. *Held*, that the provisions of this act were not inconsistent with the act of 1884, ch. 252, providing generally for the construction, extension, maintenance and operation of street railroads, and providing that "all acts and parts of acts * * * inconsistent with this act are hereby repealed." *Harlem Bridge, M. & F. R. Co.* v. *Southern Boulevard R. Co.*, 41 *Hun* 553, 3 *N. Y. S. R.* 316.

Pa. General Borough Law of April 3, 1851, does not repeal the act of June 13, 1836, authorizing the court of quarter sessions to lay out private roads. *Private Road in Huntingdon Borough*, 149 *Pa. St.* 133, 24 *Atl. Rep.* 189.

Pa. Act of April, 1851, allowing the personal representatives of a deceased party to prosecute suit for injuries to the person by negligence or default, is not repealed by the act of April 26, 1855, so far as to affect proceedings under it before the passage of the latter act. *Conroy* v. *Pennsylvania R. Co.*, 1 *Pittsb.* (*Pa.*) 440.

A general statute does not repeal a prior special one on the same subject, unless the repeal be express, or the general act be in direct conflict with the special one. So where a railroad charter provides a method of condemning land, it is not repealed by a subsequent general incorporation act, unless it comes within the above rule. *Cascades R. Co.* v. *Sohns*, 1 *Wash. T.* 557.—QUOTING Corbett *v.* Territory, 1 Wash T. 431. REVIEWING Clarkson *v.* Hudson River R. Co., 12 N. Y. 304.

67. Implied repeal.—Colo. Gen. St. ch. 93, § 15, required railroad companies to give to the clerk of the county notice of a station at which a book would be kept for entering a description of animals killed by the road. This section was amended by the act of March 31, 1885, from which the pro-

vision requiring such notice was omitted. *Held*, that the provision of the general statutes was thereby repealed. *Denver & R. G. R. Co.* v. *Crawford*, 11 *Colo.* 598, 19 *Pac. Rep.* 673.

It is provided by Conn. Gen. St. § 3480, that every railroad company which should locate its road across any highway should cross over or under the highway, and that it should make and maintain such bridges for the highway as the convenience and safety of the public travel upon it should require. An act passed in 1889 (ch. 220, § 7) provides that "it shall be the duty of the railroad companies to maintain and keep in repair all structures erected over their tracks at any highway crossing, but it shall be the duty of the municipality in which the structure is situated to keep in repair the surface of the highway, including planks and other surface material of the highway upon such structure." *Held*, that this act did not repeal by implication the previous act, which still remained in force. *Middletown* v. *New York, N. H. & H. R. Co.*, 62 *Conn.* 492, 27 *Atl. Rep.* 119.

An act of incorporation of a railroad, in which the legislature has reserved the right of repeal, may be repealed by implication, upon the principle that every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto. *Union Branch R. Co.* v. *East Tenn. & G. R. Co.*, 14 *Ga.* 327. —FOLLOWED IN West End & A. S. R. Co. *v.* Atlanta St. R. Co., 49 Ga. 151.

General words in a statute should not be construed as repealing by implication a particular statute unless they are otherwise inoperative, and the provisions in a city charter authorizing the city to tax express companies do not repeal the provisions of a general law requiring foreign express companies to pay a certain tax to the state in lieu of all other taxation. *Adams Ex. Co.* v. *Owensboro*, 85 *Ky.* 265, 3 *S. W. Rep.* 370.—FOLLOWING Adams Exp. Co. *v.* Lexington, 83 Ky. 657.

Where there are a number of statutes giving preference on the court calendars to actions against a city, and several of these are expressly repealed, and it is manifest that it was the intention of the commissioners who revised the laws, and of the legislature, to repeal all statutes giving such preference, one which seems to have been omitted by oversight will be held repealed also. *Mayor, etc., of N. Y.* v. *Broadway & S. A. R. Co.*, 12 *Hun* (*N. Y.*) 571, 54 *How. Pr.* 323.

Oreg. Act of February 20, 1885, making it unlawful for persons engaged in the transportation of freight to charge more for a shorter than for a longer haul of a similar kind or amount, is by necessary implication repealed by the act of February 20, 1891, which empowers the board of railroad commissioners to establish freight rates, subject to revision by the courts in a procedure provided for in the latter act. *State* v. *Rogers*, 22 *Oreg.* 348, 30 *Pac. Rep.* 74.

68. Effect of repeal.—When a law is in the nature of a contract, when absolute rights have vested under it, a repeal of the law does not divest those rights. *Fletcher* v. *Peck*, 6 *Cranch* (*U. S.*) 87.—QUOTED IN People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173.

The personal representative of one killed by a railroad obtained a judgment against the company, and the company sued out a writ of error. Pending the writ the statute authorizing such suits was repealed. *Held*, that this did not prevent an affirmance of the judgment, no error appearing in the court below. *Kansas Pac. R. Co.* v. *Twombly*, 100 *U. S.* 78.

Ala. Code of 1867, § 2536, authorized suits against the state, but a judgment could only be paid through the state officers, after an appropriation was made for the purpose. Suit was commenced while this statute was in force, but before a final hearing it was repealed, and on motion of the state the suit was dismissed for want of jurisdiction. *Held*, that as the functions of the court did not extend beyond simply auditing the claim, the repeal of the statute was not in violation of that clause of the federal Constitution which prohibits laws impairing the obligation of contracts. *South & N. Ala. R. Co.* v. *Alabama*, 101 *U. S.* 832.—FOLLOWING Memphis & C. R. Co. *v.* Tennessee, 101 U. S. 337.—FOLLOWED IN Baltzer *v.* State, 104 N. Car. 265, 10 S. E. Rep. 153.

The repeal of a statute terminates all proceedings under it, unless rights have accrued which cannot be divested. *Musgrove* v. *Vicksburg & N. R. Co.*, 50 *Miss.* 677.

The effect of a repealing statute is to obliterate the repealed statute as completely as if it never had been passed. It must be considered as a law that never existed ex-

cept for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. If there has been a change or repeal of the law applicable to the rights of the parties, after rendition of the original judgment and pending the appeal, the case must be heard and decided in the appellate court, according to the then existing law. *Musgrove* v. *Vicksburg & N. R. Co.*, 50 *Miss.* 677.—FOLLOWING Key *v.* Goodwin, 4 M. & S. 360.

If the judgment of the court of original jurisdiction was wrong on the law as it then stood, although there may have been error, if the law has been repealed the appellate court will not reverse and remand, because the inferior court must recognize the repeal and conform on the second trial to the law as it then was. *Musgrove* v. *Vicksburg & N. R. Co.*, 50 *Miss.* 677.

An order was made by the circuit court sending an appeal from an assessment of land damages by the railroad commissioners and selectmen to a referee for trial, but no action was taken under the order by reason of exceptions which were transferred to this court. Before the exceptions were reached for decision in the supreme court, the statute was amended by excluding such cases from its operation. *Held*, that the order of reference should be rescinded. *Gray* v. *White Mountains* (*N. H.*) *R. Co.*, 56 *N. H.* 182, 20 *Am. Ry. Rep.* 450.

A power given by an act repealed in a revision, but which, by the revision, in the same instant that it was repealed, was immediately re-enacted, so that there was never a moment when the act repealed was not in force, is not taken away by the repealer. *Middleton* v. *New Jersey W. L. R. Co.*, 26 *N. J. Eq.* 269; *reversed on another point in* 27 *N. J. Eq.* 557.

Wisconsin Act of April, 1855, made railroad companies liable for labor performed in constructing their roads, but required laborers to give thirty days' notice of wages that might be due. After a laborer who had worked under a subcontractor had given the notice required, the statute was repealed. *Held*, that upon giving the notice the laborer obtained a vested right to his claim against the company, which could not be divested by the subsequent repealing act, and that he might recover against the company in a suit brought after the passage of the repealing act. *Streubel* v. *Milwaukee & M. R. Co.*, 12 *Wis.* 67.

A statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of the statute adopted. So where a statute provides that, in actions where a corporation is a party, the adverse party may be examined as a witness in his own behalf, by giving a notice as required by another statute, the subsequent repeal of the statute thus referred to does not dispense with the notice. *Sika* v. *Chicago & N. W. R. Co.*, 21 *Wis.* 370.

Where a special act empowers a railway company to stop up streets, and the deposited plans show that Sun street is not to be stopped up, and subsequently the company obtains another act authorizing it to make an underground railway and re-enacting the powers given by the previous act, the deposited plans are not incorporated in the special act, and the power to stop up all streets, including Sun street, is an existing power capable of being enforced. *Attorney-General* v. *Great Eastern R. Co.*, 41 *L. J. Ch.* 505, *L. R.* 7 *Ch.* 475, 20 *W. R.* 599, 26 *L. T.* 749.

69. Saving clauses. — Iowa Act of 1884, ch. 159, § 1, repeals the act of 1876, ch. 123, which authorizes townships to vote taxes in aid of railroads. Section 45 of the Code provides, *inter alia*, that the repeal of a statute shall not affect any penalty incurred under the statute. *Held*, that the repeal of the act of 1876 did not repeal penalties provided therein against delinquent taxpayers, for taxes voted to a railroad, where the penalty had already accrued before the passage of the repealing act. *Chicago, M. & St. P. R. Co.* v. *Hartshorn*, 30 *Fed. Rep.* 541.

After the repeal of Wis. Act of 1874, ch. 273, no recovery could be had in any action then pending under the penal provisions of that act, either by virtue of Rev. St. ch. 119, § 33, or by virtue of the clause in the repealing act (ch. 57 of 1876) which provided that nothing therein contained should "in any manner affect any litigation" then pending in any of the courts of that state or of the United States. *Rood* v. *Chicago, M. & St. P. R. Co.*, 43 *Wis.* 146, 17 *Am. Ry. Rep.* 170.—FOLLOWING Dillon *v.* Linder, 36 Wis. 344.—FOLLOWED IN Smith *v.* Chicago & N. W. R. Co., 43 Wis. 686; Streeter *v.* Chicago, M. & St. P. R. Co., 44 Wis. 383. QUOTED IN Smith *v.* Chicago & N. W. R. Co., 1 Am. & Eng. R. Cas. 303, 49 Wis. 443.

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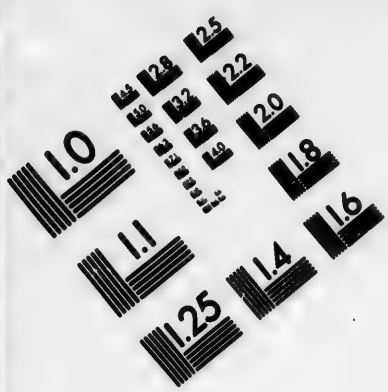

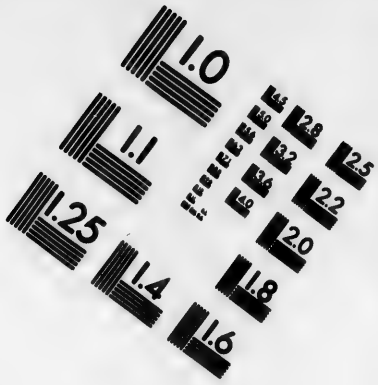

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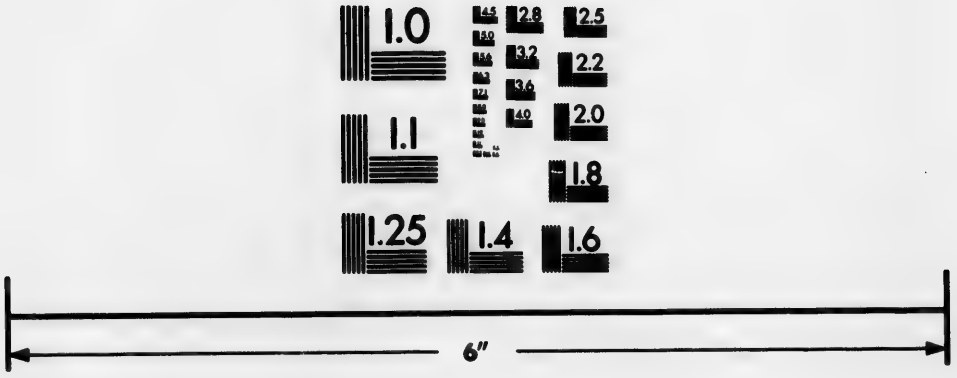

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I. NATURE, CHARACTERISTICS, AND RIGHTS OF HOLDERS.

1. Nature, generally—Evidence of title.—A certificate of shares is the affirmation of the company that a certain amount of stock stands in the name of the person mentioned. *Shropshire Union R. & C. Co.* v. *Reg.*, 7 *L. R. H. L. Cas.* 496, 23 *W. R.* 709, 32 *L. T.* 283; *reversing L. R.* 8 *Q. B.* 435, 42 *L. J. Q. B.* 193, 21 *W. R.* 953, *which reversed L. R.* 8 *Q. B.* 420.

In a certain sense, shares of stock in a corporation represent an interest in the corporate estate, and a conveyance thereof is a conveyance of such interest. But it is not a particular interest in particular property, but simply an interest in the rights and property of the corporation, whatever they may be, and subject to the corporate obligations. *State* v. *North La. & T. R. Co.*, 34 *La. Ann.* 947.

A certificate of stock, although not the title, is an authoritative declaration that such a title exists, which may operate as an equitable estoppel in favor of third persons who part with value in the belief that it is true. *Willis* v. *Fry*, 13 *Phila.* (*Pa.*) 33.

A share of stock is without earmarks, and cannot be distinguished from other shares of the same corporation and issue. The certificates bearing dates and numbers are but evidence of title. *Hubbell* v. *Drexel*, 15 *Phila.* (*Pa.*) 478.

2. Shares are personal property.— Shares of stock in a company duly incorporated are personal property. *McClaskey* v. *Lake View M. & T. Co.*, 18 *Colo.* 65, 31 *Pac. Rep.* 333. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238. *Johns* v. *Johns*, 1 *Ohio St.* 350.—QUOTING Bradley *v.* Holdsworth, 3 M. & W. 422. REVIEWING Duncuft *v.* Albrecht, 12 Sim. 189.

And accompany the person of the owner. *Huntzinger* v. *Philadelphia Coal Co.*, 11 *Phila.* (*Pa.*) 609.—QUOTING McKeen *v.* Northampton County, 49 Pa. St. 525; Hutchins *v.* State Bank, 12 Metc. (Mass.) 421.

3. Rights conferred on holder, generally.—The capital stock of a corporation is the money or property put into the corporate fund by the subscribers for said stock, which fund becomes the property of the corporation. A share of capital stock is the right to partake, according to the amount put into the fund, of the surplus profits, and upon dissolution of the corporation, of the fund remaining after payment of debts. *Burrall* v. *Bushwick R. Co.*, 75 *N. Y.* 211.

A subscriber may become the owner of a given number of shares, but not in such sense that he may take away those shares out of the corporate fund; and the corporation has no power, and cannot be compelled, while continuing in legal existence and carrying on the business for which it was created, to issue and deliver such shares. All that the corporation can do is to issue written evidence of the existence and ownership of such shares, known as stock certificates. *Burrall* v. *Bushwick R. Co.*, 75 *N. Y.* 211.

4. Preference stock in English law.— Preference stock allotted to the shareholders of a railway company, whose road is purchased by the company issuing such stock, is stock within the meaning of 13 & 14 Vict. c. 97, Schedule, tit. Conveyance, and is liable to pay duty on its market value. *Furness R. Co.* v. *Inland Revenue Com'rs*, 10 *Jur. N. S.* 1133, 33 *L. J. Ex.* 173, 13 *W. R.* 10, 10 *L. T.* 161. *Ulverstone & L. R. Co.* v. *Inland Revenue Com'rs*, 2 *H. & C.* 855.

A company has power to issue preference shares if it is given this power by the articles of association; it is not necessary that the power should be stated in the memorandum of association. *Harrison* v. *Mexican R. Co.*, 44 *L. J. Ch.* 403, *L. R.* 19 *Eq.* 358, 23 *W. R.* 403, 32 *L. T.* 82.—FOLLOWED IN Re South Durham Brewery Co., L. R. 31 Ch. D. 261, 34 W. R. 126, 55 L. J. Ch. 179, 53 L. T. 928.

A company was empowered by its act to divide the ordinary shares into preferred and deferred half shares. There was no other power in the act to issue preference shares. The company filed a scheme of arrangement with its creditors, under the Railway Companies Act, 1867, § 6, to which it obtained the assent of the debenture holders, and also of the ordinary shareholders (including the holders of preferred and deferred half shares), at an extraordinary general meeting. *Held*, that the holders of preferred half shares did not form a class of preference shareholders whose separate assent must be obtained under section 12 of the act. *In re Brighton & D. R. Co.*, *L. R.* 44 *Ch. D.* 28.

5. Preferred stock and rights of holders.*—Certificates of stock recited that "the preferred stock is to be and remain a first claim upon the property of the company after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum," which should be paid before the payment of any dividends on the common stock. *Held*, that this only gave

* Preferred stock, see notes, 16 AM. & ENG. R. CAS. 435; 13 *Id.* 144; 9 *Id.* 644; 4 *Id.* 291.

the preferred stockholders priority over the holders of common stock, but did not create any lien or claim in their favor superior to debts contracted by the company after the stock was issued. *Warren* v. *King*, 108 *U. S.* 389, 2 *Sup. Ct. Rep.* 789.—APPROVING King *v.* Ohio & M. R. Co., 2 Fed. Rep. 36. FOLLOWING St. John *v.* Erie R. Co., 22 Wall. 136.

Defendant company issued certificates of stock reciting that the holders should be entitled to "shares of preferred stock of said corporation, and shall be entitled to receive of the net earnings of said company, which may be divided * * * in each year, up to $7 per share, and to share in any surplus beyond $7 a share which may be divided upon the common stock." *Held*, that this gave the holders of the preferred stock a seven per cent. dividend in preference to all others, and, if the surplus was sufficient, then the holders of common stock were entitled to seven per cent., and, if there was still a surplus, it should go to the holders of the preferred and common stock equally. *Bailey* v. *Hannibal & St. J. R. Co.*, 1 *Dill.* (*U. S.*) 174.

A valid equitable lien, as against subsequent incumbrancers or their agents, is created by an agreement that the so-called preferred stock of a railroad company shall be a lien of a certain class, provided the agreement is brought to their knowledge. *Skiddy* v. *Atlantic, M. & O. R. Co.*, 3 *Hughes* (*U. S.*) 320.

A subscription for "preferred stock," which is to draw ten per cent. interest at once, cannot be reckoned to make up the amount of capital stock required by the charter. *Lewey's Island R. Co.* v. *Bolton*, 48 *Me.* 451.

A corporation voted on December 10, 1851, to issue preferred stock to raise money to pay a floating debt and bonds due July 1, 1852, four shares of the preferred to be exchanged for three shares of the old stock and a cash payment. A bonus was to be given if a certain per cent. of the last should be paid with interest between January 1 and February 1, 1852, the remainder to be paid on June 15 following. Dividends were to be paid at a certain rate on the preferred stock, and every stockholder subscribing "at any time" after February 1, 1852, should be "entitled to have his stock preferred in like manner." On April 1, 1888, a stockholder tendered three shares of the old stock, with the requisite cash, and demanded four shares of the preferred stock, and it was refused. The average rate of dividends paid on the preferred stock up to that time had been much less than the proposed rate, but the corporation was then prosperous, and that rate had been maintained for some little time. *Held*, that such stockholder was obliged to elect to take the preferred stock, if not on or before June 15, 1852, within a reasonable time at least; and that he had failed to do so, and was not entitled to the preferred stock. *Holland* v. *Cheshire R. Co.*, 151 *Mass.* 231, 24 *N. E. Rep.* 206.

Where stockholders adopt a resolution authorizing an issue of preferred stock, and it is recited that it is to be issued under Ohio Act of April 16, 1870, which authorizes certificates of preferred stock, but does not authorize certificates of indebtedness, the terms of the statute become a part of the certificates; and such certificates will be held to be certificates of stock, unless, from the whole transaction, it is clear that the purpose was to create a debt. *Miller* v. *Ratterman*, 43 *Am. & Eng. R. Cas.* 339, 47 *Ohio St.* 141, 24 *N. E. Rep.* 496.

II. ISSUING.

6. Construction of statutes.—Ala. Const. art. 14, § 6, provides that "no corporation shall issue stock or bonds except for money, labor done or money or property actually received, and all fictitious increase of stock or indebtedness shall be void." Ala. Code 1876, § 1824, requires all subscriptions to capital stock to railroads to be payable in money, labor or property at their money value. *Held*, that where one company buys the road of another, and pays for the same by an issue of stock and bonds, the road may be valued at the cost of building it, and it is immaterial that the selling company acquired it for less than its actual value. *Grant* v. *East & W. R. Co.*, 54 *Fed. Rep.* 569, 2 *U. S. App.* 182, 4 *C. C. A.* 511; *affirming* 52 *Fed. Rep.* 531.

Neb. Const. art. 11, § 5, prohibits the issuing by a railway corporation of stocks or bonds except for the consideration actually received. One of the objects of this provision is to enable the public to ascertain the actual cost of each railway in the state, and to enable the legislature to pass laws fixing an equitable rate of taxation, and for the transportation of persons and property, so that justice may be done alike to the rail-

way company, the public and private individuals. *State ex rel.* v. *Atchison & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 388, 24 *Neb.* 143, 38 *N. W. Rep.* 43.

Stockholders of defendant company procured an act of the legislature authorizing it to issue additional shares of stock, not exceeding ten per cent. of its original capital, as many as might be necessary to enable the company to provide for and pay interest on the instalments paid in for the construction of the road until it should be completed and put in operation. *Held*, that the additional shares thus authorized were to be converted into money, and the payments to subscribers were to be made in cash, and not by a transfer of shares. *Manice* v. *Hudson River R. Co.*, 3 *Duer* (*N. Y.*) 426.

7. Power to issue — Validity of certificate—Interest. —A company issued a writing stating that the holder was entitled to a certain number of shares of fifty dollars each of the capital stock of the company, but provided that it should bear interest until the road was open to a certain designated place. *Held*, that this constituted the holder a stockholder and member of the company, and was not merely evidence of a conditional subscription, which would mature into an absolute subscription when the road was built to the place designated. *McLaughlin* v. *Detroit & M. R. Co.*, 8 *Mich.* 100.—EXPLAINED IN Williston *v.* Michigan S. & N. I. R. Co., 13 Allen 400.

The provision in the certificate for the payment of interest constituted a contract between the company and the holder, and the company could not change the holder's right to demand money by a resolution requiring him to accept the bonds of the company instead of money, where it was passed without the holder's consent. *McLaughlin* v. *Detroit & M. R. Co.*, 8 *Mich.* 100.

The company defended an action to recover the interest reserved in the above certificates on the ground that they were issued by the president and treasurer of the company without authority. *Held*, that the resolution reciting that such interest should be paid in bonds was a ratification of the act of the officers, if indeed it needed any ratification. *McLaughlin* v. *Detroit & M. R. Co.*, 8 *Mich.* 100.

A statute authorizing the issue of preferred stock, if accepted by the stockholders, authorizes such issue by the directors, although individual stockholders may oppose it. *Curry* v. *Scott*, 54 *Pa. St.* 270.

8. Issuing stock for land. — In the absence of express legislation a corporation has the same power of disposition over its unsubscribed capital stock as any ordinary owner, and it may be exchanged for land, to be sold again, when the corporation has general power to purchase real estate. If such exchange be an abuse of the company's corporate power, it furnishes no ground on which the vendor of the land can object. *Dayton & C. R. Co.* v. *Iatch*, 1 *Disney* (*Ohio*) 84.

9. Issuing paid-up stock at a discount.—A company governed by the Companies Clauses Consolidation Act, 1845, and the acts amending it, may issue fully paid-up original stock at a discount, and for payment either in cash or for land or labor or other consideration, subject to the liability of the directors for issuing the stock below its value without necessity. Such companies may also issue debentures or debenture stock at a discount, if authorized to borrow money or raise money by mortgages or debentures. *Webb* v. *Shropshire R. Co.*, [1893] 3 *Ch.* 307.

10. Issuing full-paid stock for work on construction. — Defendants agreed to accept a road which complainants were to build, and to issue to complainants stock at the rate of 150 shares per mile of the road, payment to be made when defendants' superintendent should approve of the road. *Held*, that the contract was fully discharged by issuing the 150 shares per mile, exclusive of any dividends which might have accrued on the stock in the meantime. *Southwestern R. Co.* v. *Papot*, 67 *Ga.* 675.

A company is not forbidden to issue bonds and stock to contractors in payment for the construction of its road, if the amount so issued does not unreasonably exceed the value actually received, by Minn. Laws 1887, ch. 12, § 1, which prohibits the sale or disposal of shares of the capital stock of railroad companies, or the issue of certificates therefor, unless such shares shall have been fully paid, or the issuance of any stock or bonds except for money, labor or property received and applied for the purpose for which the company was created. *Brown* v. *Duluth, M. & N. R. Co.*, 54 *Am. & Eng. R. Cas.* 219, 53 *Fed. Rep.* 889.—QUOTING Memphis & L. R. R. Co. *v.* Dow, 120 U. S. 298, 7 Sup. Ct. Rep. 482.

11. Issuing preferred stock to contractors.—It is not *ultra vires* for a company to agree to issue to contractors, for the completion of the road, preferred stock in payment for work to be done, and to agree that a majority of the directors shall be the holders of a certain number of shares of said preferred stock; provided the number of shares agreed to be issued does not make the whole amount of shares greater than the capital stock authorized by the charter. (Warner, J., dissenting.) *Hazlehurst* v. *Savannah, G. & N. A. R. Co.*, 43 *Ga.* 13.

12. Fictitious issue in excess of corporate capital.—Certificates of stock in a corporation issued upon the basis of a fictitious increase of its capital stock, when there is no increase of its capital, are utterly void. *Beitman* v. *Steiner*, 98 *Ala.* 241, 13 *So. Rep.* 87.

Where an attempt has been made to authorize the issue of an excess of stock certificates over the real capital of a corporation, the law does not avoid the entire issue, but the vitiating operation of the Constitution (art. 14, § 6) is confined to the fictitious excess. *Beitman* v. *Steiner*, 98 *Ala.* 241, 13 *So. Rep.* 87.

Where all the stock certificates are issued and delivered to subscribers at one time, and purport to represent the gross capital—actual and fictitious—the certificate, though not representing its face value, is in part based on actual property, giving the holder the right to share in the income and assets of the corporation in the proportion that his certificate sustains to the whole issue and the whole issue sustains to the actual capital. *Beitman* v. *Steiner*, 98 *Ala.* 241, 13 *So. Rep.* 87.

Certificates of stock in corporations issued in double the amount of the actual capital represented by them are not invalid for that cause; and a purchaser of such certificates, who gives his promissory note therefor, with a knowledge of the fictitious increase of shares and the absence of concealment or misrepresentation, cannot set up a failure of consideration in defense of an action on his said note. *Beitman* v. *Steiner*, 98 *Ala.* 241, 13 *So. Rep.* 87.

13. Rights of holder of stock fraudulently issued.—In an action against a company by the holder of fraudulent stock, issued and negotiated by its treasurer, for the refusal to exchange it for new stock, the company is responsible for the fraud of the treasurer. *Tome* v. *Parkersburg Branch R. Co.*, 39 *Md.* 36, 11 *Am. Ry. Rep.* 285.—DISTINGUISHING Swan *v.* North British Australasian Co., 32 L. J. Ex. 273. REVIEWING New York & N. H. R. Co. *v.* Schuyler, 34 N. Y. 61; Titus *v.* Great Western Turnpike Road, 5 Lans. (N. Y.) 250. —DISTINGUISHED IN Baltimore & O. R. Co. *v.* Wilkens, 44 Md. 11. FOLLOWED IN Western Md. R. Co. *v.* Franklin Bank, 60 Md. 36.

In an action to recover damages sustained by the refusal of defendant corporation to recognize as valid certain shares of stock held by plaintiffs, or to allow them to be transferred and to issue new certificates therefor, the certificates having been fraudulently issued by the company's treasurer, the measure of damages is the market value of the shares at the time when the company first refused to recognize them as valid. *Allen* v. *South Boston R. Co.*, 150 *Mass.* 200, 5 *L. R. A.* 716, 22 *N. E. Rep.* 917.

If an officer of a corporation, having the power, either alone or with others, to issue certificates of stock, fraudulently issues as security for his private debts a certificate to his creditor in the latter's name, such creditor cannot rely upon the certificate, and recover damages from the corporation upon its refusal to recognize it as valid, although he has no knowledge of the fraud; but if on taking it he fails to investigate the title to the stock, he is affected with notice of whatever he might have discovered upon making proper inquiry. *Farrington* v. *South Boston R. Co.*, 150 *Mass.* 406, 23 *N. E. Rep.* 109.

14. Compelling issue of stock, generally.—In negotiating a loan defendant company offered to give lenders its bonds, with the privilege of becoming stockholders for one half of the amount of the loan. Plaintiff, a subscriber, received a provisional certificate declaring him to be entitled to scrip certificates for a certain number of shares after a certain fixed date; but at the bottom of the certificate, and below the signatures, there was a memorandum stating that the exchange of certificates was "limited to 1st January, 185-," but by a vote of the company the date was subsequently fixed as 1855. After having complied with all the conditions of the subscription, plaintiff applied in 1857 for his certificates of shares. *Held*, that his right

to become a stockholder became absolute when he complied with all the terms touching the loan, and could not be affected by such memorandum on the provisional certificate. *Van Alen* v. *Illinois C. R. Co.*, 4 *Abb. App. Dec.* (*N. Y.*) 443, 2 *Keyes* 673; *affirming* 7 *Bosw.* 515.

15. Compelling reissue of stock represented by lost certificate.* — The right of the owner of corporate stock who has lost his certificate, in case the corporation refuses, upon indemnity being tendered, to issue to him a new certificate, to maintain an equitable action to compel such issue, was not taken away or affected by N. Y. Act of 1873, ch. 171, giving a summary remedy in such cases. That act did not give a remedy at law, but simply a cumulative and additional equitable remedy. *Kinnan* v. *Forty-second St., M. & St. N. A. R. Co.*, 140 *N. Y.* 183, 55 *N. Y. S. R.* 584, 35 *N. E. Rep.* 498; *affirming* 49 *N. Y. S. R.* 608, 1 *Misc.* 457, 21 *N. Y. Supp.* 789.

16. Right to attack validity of issue.—The question whether a corporation has made an improper issue of capital stock cannot be inquired into in a proceeding to acquire land for the use of the corporation. *In re Staten Island R. T. R. Co.*, 38 *Hun* (*N. Y.*) 381.

17. Estoppel to deny validity of overissued stock. — A corporation is estopped to deny the validity of a stock certificate issued by it in a fraudulent manner for stock in excess of the authorized capital of the corporation. *Jarvis* v. *Manhattan Beach Co.*, 53 *Hun* 362, 25 *N. Y. S. R.* 1, 6 *N. Y. Supp.* 703.

18. Taking notes in payment for stock—Liability of corporation.—A company sold stock to be paid for in instalments, and issued conditional certificates reciting that unconditional certificates would be issued when the instalments were all paid. It took notes, which it negotiated, and which were never paid, for the deferred instalments, but issued unconditional certificates to the assignees of the certificates. *Held*, that the holders of the notes might recover against the company. *Houston & T. C. R. Co.* v. *Bremond*, 66 *Tex.* 159.

A corporation can exercise no powers except those conferred by its charter; but in executing those powers it may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business. So a company may sell stock and take in payment a note secured by a mortgage, where the sole purpose is to negotiate the note to raise money to build its road. *Clark* v. *Farrington*, 11 *Wis.* 306.

And the fact that the company's charter fixes the amount of its shares at so many dollars does not necessarily imply that payment therefor shall be made in cash. *Clark* v. *Farrington*, 11 *Wis.* 306.

19. Conversion of bonds into stock.—Railroad directors have no power to sell stock at less than the price fixed in the company's charter; and this cannot be done by issuing a bond convertible into stock at a discount. Stock thus taken and held by a party with notice may be reduced to the charter value of the shares. *Sturges* v. *Stetson*, 1 *Biss.* (*U. S.*) 246.

A company having a capital stock of $1,500,000, with power to increase the same to any necessary amount, and to allow and pay interest thereon, issued its bonds, bearing interest payable semi-annually, and containing a provision that they might, within a specified time, be converted into stock of the road at the option of the holder. Interest was allowed to the stockholders up to the date of the first dividend, and was paid by issuing to them new stock, the sum so paid not exceeding the net earnings of the road during the time named. *Held*, that a bondholder, who had been regularly paid the interest on his bonds up to the time of the dividend, and who then elected to convert his bonds into stock, was only entitled to receive stock to the amount of the principal sum specified in the bonds, and could claim no part of the new stock so issued by the company, nor any compensation or allowance, in stock or otherwise, on account thereof. *Sutliff* v. *Cleveland & M. R. Co.*, 24 *Ohio St.* 147, 6 *Am. Ry. Rep.* 356.

20. Conversion of stock into bonds.—A railroad company entered into an agreement with defendant and another as trustees for purchasers of the company's property, by which the company agreed to lease its franchise and property to a new company to be organized by the trustees, and to receive a certain amount of stock of the new company. In case the new company, during the lease, should issue mort-

* Rights of true owner and of holder of stolen or lost stock certificates, see note, 13 L. R. A. 605.

gage bonds, the holders of the transferred stock should have the right to exchange it for an equal amount of the bonds. The agreement was carried out, the stock delivered in payment of the lease was soon sold and transferred by the lessor, but the transfer was not entered on the books of the new company. Subsequently the new company issued mortgage bonds, and nine years thereafter, and after it had passed into the hands of a receiver, and its stock was worthless, plaintiff, who was the owner of a portion of the transferred stock, demanded that it should be exchanged for bonds, which was refused, and he brought suit to recover the value of the bonds. *Held*, that the laches in applying for the exchange waived all right to demand the exchange or to recover the value of the bonds. *Catlin* v. *Green*, 120 *N. Y* 441, 24 *N. E. Rep.* 941, 31 *N. Y. S. R.* 532; *affirming* 5 *N. Y. S. R.* 866.

21. Conversion of tax certificate into stock.—Under the acts incorporating the Pacific railroad and acts amendatory thereto, it is the tax certificate, and not the collector's tax receipt, which is made assignable and convertible into stock. Where one does not show that any certificates for taxes paid were ever issued to him or to the taxpayers, he presents no right to have the railroad issue its stock to him. *Spurlock* v. *Missouri Pac. R. Co.*, 90 *Mo.* 199, 2 *S. W. Rep.* 219.

III. INCREASE AND REDUCTION OF STOCK.

22. Right to increase capital stock.*—Where a company has paid for things properly chargeable to capital out of revenue, it may raise fresh capital for the purpose of recouping the revenue account at a subsequent time. *Mills* v. *Northern R. of Buenos Ayres Co.*, 23 *L. T.* 719.

Where the articles of association of a company provide that the directors may, with the sanction of a special resolution, increase the capital in such manner and to such amount, and to be with and subject to such rules, regulations, privileges and conditions, as the company in general meeting shall think fit, special resolutions authorizing an increase of the capital by the issue of preferred stock are not *ultra vires*. *Harrison* v. *Mexican R. Co.*, *L. R.* 19 *Eq.* 358, 44 *L. J. Ch.* 403, 32 *L. T.* 82, 23 *W. R.* 403.—FOLLOWED IN Re South Durham Brewery Co., L. R. 31 Ch. D. 261, 34 W. R. 126, 55 L. J. Ch. 179, 53 L. T. 928.

The provisions of Pa. Const. art. 16, § 7, and of the act of April 18, 1874, regulating the manner in which the stock and indebtedness of corporations may be increased, do not apply to a corporation which was invested by its charter, before the Constitution was adopted, with unrestricted power to make such increase, and accepted the benefit of no legislation since 1874. And this though the corporation, by accepting legislation in 1868, subjected itself to the act of May 3, 1855, and the constitutional amendment of 1857. *Gloninger* v. *Pittsburgh & C. R. Co.*, 46 *Am. & Eng. R. Cas.* 276, 139 *Pa. St.* 13, 21 *Atl. Rep.* 211.—DISTINGUISHING Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352; Lewis *v.* Hollahan, 103 Pa. St. 425; Pennsylvania R. Co. *v.* Bowers, 124 Pa. St. 183. FOLLOWING Williamsport Pass. R. Co. *v.* Williamsport, 120 Pa. St. 1; Hays *v.* Com., 82 Pa. St. 523; Ahl *v.* Rhoads, 84 Pa. St. 319; Lewis *v.* Jeffries, 86 Pa. St. 340.

A corporation, organized under Wis. Rev. St. ch. 87, may increase its capital stock in the manner prescribed by section 1826 without prejudice to its right to enforce prior stock subscriptions. *Port Edwards, C. & N. R. Co.* v. *Arpin*, 80 *Wis.* 214, 49 *N. W. Rep.* 828.

Such a company, as soon as incorporated, may make assessments on unpaid stock subscriptions, without regard to the aggregate amount of capital stock subscribed or the sums paid thereon. *Port Edwards, C. & N. R. Co.* v. *Arpin*, 80 *Wis.* 214, 49 *N. W. Rep.* 828.—DISTINGUISHING Anvil Min. Co. *v.* Sherman, 74 Wis. 226.

23. Notice to stockholders of increase.—A street-railway company is a private corporation within the meaning of Pa. Const. art. 16, § 7, nor can the charter or by-laws of such corporation disregard the constitutional requirement of sixty days' notice to stockholders before the company may increase its stock or debt, and such increase, based on less notice, will be restrained. *Shepp* v. *Norristown Pass. R. Co.*, 2 *Pa. Dist.* 679.

24. Right of holders of original stock to subscribe for new.—Where a charter provides that in case any subsequent increase of the capital of the company is

* Right to increase stock as between owner of capital and income, see note, 16 L. R. A. 461.

authorized, sixty days' notice shall be given of such increase, within which time the stockholders shall have the privilege of taking additional shares, in order to entitle a stockholder to demand additional shares it must appear that he applied within the sixty days and paid or tendered the cost of the shares. (Egan, J., dissenting.) *Hart* v. *St. Charles St. R. Co.*, 30 *La. Ann.* 758.

S. held the receipt of a railroad for $7500, money advanced, to be repaid to him or his order, with interest, or received in payment $10 on each share of stock of the company to be issued to him or his assigns whenever the directors should authorize the issue of the second million of stock. The receipt was assigned to plaintiff with the right to take 300 shares of the stock to be issued as set forth therein, to secure a note for $7000, reciting that the maker had deposited the scrip with the right to sell or assign the same on non-payment of the note. The second million of stock was afterward issued and 750 shares issued to S. on the receipt, 300 of which were delivered by him to plaintiff and the certificate surrendered to the company. About a month previous to the surrender of the receipt and the delivery of the shares to plaintiff, the company decided to issue 70,722 additional shares, but allotted no part thereof to plaintiff as owner of the 300 shares. Plaintiff claimed that he was entitled to 562 new shares, as an accretion upon the 300 shares. *Held*, that as he was not the owner of the stock until a month after the additional issue, he had none of the rights of a stockholder in respect to it, and that the surrender of the receipt with the indorsements thereon, made after the new stock was created, was no notice to the company of plaintiff's rights. *Miller* v. *Illinois C. R. Co.*, 24 *Barb.* (*N. Y.*) 312.

When new stock, that is to share in profits with existing stock, is issued by a corporation all holders of the existing stock have an equal right to subscribe for their proportionate part of the new stock; but this rule does not apply to original stock bought in by the corporation and held as assets, and sold for the payment of liabilities, or for the general benefit. *State ex rel.* v. *Smith*, 48 *Vt.* 266, 16 *Am. Ry. Rep.* 394. —REVIEWING AND DISTINGUISHING Gray *v.* Portland Bank, 3 Mass. 364.—REVIEWED IN Chicago, P. & S. W. R. Co. *v.* Marseilles 84 Ill. 643.

25. Contract with stockholders as to application of new stock. — The stockholders of defendant company procured an act of the legislature authorizing the company to issue so many additional shares, not exceeding ten per cent. of its original capital, "as might be necessary to enable the company to provide for, and pay, interest on the instalments paid in for the construction of the road until it should be completed and put in operation." *Held*, that the additional shares thus authorized were to be sold for money and the payments to the stockholders made in cash, and not by a transfer of shares. *Manice* v. *Hudson River R. Co.*, 3 *Duer* (*N. Y.*) 426.

The manifest intention of the parties was that interest should continue to be paid to the subscribers until an income should be realized from the road as an entirety, *i. e.*, until the completion of the whole road. *Manice* v. *Hudson River R. Co.*, 3 *Duer* (*N. Y.*) 426.

26. Validity of subscription to new stock. — Pa. Act of March 24, 1865, authorized any railroad company to issue such additional shares of stock as might be necessary to equip its road, the stock to be of the same value and stand on the same footing as the original stock. By the act of April 10, 1867, the directors of any company authorized to increase its stock, when the increase shall have been authorized by the stockholders, may determine in what manner the same may be subscribed and sold, the amounts of the instalments and the manner of their payments. The stockholders of a railroad resolved that the directors should have power to increase the stock and dispose of the same as they might deem advisable. The directors accepted a subscription for an additional issue of stock for the purpose of extending the road, and stipulated that interest at the rate of six per cent. upon the instalments on the stock should be paid until the completion of the extension, with a proviso that the new stockholders should not participate in any of the profits theretofore made. *Held*, that such subscription was unauthorized by said acts and the resolution of the stockholders. *McManus* v. *Philadelphia & R. R. Co.*, 58 *Pa. St.* 330.

27. Payment of bonus on increase of stock. — A corporation chartered in 1865, by a special act which conferred the unconditional "privilege of increasing its

capital stock from time to time," cannot be required, upon an increase of its capital stock, to pay the bonus which by the general act of April 18, 1874, is required to be paid by all corporations upon an increase of capital stock under that act. To require such payment would impair the obligation of the contract contained in the charter, within the prohibition of the Constitution of the United States. *Com.* v. *Erie & W. Transp. Co.*, 107 *Pa. St.* 112.

There is an essential distinction between a tax and a bonus. The legislative power of taxation is limited only by its own sovereignty; a bonus implies a consideration for something conferred, and where the corporation receives nothing beyond what it possessed by its charter, the legislature cannot exact additional consideration. *Com.* v. *Erie & W. Transp. Co.*, 107 *Pa. St.* 112.

28. Remedies for invalid or irregular increase.—Stockholders who have voted for an increase of stock, and have shared in its benefits, or those who have bought their stock after the increase was made, are estopped from contesting the legality of the increase. *Venner* v. *Atchison, T. & S. F. R. Co.*, 28 *Fed. Rep.* 581.

Though it may be that for the fictitious increase of stock a writ of *quo warranto* might issue against the persons constituting the corporation, or that creditors might call on the stockholders to make good the difference between the actual capital and such increase, still these are risks voluntarily assumed by a purchaser with knowledge of the facts relating to such issue. *Beitman* v. *Steiner*, 98 *Ala.* 241, 13 *So. Rep.* 87.

A declaration alleging that plaintiff, at the request of defendant, a railroad corporation, had conveyed his stock therein to a third person, to be held in trust for certain purposes, and that defendant, in consideration thereof, agreed with such trustee not to issue any additional stock without the consent of the contractors who were constructing the railroad, but that defendant, without such consent, had issued other stock, whereby the value of that conveyed in trust by plaintiff had been materially diminished, discloses no ground of action. *Poor* v. *European & N. A. R. Co.*, 59 *Me.* 270.

A corporation voted to issue 600 additional shares, and to allow each stockholder to take one new share for every two shares already held by him, provided he should by a certain day subscribe therefor, and pay a part of the price, and give notes for the remainder. *Held*, that there was no implied condition that the whole number of 600 new shares should be issued; and that the failure of the corporation to issue that number was no ground for maintaining an action by a stockholder to recover back money so paid by him, nor for defeating an action on notes so given by him. *Nutter* v. *Lexington & W. C. R. Co.*, 6 *Gray* (*Mass.*) 85.

The holders of original stock in a company created by the laws of two other states sued in New York to set aside an issue of new stock made by the directors, and to restrain the use of the proceeds of the sale of the stock. It appeared that the legislature of one of the states had confirmed the issue, and that the highest court of the other state had decided that the issue was legal and valid. *Held*, that the New York court would not grant relief, especially where it was opposed by a large majority of the stockholders. The powers of the corporation must be tested by the laws of the states where it was created. *O'Brien* v. *Chicago, R. I. & P. R. Co.*, 53 *Barb.* (*N Y.*) 568, 4 *Abb. Pr. N. S.* 381, 36 *How. Pr.* 24.

29. Stock dividends.*—Stock dividends are profits of the corporation added to the stock of each corporator or stockholder, and when actually made are within the meaning of the Pennsylvania statute imposing a tax on dividends. *Com.* v. *Cleveland, P. & A. R. Co.*, 29 *Pa. St.* 370. *Citizens' Pass. R. Co.* v. *Philadelphia*, 49 *Pa. St.* 251. *Com.* v. *Pittsburgh, Ft. W. & C. R. Co.*, 74 *Pa. St.* 83.

Under ordinary circumstances, where a company has earned dividends, and desires to retain the money, either for making improvements on its road or for the payment of debts, it is no violation of law to retain it and in lieu thereof to issue to the stockholders a corresponding amount of stock. *Howell* v. *Chicago & N. W. R. Co.*, 51 *Barb.* (*N. Y.*) 378.

The election to do either rests with the board of directors, and if the company has the power to increase its capital stock, for any purpose, either mode of making the

* Stock dividends, see note, 22 AM. & ENG. R. CAS. 48.

increase is lawful, and is no ground for an injunction. *Howell* v. *Chicago & N. W. R. Co.*, 51 *Barb.* (*N. Y.*) 378.

Where a corporation has the power to increase its capital, it is immaterial whether such increase is made by awarding the stock to stockholders as dividends, in lieu of money, retaining the money for the purposes of the company, or in paying to the stockholders the dividends in cash from the earnings of the company and selling the stock in the market, to raise money for the use of the corporation. *Howell* v. *Chicago & N. W. R. Co.*, 51 *Barb.* (*N. Y.*) 378.

30. Reduction of capital stock.—It seems that the reduction of the capital stock of a corporation by proceedings under N. Y. Act of 1878, ch. 264, does not authorize the distribution among the stockholders of a sum equal to the difference between the original and the reduced amount of capital; and such a distribution is unlawful even where the original capital was actually paid in, unless it appears that it is unimpaired. Where, however, the corporation has on hand actual capital available for the payment of debts, exceeding the amount to which it has reduced its stock, the excess may be distributed. *Strong* v. *Brooklyn Cross-Town R. Co.*, 93 *N. Y.* 426.—FOLLOWING Seeley *v.* New York Nat. Exch. Bank, 8 Daly 400, 78 N. Y. 608.

The provision of 1 N. Y. Rev. St. 602, § 2, prohibiting a corporation from depleting its capital stock by payments to stockholders, does not apply, as the actual capital in excess of the reduced amount ceases to be capital stock. *Strong* v. *Brooklyn Cross-Town R. Co.*, 93 *N. Y.* 426.

IV. TRANSFERS.

1. *Right to transfer. Validity.*

31. Who may make a valid transfer.*—A transfer by a person who, at the time, holds no shares on the books of the company, passes no title to any shares of stock in the company; nor does it convey any title to stock subsequently acquired, and it cannot be made good by a transfer to the person making the same of stock subsequently acquired. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534; *modified and affirmed in* 34 *N. Y.* 30.

If one subscribes without authority, for and in name of another, to capital stock, he thereby binds himself and becomes an equitable owner of the stock. A transfer thereof from the person in whose name the subscription is made is not necessary; it is sufficient if the stock be carried to the account of the subscriber on the stock ledger of the company. *State ex rel.* v. *Smith*, 48 *Vt.* 266, 16 *Am. Ry. Rep.* 394.—QUOTING City Bank of Columbus *v.* Bruce, 17 N. Y. 507.

32. Power of executors to transfer.—One of two executors cannot make a valid transfer of railway shares or stock registered in the names of both, under and subject to the provisions of the Companies Clauses Act, 1845. *Barton* v. *North Staffordshire R. Co.*, *L. R.* 38 *Ch. D.* 458.—REVIEWING Taylor *v.* Midland R. Co., 28 Beav. 287.

An executor fraudulently transferred to a bank, to secure a note executed by the testator's son, a certificate of stock standing in the name of the testator. The will contained no limitation upon the executor's power to dispose of the estate. The corporation recorded the transfer and issued a new certificate to the bank. The note not being paid, the stock was sold and a certificate issued to the purchaser. *Held*, that the administrator *de bonis non* could not maintain a bill against the corporation to compel it to issue a new certificate for the benefit of the estate. *Crocker* v. *Old Colony R. Co.*, 137 *Mass.* 417.

Pa. Act of June 16, 1836, § 3 (Pamph. L. 683), does not confer power upon foreign executors to transfer corporate stock in Pennsylvania, unless their authority be derived from one of the provinces in this country at the time the act of 1705 (1 Smith 33) was passed. *Alfonso* v. *Philadelphia & R. R. Co.*, 8 *Phila.* (*Pa.*) 86.

33. Construction of power of attorney to transfer. — Where stock is transferred under a power of attorney attached to a certificate, which power also contains an assignment of the shares and authority to transfer such shares, the power will not authorize the transfer of any share acquired after the date of such power. Such transfer can only operate to transfer stock held by the person named in the certificate and power, at the date of the power; and if such stock was previously transferred by him, no title will pass, under the transfer of

*Transfers of stock in equity, see note, 22 AM. & ENG. R. CAS. 25

the attorney, to any stock subsequently acquired by such person. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534; *see also* 34 *N. Y.* 30.

34. Transfer by holder indebted to company—Lien on shares.—A corporation cannot refuse to register a transfer of stock on the ground that the transferor of the stock is indebted to the corporation, unless it has a lien on the stock at the time of the transfer. A by-law passed two days after the transfer, declaring that no transfers will be made where the transferor is indebted to the company, will not give the company a lien nor the right to refuse to make the transfer. *People ex rel.* v. *Crockett*, 9 *Cal.* 112.

Missouri Act of 1849, granting a charter to the Pac. R. of Missouri, and the act of 1853, authorizing counties to subscribe to the stock thereof, construed; and *held*, that the company had power to pass a by-law forbidding a transfer of stock by holders indebted for a balance on the stock, and that such a by-law was applicable to counties so indebted. *Spurlock* v. *Pacific R. Co.*, 61 *Mo.* 319.

An original subscriber to the capital stock of a railroad company incorporated subject to the provisions of the General Railroad Act of Feb. 19, 1849, is not discharged from liability for the amount remaining unpaid upon such stock by transferring it to another, whether the transfer is made in good faith or not. *Pittsburgh & C. R. Co.* v. *Clarke*, 29 *Pa. St.* 146.

Under the provisos of section 7 of the above act, no valid transfer of stock can be made by a person indebted to the company, without the consent of the board of directors, and then no such transfer will discharge the owner from any liability theretofore incurred. The liability to pay for the amount of stock subscribed is an indebtedness within the meaning of the act, although the instalments have not been called in at the time of the transfer. It is *debitum in præsenti solvendum in futuro. Pittsburgh & C. R. Co.* v. *Clarke*, 29 *Pa. St.* 146.

A transfer of stock by a person so indebted, without the action of the board of directors, is a nullity; and such consent must be evidenced by a recorded resolution of the board, and cannot be proved by parol, unless the written minute has been destroyed or lost. *Pittsburgh & C. R. Co.* v. *Clarke*, 29 *Pa. St.* 146.

All railroad companies incorporated in the state by or under special acts are subject to the regulations of the General Railroad Act of Feb. 19, 1849, except in so far as such regulations are specially altered in the special acts, or are inconsistent therewith. So where a stockholder in a company organized under a special act transfers his shares while indebted to the company, the latter has a lien on the shares, under the general act, for the amount of its claim. *Mt. Holly Paper Co.'s Appeal*, 99 *Pa. St.* 513.

35. Consideration — Validity. — A railroad company, merely organized, but without means or credit, purchased stock of another company, giving its notes therefor with sureties, the stock purchased being held by one of the sureties for indemnity. It failed to pay its notes at maturity, and its stockholders prevented the making of assessments or calls upon themselves to provide a fund for such payment, the stock purchased then being of less value than was supposed when the purchase was made. Thereupon an arrangement was made by the concurrence of the purchasing company and its sureties, some of whom were its directors, whereby an association of men, including said sureties, took, in good faith, a transfer of the stock, paying therefor the notes which had been given for it. *Held*, that the transfer of the stock was not void, and equity would not interfere to set it aside at the instance of stockholders who had paid nothing upon their stock subscriptions. *Hill* v. *Nisbet*, 100 *Ind.* 341.

The construction of a railroad having been undertaken and progressed with, and then suspended from lack of means to carry on the work, and large indebtedness having been incurred, L. agreed to negotiate certain mortgage bonds and to complete the road, upon condition that the president, owner of the greater part of the stock, would transfer to him a specified number of shares thereof, being a majority of the entire stock of the company, and upon the further condition that he should have absolute control and management of the affairs of the company. L. further agreed with the president to negotiate a loan for him individually on his note secured by the pledge of the balance of his stock, and that he should be paid a fair compensation for his services as president of the company, the amount to be agreed upon, and that all

accounts between him and the company, to which he was largely indebted, should be audited. The transfer of the special number of shares was made as agreed. L. advanced to the president a part of the loan. He also negotiated the sale of the bonds, and with the money derived therefrom, and with additional means furnished by himself, the road was completed and fully equipped. L. also tendered to the president the balance of the loan, but he declined it, being engaged in a negotiation to transfer his stock and hand over the control of the company to a rival corporation, in violation of his agreement with L. On learning this, L. had another person elected president. The accounts between the president and the company were not adjusted, as no sufficient *data* were furnished for the purpose. On a bill filed by the administratrix of the president to have his transfer of stock to L. set aside on the ground that it was obtained by fraud and without consideration — *held*, that the agreement by L. was made in good faith and with a purpose to carry out every promise made therein, and his failure to do so was occasioned by no fault properly chargeable to him, and did not invalidate the transaction. *Healey* v. *Loveridge*, 72 *Md.* 220, 19 *Atl. Rep.* 921.

The entire stock of a street railway was held by two brothers. The charter provided that there should be three directors who should be stockholders. In order to qualify their father as a director they transferred to him two shares. He willed them to his daughter, who, after the father's death, acted as director. One of the brothers became dissatisfied, and filed a bill to require the daughter to reassign the shares, claiming that both the father and she held them in trust for the brothers. *Held*, that the transfer to the father was not without consideration, and the prayer of the bill could not be granted. *Kiely* v. *Smyth*, 27 *Grant's Ch.* (*U. C.*) 220.

36. Transfer by way of loan.—Defendant procured a loan of 100 shares of railroad stock, and gave a receipt stating that the stock was to be returned on or before a certain day, or paid for at a specified price. The certificate of stock was transferred, with a memorandum on its back authorizing defendant to transfer the stock on the books of the company, and it clearly appeared that it was the purpose of the loan to enable defendant to put the stock in circulation. *Held*, that it was not necessary that he return the identical certificate, but the contract was fully complied with by restoring a certificate of 100 shares of other stock, where there was no difference in its value. *Barclay* v. *Culver*, 30 *Hun* (*N. Y.*) 1.

37. Revocation of transfer.—Where a stockholder deposits his certificates of stock with trustees, to enable the directors to dispose of it, in winding up the affairs of the company, he remains the legal owner of the stock. The authority to sell is revocable at any time before disposed of, and the stockholder may revoke it so as to retain the right to vote his own stock at corporate elections, especially where the directors have obtained no vested right to the stock. *Woodruff* v. *Dubuque & S. C. R. Co.*, 19 *Abb. N. Cas.* (*N. Y.*) 437, 30 *Fed. Rep.* 91.

It was urged that such transaction created a trust for the corporation itself. Whether it did or did not depends upon whether what is done with the funds is for the corporation. If the stock was held for the depositors individually, one depositor cannot enjoin the trustees from voting stock deposited by another. *Woodruff* v. *Dubuque & S. C. R. Co.*, 19 *Abb. N. Cas.* (*N. Y.*) 437, 30 *Fed. Rep.* 91.

2. *How Effected.*

38. In general.—A blank power of attorney, accompanying certificates of railroad stock, may be filled up according to the agreement of the parties, and will take effect from date, though executed under seal. *Bridgeport Bank* v. *New York & N. H. R. Co.*, 30 *Conn.* 231.

Stock received and transferred on the same day should, in equity, be considered as received before it was transferred, although the numbers of the transfer may be such as to make the transfer by the transferor appear earlier than the transfer to him, unless it is proven that such transfer was made prior to the one by which the stock was assigned to the transferor. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

In the absence of any by-law or other law of a corporation regulating the mode in which its stock shall be transferred, transfers must be made in the manner prescribed by the usages of the company or set forth in the certificates of its stock. *State ex rel.* v. *McIver*, 2 *So. Car.* 25.

Where a company's act requires the conveyance of shares to be by writing duly stamped, and under the hands and seals of both parties, a blank transfer is void. *Hibblewhite* v. *M'Morine*, 6 *M. & W.* 200, 2 *Railw. Cas.* 51.—APPROVING Société Générale de Paris *v.* Walker, L. R. 11 App. Cas. 20, 55 L. J. Q. B. 169, 54 L. T. 389, 34 W. R. 662.

The directors of a company have it in their discretion to permit the transfer of shares without the production of the certificates. *Shropshire Union R. & C. Co.* v. *Queen*, *L. R.* 7 *H. L. Cas.* 496, 23 *W. R.* 709, 32 *L. T.* 283; *reversing L. R.* 8 *Q. B.* 435, 42 *L. J. Q. B.* 193, 21 *W. R.* 953, *which reversed L. R.* 8 *Q. B.* 420.

The charter of a street-railway company provided that the stock "shall be transferable in such way as the directors shall by by-law direct." *Held*, that this did not prevent the transfer of the stock until such a by-law should be passed, but left it as at common law, so that it might be transferred by word of mouth. *Kiely* v. *Smyth*, 27 *Grant's Ch.* (*U. C.*) 220.

39. Negotiability—Transfer by delivery.—While certificates of stock in railroad and other business corporations do not possess in full the qualities of commercial paper, when the transfer indorsed thereon is signed in blank by the shareholder named therein, they become in effect, so far as the public is concerned, the same as if they had been issued to bearer. *Fifth Ave. Bank* v. *Forty-second St. & G. S. F. R. Co.*, 137 *N. Y.* 231, 33 *N. E. Rep.* 378, 50 *N. Y. S. R.* 712; *affirming* 63 *Hun* 629, 44 *N. Y. S. R.* 379, 17 *N. Y. Supp.* 826.

An American railway company, having its sole office in the United States, issued under its seal certificates for its capital shares. Each certificate purported to certify that H. & Co., who were the company's correspondents in England, were entitled to twenty shares in the capital stock of the company, "transferable only in person or by attorney on the books of the said company." Upon the back of each certificate was indorsed a power of transfer under seal; it was in effect an absolute transfer of the shares represented by the certificate, followed by an irrevocable power of attorney "to the use of the above-named assignee, to make and execute all necessary acts of assignment and transfer of the said stock on the books of the said company"; this was signed by H. & Co., the names of the transferee and of the attorney being both left in blank. The object of the power was to enable an English holder to appoint an attorney to act for him in America, where alone a transfer could be registered. It was proved that when thus signed in blank these certificates, by the usage of English bankers and dealers in public securities, were transferred by mere delivery, and were dealt with like bonds payable to bearer. *Held*, that the certificates were intended to pass by transfer only and not by mere delivery, and were not negotiable instruments. *London & C. B. Co.* v. *London & R. P. Bank*, *L. R.* 20 *Q. B. D.* 232.—REVIEWING Crouch *v.* Credit Foncier of England, L. R. 8 Q. B. 374.

40. Assignment by deed with delivery of certificate.—Though the by-laws of a corporation require all transfers of shares to be made in a book to be kept by the treasurer, an assignment of shares by the deed of the vendor, accompanied by a delivery of the certificates to the vendee, is valid, without any transfer on the books of the corporation, not only between the vendor and vendee, but against a creditor of the former who attaches the shares before any notice of the sale has been given to him or to the treasurer of the corporation; but it seems that the vendee could not compel a payment of dividends, or claim a certificate from the corporation, without first applying to have the transfer made according to the by-law. *Sargent* v. *Essex Marine R. Corp.*, 9 *Pick.* (*Mass.*) 202.

Under the provisions of the Companies Clauses Consolidation Act, 1845, a deed of transfer of shares or stock does not pass the legal interest to the transferee until it has been delivered to the secretary of the company. If he returns it because it does not comply with the requirements of the act it is to be considered as not delivered to him. *Nanney* v. *Morgan*, *L. R.* 37 *Ch. D.* 346; *affirming L. R.* 35 *Ch. D.* 598.

41. Necessity of transfer on books of company.—Shares of bank stock are only assignable on the books of the company. *Union Bank* v. *Laird*, 2 *Wheat.* (*U. S.*) 390.—DISTINGUISHED IN Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238.

Certificates of stock in a railway company, unlike negotiable paper, can only be assigned by an act of the company, or in pursuance of a by-law. *Hall* v. *Rose Hill & E. Road Co.*, 70 *Ill.* 673.

The members of an association organized to construct a street railway having become entitled, by act of incorporation, to stock in the corporation, assignees of the shares of one of the original associates sued the corporation for its refusal to issue certificates of stock to them in lieu of other shares. *Held*, that the transfer from the assignor, although not made on the books of the association, passed his title and interest in the shares. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.—DISTINGUISHING Fisher *v.* Essex Bank, 5 Gray (Mass.) 378; Blanchard *v.* Dedham Gas Light Co., 12 Gray 215; Union Bank *v.* Laird, 2 Wheat. (U. S.) 390; Pinkerton *v.* Manchester & L. R. Co., 42 N. H. 427.

A corporate by-law prohibiting the transfer of stock except by a formal entry on its books will not, in the absence of a constitutional or statutory prohibition, render invalid a conveyance by a transfer of the stock certificate. Such transfer is good against an execution creditor of the stockholder who had no notice of the transfer when the execution was levied, but was notified thereof before he purchased the stock at a sale under the execution. *Wilson* v. *St. Louis & S. F. R. Co.*, 108 *Mo.* 588, 18 *S. W. Rep.* 286.

Where the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser receiving a certificate with power of attorney, etc., gets the entire interest of the seller, with all his rights. Such purchaser, neglecting to have the transfer made on the books of the corporation until after such stock is transferred to a *bona fide* holder without notice, loses his right to demand and have the transfer thereof made to him. But the corporation would be liable to the holder of such certificate for permitting the stock to which he was entitled to be transferred to another, etc., because it had constructive notice of these outstanding certificates. *New York & N. H. R. Co.* v. *Schuyler*, 34 *N. Y.* 30; *modifying* 38 *Barb.* 5[illegible].—FOLLOWING Bissell *v.* Michigan S. & N. I. R. Co., 22 N. Y. 258. QUOTING Bridgeport Bank *v.* New York & N. H. R. Co., 30 Conn. 270. REVIEWING Pollock *v.* National Bank, 7 N. Y. 274.

42. Powers and duties of transfer agent.—If the purchaser of stock of a railway company applies to procure a transfer of the same to him, and the directors order the transfer to him, and new certificates to be issued to him, he will become an innocent holder, if he acts in good faith; and the company will be estopped to deny that the stock thus issued is valid. But if the secretary of a railway company issues new certificates of stock to one claiming to have purchased shares therein, without taking up or canceling the original, the new certificates will be invalid. *Hall* v. *Rose Hill & E. Road Co.*, 70 *Ill.* 673.

The transfer agent of a foreign corporation, provided for by N. Y. Act of 1842, ch. 165, has no right to inquire whether the transfer of stock to the relator was merely colorable, or whether a consideration was paid therefor, or as to the occasion of the transfer. *People ex rel.* v. *Paton*, 5 *N. Y. S. R.* 316, 20 *Abb. N. Cas.* 172.

A corporation is the trustee of its stockholders, and is bound to proper vigilance that they be not injured by unauthorized transfers of stock. Thus, where the signatures to powers of attorney for transfer were genuine, but at the time of the transfer were thirteen years old—*held*, that the corporation was put on inquiry, and was bound first to ascertain if the powers had been revoked. *Pennsylvania R. Co.'s Appeal*, 86 *Pa. St.* 80.

3. *Transfer by Way of Pledge.*

43. Whether pledge or mortgage.—Where a stockholder of an incorporated company borrows money, and as security causes his shares to be transferred to the lender on the books of the company (R. C. §§ 1783-88), the transaction is a pledge, and not a mortgage, and the lender has no right to sell or transfer the shares to another without demanding payment of the debtor or giving him notice of the intention to sell; nor can the lender sell at private sale for less than the market value of the shares. *Nabring* v. *Bank of Mobile*, 58 *Ala.* 204.

Plaintiff transferred to defendants, on the books of the corporation, fifty shares of stock in a railroad company. The transfer was absolute in its terms. At the same time plaintiff gave defendants his note for $2000 borrowed money, and in the note it was stated that the stock was deposited as collateral security. *Held*, that the transaction was a pledge, and not a mortgage, of the stock. *Wilson* v. *Little*, 2 *N. Y.* 443.

44. Rights of pledgee, generally.—Where stock is pledged for the "redemp-

tion of certificates of debt," and the certificates bind the debtor for the payment of "the sum therein mentioned and interest thereon," the stock is bound for the payment of the interest itself, and a foreclosure may be decreed on default in payment of any instalment of interest. *Swasey* v. *North Carolina R. Co.*, 1 *Hughes* (*U. S.*) 17.

A father, owning certain shares of stock, transferred them to his son to enable him to become a director in the company. It appeared that the transfer was but a loan. A new certificate of stock was issued to the son, who soon afterward delivered the certificate to his father, with a blank transfer on the back thereof; the shares were attached and sold as the property of the son. *Held*, that the father became a *bona fide* purchaser or pledgee for value, and that the transfer to him on the back of the certificate, signed in blank, constituted a power of attorney within the meaning of Mass. St. 1884, ch. 229. *Andrews* v. *Worcester, N. & R. R. Co.*, 159 *Mass.* 64, 33 *N. E. Rep.* 1109.

Where stock is transferred under a power of attorney attached to a certificate, which power also contains an assignment of the shares and authority to transfer such shares, the power will not authorize the transfer of any share acquired after the date of the power. Such transfer can only operate to transfer stock held by the person named in the certificate and power, at the date of the power; and if such stock was previously transferred by him, no title will pass, under the transfer of the attorney, to any stock subsequently acquired by such person. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

In the case of a certificate and power of attorney held by the party to whom it has been pledged, without making a transfer on the books of the company, the same rule should be applied. Such certificate and power will give to the holder an equitable title to any valid stock held by the person named therein, at the date of the power, if he continues to hold such stock; but if all the stock held by the party at the date thereof has been sold by him, then the certificate has ceased to be of any value, and should be canceled. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

45. Rights of pledgee of fraudulently issued stock.—If upon the faith of a regularly issued stock certificate, a purchaser or pledgee of stock, which in fact has been fraudulently and collusively issued by officers of the corporation, advances money or parts with anything of value, the corporation is bound by way of estoppel to indemnify him, to the extent of his expenditure, against loss in consequence of the falsity of the certificate. *Kisterbock's Appeal*, 127 *Pa. St.* 601, 18 *Atl. Rep.* 381.

A holder of such certificate who has received it as collateral security for a pre-existing debt from the person in whose name it was fraudulently issued, being uninjured by the falsity of the statements which it contains, has no claim upon it which he can enforce against the corporation. *Kisterbock's Appeal*, 127 *Pa. St.* 601, 18 *Atl. Rep.* 381.

Such a certificate is worthless, as a certificate, and gives no rights of its own force. A transfer thereof passes to the transferee no right or claim to shares of stock. The only right which can exist upon it, as against the corporation, is created by the act of parting with a valuable consideration in reliance upon its statements. *Kisterbock's Appeal*, 127 *Pa. St.* 601, 18 *Atl. Rep.* 381.

When such a certificate is given in pledge, the thing pledged is not shares of stock, but merely a right to call upon the corporation for indemnity against any loss suffered in consequence of reliance upon its representation that the person therein named is the owner of the shares therein mentioned. *Kisterbock's Appeal*, 127 *Pa. St.* 601, 18 *Atl. Rep.* 381.

If a fraudulent certificate is pledged by one who has no claim to indemnity thereon, and the pledgee receives, in settlement of his claim to be indemnified for his advances made on the pledge, genuine shares of stock, surrendering the spurious shares so pledged, such genuine shares do not become a substituted pledge in his hands, but are his absolutely. *Kisterbock's Appeal*, 127 *Pa. St.* 601, 18 *Atl. Rep.* 381.

Wherefore, a pledgor of such certificate, who has himself no claim to be indemnified thereon, is not entitled to recover from his pledgee, who advanced money to him on faith of it, any part of what the latter may have received from the corporation upon his claim for indemnity, although such claim may have been paid in genuine shares which afterwards increased in value to an amount

exceeding the debt of the pledgor to the pledgee. *Kisterbock's Appeal*, 127 *Pa. St.* 601, 18 *Atl. Rep.* 381.

46. Pledge by trustees — Duty of pledgee to make inquiry. — A mortgagee of stock cannot enforce his claim in opposition to the *cestui que trust* of railway shares, although the legal title stood in the name of the person pretending to mortgage them. *Shropshire Union R. & C. Co.* v. *Queen*, *L. R.* 7 *H. L. Cas.* 496, 23 *W. R.* 709, 32 *L. T.* 283; *reversing L. R.* 8 *Q. B.* 435, 42 *L. J. Q. B.* 193, 21 *W. R.* 953, *which reversed L. R.* 8 *Q. B.* 420.

Where shares stand in the name of a trustee, one who accepts such shares as pledgee is bound to make proper inquiries to discover the trust, and if he fails to do so, he cannot hold the shares against the equitable owner. *Shropshire Union R. & C. Co.* v. *Queen*, *L. R.* 7 *H. L. Cas.* 496, 23 *W. R.* 709, 32 *L. T.* 283; *reversing L. R.* 8 *Q. B.* 435, 42 *L. J. Q. B.* 193, 21 *W. R.* 953, *which reversed L. R.* 8 *Q. B.* 420.

47. Identical certificates need not be returned to pledgor.—The pledgee of stocks, in the absence of a specific agreement to the contrary, is entitled to transfer the stock into his own name. When so transferred the particular shares become indistinguishable from the great mass of other stock, and the pledgor has no right to demand the return of any particular certificates. It is enough if the pledgee have at all times shares sufficient in number to answer the pledgor's demand upon repayment of the loan. *Hubbell* v. *Drexel*, 15 *Phila.* (*Pa.*) 478.

48. Sale of pledge on default of payment.—The right to sell stock held as collateral security follows the pledge, unless restricted by positive stipulation; and such right may be exercised after the debt is due, upon a demand for payment and notice of the time and place of sale at public auction, which in New York city may be at the Merchants' Exchange. Any other mode of sale must rest upon express agreement. *Brown* v. *Ward*, 9 *How. Pr.* (*N. Y.*) 497.

49. Pledgor's remedy for conversion by pledgee. — Although a stockholder, whose shares have been duly transferred on the books of the company, as security for a debt, may not have such legal title as will enable him to maintain trover against the pledgee for unauthorized sale, he may maintain a special action on the case; and a count in case may be added to the complaint in trover by amendment. *Nabring* v. *Bank of Mobile*, 58 *Ala.* 204.

4. *Sales of Stock*

50. The contract—Power to sell.* — The indorsement on the back of an agreement for the sale and surrender of stock to a railway company on a certain contingency, by the contractor to build the road, giving his assent thereto, upon certain conditions, and agreeing to take the stock in case of its surrender, does not make him a purchaser, or affect in any degree the sale to the company; and the terms of his consent will not bind the party agreeing to sell, he being no party to the contract. *Chicago, P. & S. W. R. Co.* v. *Marseilles*, 84 *Ill.* 145, 16 *Am. Ry. Rep.* 442.

A company intending to apply to the legislature for the right to construct its road on a shorter line than that authorized by its charter may make a valid contract for the sale of its stock, conditioned upon the change being made, before the authority is obtained from the legislature. *Portage County Sup'rs* v. *Wisconsin C. R. Co.*, 121 *Mass.* 460.

51. Validity — False representations.—Statements of the president of a railroad corporation, to induce a person to purchase stock in the corporation, that the corporation was able to lay its track and provide rolling stock and pay all bills contracted, and that its stock was not for sale, and could not be bought anywhere but of him, are statements which a jury would be warranted in finding to be representations of fact, and not expressions of opinion. *Teague* v. *Irwin*, 127 *Mass.* 217.

Under Hill's Oreg. Code, § 3230, all sales of stock in a corporation subject the purchaser to the payment of any unpaid balance due on said stock. A debtor to the company conveyed his stock to a trustee, to sell the same to any person who would pay his indebtedness to the corporation therefor. *Held*, that this was no sale, and the trustee was not such purchaser as would incur a liability under said statute. *Powell* v. *Willamette Valley R. Co.*, 15 *Oreg.* 393, 15 *Pac. Rep.* 663.

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* Right of one corporation to acquire or deal in stock of another otherwise than by subscription, see notes, 36 AM. ST. REP. 136; 7 L. R. A. 605; 9 *Id.* 650.

If a sale of stock by a railroad corporation is otherwise valid, it is not vitiated by the fact that the motive of some of the directors and of the purchaser was to enable the latter to vote upon the stock in a certain manner at an approaching election of directors. *State ex rel.* v. *Smith*, 48 *Vt.* 266, 16 *Am. Ry. Rep.* 394.

52. Sale at less than price fixed in charter. — Where a charter divides the company's stock into shares of fifty dollars each, it is intended thereby to fix that as its selling price, and an arrangement by which it is sold at a less price is a fraud upon the law and the stockholders. *Sturges* v. *Stetson*, 1 *Biss.* (*U. S.*) 246.

In such case a provision in the charter giving the directors power to sell the property of the company, or any notes or bonds belonging to it, does not apply to sales of capital stock, so as to authorize it to be sold at less than its par value; neither does a provision empowering them to fix the time and terms of payment of subscriptions to stock give them such power. *Sturges* v. *Stetson*, 1 *Biss.* (*U. S.*) 246.

In such case it was urged that there was nothing in the charter which prohibited the directors from selling stock at less than its par value. *Held*, that no such provision was necessary. Their authority was derived exclusively from the charter, and it was not necessary to prohibit them from doing that which the charter did not authorize them to do. *Sturges* v. *Stetson*, 1 *Biss.* (*U. S.*) 246.

Although to an innocent holder the company would be liable for stock thus issued, these facts constitute a good defense to an action upon an executory contract for the purchase of such stock. *Sturges* v. *Stetson*, 1 *Biss.* (*U. S.*) 246.

53. Sale for less than face value.— There is nothing in the Colorado statutes, under which defendant corporation was created, to forbid the sale of stock at less than par; and where such sale is not prohibited, it is valid as between the corporation and the purchaser of stock. *Harrison* v *Arkansas Valley R. Co.*, 4 *McCrary* (*U. S.*) 264, 13 *Fed. Rep.* 522.

N. H. Gen. St. ch. 134, § 8, prohibiting a corporation from selling or disposing of its capital stock at less than par, except at auction for non-payment of assessments, does not apply to the holder of stock which the corporation has pledged or mortgaged. *Peterborough R. Co.* v. *Nashua & L. R. Co.*, 59 *N. H.* 385.

54. Construction of contracts of sale.—The owner of railroad stock executed and delivered a paper stating: "I hold of the stock of the W. & H. railway company $33,250 or 1350 shares, which is sold to B. and which, though standing in my name, belongs to him, subject to a payment of $8000." *Held*, to be an executed contract, passing the stock to the purchaser at once, but reserving title as security for the $8000. *Beardsley* v. *Beardsley*, 138 *U. S.* 262, 11 *Sup. Ct. Rep.* 318.

Where an agreement is entered into to pay a certain part of a construction contract in the stock of the company, without any price per share, or otherwise, being named, it is an agreement to pay the amount according to the market price of the stock; but if the stock depreciates, so that it has no money value, before the contract is performed, the amount agreed to be paid in stock becomes payable in money. *Hart* v. *Lauman*, 29 *Barb.* (*N. Y.*) 410.—DISTINGUISHING Moore *v.* Hudson River R. Co., 12 Barb. 156.

55. When title passes.—The title of the purchaser of stock in a company is complete against everybody but the corporation, when the seller has given, on the scrip, authority to the proper officer to transfer upon the books and the purchaser has paid the price; and the presumption is at least *prima facie* that the price is paid when the authority to transfer is given and the possession of the scrip is delivered. *Ross* v. *Southwestern R. Co.*, 53 *Ga.* 514.

56. Warranties. — The transferor of stock, without representation or specification as to the particular property held by the corporation, warrants only his title to the stock, and not the title of the corporation to the property held by it. *State* v. *North La. & T. R. Co.*, 34 *La. Ann.* 947.

In absence of fraudulent concealment or misrepresentation, failure of title of the corporation to its property furnishes no ground for action of nullity of transfers of stock, based on error or breach of warranty. *State* v. *North La. & T. R. Co.*, 34 *La. Ann.* 947.

57. Right to interest as between buyer and seller.*—When a stockholder assigns and transfers his stock after two

* Transfer of stock; right to dividends, see note, 4 AM. & ENG. R. CAS. 292.

years' interest has accrued thereon, the company is bound to pay said two years' interest to him, and not to the transferee. *Ohio* v. *Cleveland & T. R. Co.*, 6 *Ohio St.* 489.

58. Seller's remedy for buyer's refusal to complete purchase.—On an agreement for the sale and purchase of stock and a refusal by the purchaser to take the stock, the measure of damages is ordinarily the difference between the par value of the stock and its market value, or between it and money. *Thrasher* v. *Pike County R. Co.*, 25 *Ill.* 393.

Where suit is brought on an executory contract for the purchase of a certain number of shares in a corporation chartered in a foreign country, it is competent for the defendant to show that at the time of making the contract the charter of the company, and all its privileges, had been revoked and annulled by the government of such foreign country, without the knowledge of defendant at the time the contract was made. *Kipp* v. *Munroe*, 18 *How. Pr.* (*N. Y.*) 383.

59. Buyer's remedy for seller's failure to deliver.—Where a construction contract is to be paid in the stock of the company, but the contract fixes no place of payment, and no tender of stock has been made, the contractor may recover the value of the stock without a demand. *Boody* v. *Rutland & B. R. Co.*, 3 *Blatchf.* (*U. S.*) 25.

Where there is no trust relation between the parties, and no obligation to deliver specific stock, the measure of damages for a failure to deliver stock is the market value of the stock on the day it should have been delivered, with interest thereon to the time of the trial. *Huntingdon & B. T. R. & C. Co.* v. *English*, 86 *Pa. St.* 247.—LIMITING Montgomery Bank *v.* Reese, 26 Pa. St. 143.

60. Specific performance.—A vendor of railroad stock, upon receiving a note for the stock sold, executed a receipt reciting that "said note is given me for the purchase of 379½ shares of stock now held by me and to be delivered, upon payment of his note, to said D." *Held*, that the contract was a conditional sale; that the only equitable remedy was relief from the condition, or specific performance, and when the purchaser failed to pay for several years, during which time the stock had greatly increased in value, specific performance should be refused. *Davison* v. *Davis*, 125 *U. S.* 90, 8 *Sup. Ct. Rep.* 825.

5. *Compelling Transfer on Books. Mandamus.*

61. In general—Surrender of certificate.—A legal by-law of a corporation which provides that no shares of its stock shall be transferred on its books until the certificate thereof has been surrendered to its president, or shown to be lost, is binding on all its stockholders and their heirs. Before the heirs of a deceased stockholder can compel the corporation to transfer shares or pay accrued dividends to them, they must comply with the requirements of the by-laws. *State ex rel* v. *New Orleans & C. R. Co.*, 30 *La. Ann.* 308.

The holder of stock certificates, either for value paid or for collateral security, has the equitable title to the stock, and on surrendering the same to the corporation in which the stock is held, may compel the company to issue new certificates to him, in his own name. *Haldeman* v. *Hillsborough & C. R. Co.*, 2 *Handy* (*Ohio*) 101.

62. Right of officers to withhold consent to transfer.—Parties seeking a transfer of the stock of a corporation must comply with the rules of the corporation relative to such transfers, but where that is done the officers of the company have no right to withhold their assent because, in their judgment, the motives and purposes of the parties are improper, or because the transfer may affect injuriously the interests of the company itself, or those of some other company. *State ex rel.* v. *McIver*, 2 *So. Car.* 25.

A mere notice to the officers of the company, from parties having a beneficial interest in the stock sought to be transferred, that the right of the party having the legal title to make the transfer is questioned and will be contested, will not justify the officers in a persistent refusal to make the transfer after a reasonable and sufficient time has elapsed to enable the parties giving the notice to institute legal proceedings to contest the right to make such transfer. *State ex rel.* v. *McIver*, 2 *So. Car.* 25.

One to whom railway shares have been conveyed in trust to pay the dividends to the grantor for life, and after his death upon a trust in favor of the grantor's niece, is not entitled to have his name entered on the register as a shareholder as a person "entitled under the transmission" referred to in 8 & 9 Vict. c. 16, § 18, upon such trans-

mission being authenticated by a declaration in writing as therein mentioned. *Copeland* v. *North Eastern R. Co.*, 6 *El. & Bl.* 277, 2 *Jur. N. S.* 1162.

The above statute applies only to shares on which a call can be made, and the company is bound to register a transfer of paid-up preference shares, although calls on the original shares, in respect of which the preference shares were allotted, are unpaid. *Hubbersty* v. *Manchester, S. & L. R. Co.*, 7 *B. & S.* 54, *L. R.* 2 *Q. B.* 59, 36 *L. J. Q. B.* 33, 15 *W. R.* 254; *affirmed in* 8 *B. & S.* 420, 36 *L. J. Q. B.* 198, *L. R.* 2 *Q. B.* 471, 16 *L. T.* 425, 15 *W. R.* 793.

A company incorporated under 27 & 28 Vict. c. 23, has not power to refuse to allow a transfer of shares of its stock without assigning a sufficient reason therefor. *Smith* v. *Canada Car Co.*, 6 *Ont. Pr.* 107.—REVIEWING In re Guillot, 26 U. C. Q. B. 246.

63. When a mandamus should be granted.—Mandamus will issue to compel a transfer of stock by a corporation claiming that it belongs in part to a party adjudged by a foreign court to have no interest therein. The La. court will not go behind the judgment to test its correctness. *State ex rel.* v. *Orleans R. Co.*, 38 *La. Ann.* 312.

A company chartered by the state is so far a public corporation that its officers owe duties to the public which they may be compelled by writ of mandamus to perform; among which are their duties relative to the capital stock of the company, and their control of the transfer thereof. *State ex rel.* v. *McIver*, 2 *So. Car.* 25.

Where the stock sought to be transferred is owned by a corporation, whose directors, being vested with the necessary power to that end, authorize the president to sell it, a contract of sale by him shows a sufficient legal and equitable title in the purchaser to entitle him to the writ of mandamus to compel the officers to transfer the stock to him. *State ex rel.* v. *McIver*, 2 *So. Car.* 25.

It is no ground of objection to the issuing of a writ of mandamus to compel the transfer of stock that the purchasers have joined with the sellers in the application for the writ. *State ex rel.* v. *McIver*, 2 *So. Car.* 25.

Though it be true that mandamus will not lie unless the duty to be performed is one in which the public have an interest, and not even then, where the party demanding the writ has another plain and adequate remedy, yet the duty of officers of a railroad corporation to permit the transfer of its stock is one in which the public has a sufficient interest to warrant the court in issuing the writ to compel its performance, and the remedy by action against the officers of the corporation to recover damages for their refusal to permit the transfer is too doubtful and uncertain in its character to supersede the specific and speedier remedy by mandamus. *State ex rel.* v. *McIver*, 2 *So. Car.* 25.

An act of the legislature authorized a county to issue bonds in payment of a "subscription for preferred stock" in a railroad. *Held*, that a demand upon the company "for certificates of preferred stock" was sufficiently definite to warrant a subsequent proceeding by mandamus to compel the company to issue the certificates, though the demand did not specify the precise character of the certificates. *State ex rel.* v. *Cheraw & C. R. Co.*, 9 *Am. & Eng. R. Cas.* 631, 16 *So. Car.* 524.

Mandamus lies to compel a railway company to register in the name of a married woman shares of stock to which she is entitled for her separate use. *Queen* v. *Carnatic R. Co.*, 42 *L. J. Q. B.* 169, *L. R.* 8 *Q. B.* 299, 21 *W. R.* 621, 28 *L. T.* 413.

Where the real owner of stock, by allowing a third person to hold the certificates which are registered in his name, enables him to hold himself out as the proprietor of the stock, an innocent purchaser without notice of the trust is entitled to a mandamus commanding the company to enter his name on the register. *Queen* v. *Shropshire Union R. & C. Co.*, 42 *L. J. Q. B.* 193, *L. R.* 8 *B.* 420, 27 *L. T.* 412, 21 *W. R.* 953.

A demand for the transfer of stock upon the secretary and treasurer of a company, and a notice of facts served upon him in the name of the company are sufficient, the court being of opinion that service and demand upon the president are not indispensable. Several demands to transfer the stock having been made, and delays and evasive answers given without in direct terms refusing, the court is of the opinion that a sufficient refusal has been shown to justify a mandamus to compel the transfer. *Goodwin* v. *Ottawa & P. R. Co.*, 13 *U. C. C. P.* 254.

64. When a mandamus will be refused.—One who is not proceeding *bona fide* for the purpose of enforcing his rights as a shareholder is not entitled to a writ of mandamus to compel the secretary of the

company to register a transfer of certain shares to him. *Reg.* v. *Liverpool, M. & N.-upon-T. R. Co.*, 16 *Jur.* 949, 21 *L. J. Q. B.* 284.

Where a railway company has issued certificates of shares to a person who has not been registered as the holder thereof, mandamus will not lie to compel it to register as a holder of such shares a person to whom it subsequently issued certificates in respect thereto, without clear proof that the person to whom the certificates were last issued has the better title. *Reg.* v. *Charnwood Forest R. Co.*, 1 *C. & E.* 419.

Where the circumstances under which a person becomes the purchaser of railway shares show that he is not proceeding *bona fide* for the purpose of enforcing the rights of a shareholder, he is not entitled to a mandamus to compel the register of such transfer in the manner provided by 8 & 9 Vict. c. 16, § 15. *Reg.* v. *Liverpool, M. & N.-upon-T. R. Co.*, 21 *L. J. Q. B.* 284, 16 *Jur.* 949.

A shareholder made a real and absolute transfer of his shares for a nominal consideration to an insolvent person in order to avoid liability for future calls. The company refused to register the transfer. A rule *nisi* for a prerogative writ of mandamus to compel the company to register the transfer was granted. *Held*, that inasmuch as the prosecutor had another specific and sufficient remedy, viz., by action of mandamus, the prerogative writ ought not to issue, and the rule must be discharged. *Queen* v. *Lambourn Valley R. Co.*, *L. R.* 22 *Q. B. D.* 463.

A purchaser of shares of stock, at a sale for non-payment of an assessment thereon, is not entitled to a writ of mandamus to the officers of the corporation to compel a transfer to be made on its books and a certificate issued to him. His remedy is at law for damages. *Stackpole* v. *Seymour*, 127 *Mass.* 104.

A mandamus to compel a transfer of stock will not be granted where there has been no demand and refusal to make the transfer; but where the rules of the company require that certificates of stock shall be transferred "in person or by attorney at the office" of the company, and it appears that a demand has been made by letter, and that the officers of the company peremptorily refused to permit the transfer to be made, it is not necessary to show that the useless ceremony of appearing at the office and there demanding the transfer has been observed. *State ex rel.* v. *Mc Iver*, 2 *So. Car.* 25.

6. Action for Refusal to Transfer.

65. When an action will lie.—An action will lie against a corporation for wrongfully refusing to issue certificates of stock to a party entitled thereto. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.

By an act of incorporation, the members of an association organized to construct a street railway having become entitled to stock in the corporation, assignees of the shares of one of the original associates sued the corporation for its refusal to issue certificates of stock to him in lieu of their shares. *Held*, that the right of an associate or his assignee to sue for such refusal does not differ in principle from that of an ordinary assignee of stock. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.

A corporation had different transfer books for different classes of its stock, and stock-brokers attached different values to the several classes, and a subscriber for stock, when he subscribed, was told by the officers of the corporation that his stock would be transferable on a particular class of books, which was afterwards refused. *Held*, that this was not a fraud which would avoid the contract, but that the remedy of the stockholder was by an action for damages. *Lohman* v. *New York & E. R. Co.*, 2 *Sandf.* (*N. Y.*) 39.

Permitting its books to be used for the purpose of committing frauds on others who are desirous of purchasing stock; issuing to such persons certificates of stock; and informing buyers who apply for information in regard to stock, before they pay for it, that stock has been transferred on the books when it has not, are acts for which a corporation should be held responsible. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

66. When an action will not lie.—By charter the capital stock of a corporation was limited to $3,000,000 and divided into shares of $100 each, transferable in such manner as the company should direct. The entire stock was taken, and certificates issued therefor; and the by-laws of the company prescribed that transfers of stock should be made on the transfer books of the company, and required the certificate of ownership to be surrendered prior to the making of such transfer and the issue of a

new certificate. The company established a transfer agency, and appointed its president transfer agent, who was authorized and accustomed, on the transfer of stock on the books in his charge and the surrender of the certificate therefor, to execute and deliver to the transferee the usual certificate, stating that he was entitled to the number of shares of stock specified therein, transferable on the books of the company by him or his attorney on the surrender of the certificate. The agent fraudulently gave to one Kyle a certificate, in the usual form, for eighty-five shares, when, in fact, the latter owned no stock, none stood on the books in his name, and no certificate for such stock had been surrendered. Plaintiffs, in good faith, and relying upon the certificate, made a loan to Kyle, receiving from him the certificate, with an assignment of the stock and a power of attorney to transfer the same. In an action by plaintiffs against the corporation for refusing to permit the stock represented by the certificate to be transferred on its books, or to pay its value—*held*, (1) that the certificate was void, and that plaintiffs did not thereby acquire a right, legal or equitable, to any stock; (2) that the corporation was not responsible to plaintiffs for damages sustained by dealing upon the faith of the certificate. *Mechanics' Bank* v. *New York & N. H. R. Co.*, 13 *N. Y.* 599; *reversing* 4 *Duer* 480. — DISTINGUISHING Kortright *v.* Buffalo Commercial Bank, 20 Wend. (N. Y.) 91, 22 Wend. 348; Bank of Ky. *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. —FOLLOWED IN Woodruff *v.* New York & N. H. R. Co., 18 How. Pr. (N. Y.) 419. QUOTED IN New York & N. H. R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534; Beaver County *v.* Armstrong, 44 Pa. St. 63.

Plaintiff bank was the equitable owner of certain shares of the capital stock of defendant railroad company, but the certificates representing the shares were held by a third person, who claimed to be the absolute owner. The books of the company showed that such certificates were in the name of such third person. Plaintiff, without returning the certificates, made demand of defendant for the transfer and delivery to it of the stock. *Held*, that upon defendant's refusal to make such transfer, plaintiff was not entitled to a judgment for the value of the stock. *New London Nat. Bank* v. *Lake Shore & M. S. R. Co.*, 21 *Ohio St.* 221.

67. Who may sue.—By an act of incorporation, the members of an association organized to construct a street railway having become entitled to stock in the corporation, assignees of the shares of one of the original associates sued the corporation for its refusal to issue certificates of stock to him in lieu of their shares. *Held*, that the assignees could sue in their own names. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.

68. Pleading.—By an act of incorporation, the members of an association organized to construct a street railway having become entitled to stock in the corporation, assignees of the shares of one of the original associates sued the corporation for its refusal to issue certificates of stock to him in lieu of their shares. *Held*, that where the declaration avers an assignment under seal, accompanied by a delivery of the certificates of stock, the court will, on motion in arrest of judgment, presume that the assignment was made for a *bona fide* consideration, and that the jury so found. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.

In an action to recover the interest on shares of stock, the complaint must directly allege that the shares were of some value. *Burrall* v. *Bushwick R. Co.*, 75 *N. Y.* 211.

Plaintiff sued to compel an issue and delivery of a certificate of certain shares of stock in defendant company. He set out in his complaint that the company issued a certain certificate that a third party was entitled to a certain number of shares in the stock of the company "upon a surrender of this certificate at the company's office, $1000," which certificate was transferred and came to plaintiff, who was the lawful owner, and that the company had refused to deliver said stock, and prayed a delivery of the stock, or judgment for $1000, with interest. *Held*, on demurrer, that the complaint did not state a cause of action for $1000 with interest, in the absence of any averment that the shares had any value, or that the company was bound to pay interest; that a judgment for the delivery of the stock could not be had, because the complaint asked for a delivery of shares and not a certificate; and if it be understood as demanding a certificate of shares, there was nothing to show that the company unjustly refused. *Burrall* v. *Bushwick R. Co.*, 75 *N. Y.* 211.

69. Matters of defense.—It is no defense to an action against a corporation for

damages for refusing to transfer stock, that plaintiff acquired the same from a prior holder by an illegal gambling contract, when there is nothing to show that the prior holder ever repudiated the contract, or made any claim on the company for the stock. *Miller* v. *Houston City St. R. Co.*, 55 *Fed. Rep.* 366.

Neither is it a defense to such an action that the certificates of stock are held by plaintiff as collateral security for a debt which is barred by the statute of limitations. Stock so held is a pledge, and the right to plead the statute is a privilege purely personal to the debtor. *Miller* v. *Houston City St. R. Co.*, 55 *Fed. Rep.* 366.

By act of incorporation, the members of an association organized to construct a street railway having become entitled to stock in the corporation, assignees of the shares of one of the original associates sued the corporation for its refusal to issue certificates of stock to him in lieu of their shares. *Held*, that a failure to ascertain the interest of the associate or his transferee at the time of the acceptance of the charter could not affect the right of either to the stock of the company in lieu of their shares. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.

In such case defenses based on the ground of issuance of stock to the assignor prior to notice and demand by his assignee, or of indebtedness of the assignor to the association, should have been made at the trial below. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.

The president of a corporation signed and left with the treasurer blank certificates of stock. The stock was transferable, as stated in each certificate, only by assignment on its books upon the surrender of outstanding certificates. The treasurer fraudulently signed and filled up in the usual form one of the certificates, affixing the corporate seal thereto, in the name of a creditor of his for borrowed money, and gave it to him as security for his debt. The treasurer owned no stock and exhibited no other certificate thereof to the creditor and made no transfer or entry of the transaction in any form on the books of the corporation, of which he had the custody. The creditor subsequently assigned this certificate, as security for a loan from a bank, to its cashier, who surrendered it and received a new one in his own name from the treasurer. Upon payment of the loan the cashier assigned the new certificate to the creditor, who, having lent a further sum to the treasurer, agreed that the certificate should be security for the entire debt. The corporation afterward discovered this and other frauds of the treasurer, and upon a demand from the creditor, and upon his presenting the certificate, refused to issue to him a new certificate. *Held*, in an action against the corporation to recover damages caused by such refusal, that the creditor did not exercise due care in taking the certificate, and could not maintain the action. *Farrington* v. *South Boston R. Co.*, 150 *Mass.* 406, 23 *N. E. Rep.* 109.—DISTINGUISHING Allen *v.* South Boston R. Co., 150 Mass. 200.

A county subscribed for 250 shares of stock amounting to $25,000, and paid to the company on the subscription $17,000. Afterwards the county court, on what purported to be the order or request of a majority of the taxpayers, transferred to A. 135 shares, and as no proper certificates had issued to the taxpayers, the transfer was made by the court. In suit against the company for refusing to transfer the stock to A. and to issue certificates therefor—*held*, (1) that a by-law forbidding a transfer of stock by holders indebted for a balance on the stock was lawful, and applicable to the county; (2) the payment of $17,000 was not a full payment of the 135 shares, but a payment *pro rata* upon all of the 250 shares, and the county was still indebted to the company for a portion of each share, and it was not obliged to make the transfer or issue the certificates. *Spurlock* v. *Pacific R. Co.*, 61 *Mo.* 319.

In an action to compel defendant, a railroad corporation organized under the laws of New York, to issue to plaintiff certain shares of stock in exchange for certificates purchased by him in open market, by their terms entitling the holder to such shares, the following facts appeared: The full amount of stock called for by defendant's articles of incorporation had been issued by it; the certificates in question were issued by its president under the authority of its executive committee. The trial court found, upon sufficient evidence, that the issue of the certificates was not authorized or ratified by defendant's board of directors, and that plaintiff was not a purchaser in good faith for full value. *Held*, that plaintiff was not entitled to the relief sought. *Ryder* v. *Bushwick R. Co.*, 134 *N.*

Y. 83, 31 *N. E. Rep.* 251, 45 *N. Y. S. R.* 388; *affirming* 57 *Hun* 591, 32 *N. Y. S. R.* 1105, 10 *N. Y. Supp.* 748.

Persons who have received transfers of spurious stock by the acts of the transfer agent, or certificates of spurious stock from the transfer agent of the company, without knowledge or ground of suspicion of fraud or irregularity, and have advanced money thereon, are entitled to recover damages against the company, in a proper action. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

Where one buys shares of railroad stock at an execution sale, and then brings suit against the corporation to compel a transfer of the stock on the corporation books, and the execution to him of the proper certificate, the company cannot set up the defense that prior to the judgment under which the stock was sold it had been duly assigned to a third party, where there is no evidence that the assignment was made before the attachment was levied. *Morehead* v. *Western N. C. R. Co.*, 96 *N. Car.* 362, 2 *S. E. Rep.* 247.

70. Measure of damages.—In an action at law against a corporation for refusing to issue or transfer stock, the plaintiff may claim in the same suit the value of the stock, together with the dividends due thereon; and in such a case the measure of damages is the value of the stock at the time of the demand, together with the dividends accrued thereon at that time, with interest to the day of trial. *Baltimore City Pass. R. Co.* v. *Sewell*, 35 *Md.* 238.

In an action against a railroad company, by the holder of fraudulent stock, issued and negotiated by its treasurer, for refusal to exchange it for new stock, the jury may allow the plaintiff the amount of money advanced by him, with interest, or the amount of the value of the stock at the date of the loan, with interest, the whole amount not to exceed the money loaned with interest. *Tome* v. *Parkersburg Branch R. Co.*, 39 *Md.* 36, 11 *Am. Ry. Rep.* 285.

Where, upon a sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand, with interest, and not the value at the time of trial, or at any intermediate period. *Pinkerton* v. *Manchester & L. R. Co.*, 42 *N. H.* 424.

71. Costs.—After the death of a trustee who held certificates of stock, one claiming to be entitled to the stock requested the company to issue a certificate to him, but it refused, and refused to examine the evidence offered to show that such person was entitled to the stock. The facts justified the conclusion that the company could easily have satisfied itself of the truth of the facts, and of its obligation to make the transfer demanded, if it had been willing to examine the evidence offered. *Held*, that, under such circumstances, the company should be charged with the costs of a suit to compel such transfer. *Iasigi* v. *Chicago, B. & Q. R. Co.*, 129 *Mass.* 46.

7. *Rights of Purchasers and Transferees.*

72. Proof of title and of transfer.—The holder of certificates of stock may rely on his possession as *prima facie* evidence of ownership; and if he undertakes to prove title by written transfer, the books of the company are the best evidence of it; but, on proof of the fact that the books are in another state, beyond the jurisdiction of the court, secondary evidence of the transfer is admissible. *Gordon* v. *Tweedy*, 74 *Ala.* 232.

73. Liability of company as guarantor of seller's title.—In the absence of fraud or collusion, a railroad will not be liable as guarantor of a vendor's title to stock, in case of failure thereof, by merely allowing the transfer of the stock to such vendor to be made upon its books. *Central R. & B. Co.* v. *Ward*, 37 *Ga.* 515.

In the absence of fraud or collusion on the part of a railroad company, the mere transfer of stock on its books to the purchaser thereof, by direction of the holder, will not render the company liable as a guarantor of the vendor's title to the stock. *Nutting* v. *Thomason*, 46 *Ga.* 34.

74. Protection accorded to bona fide purchasers, generally.—Where the rightful owner of stock invests another person with the usual evidence of title thereto, or an apparent authority to dispose of the stock, he is estopped from making any claim thereto against an innocent purchaser on the faith of such apparent ownership or right of disposal. *Walker* v. *Detroit Transit R. Co.*, 47 *Mich.* 338, 11 *N. W. Rep.* 187.

The presumption is that a certificate of stock in the usual form is full paid, and a purchaser who takes it without notice is not liable to creditors, if the company's representations that the stock is full paid are false. *Johnson* v. *Lullman*, 15 *Mo. App.* 55; *affirmed in* 88 Mo. 567.

Where a corporation permits its agents to sell stock covered by certificates when there is stock standing to its credit sufficient to cover such certificates, it is bound to make good such certificates to the extent of any shares owned by the corporation, within the capital stock of the company; and the shares of stock unsold should be applied to the satisfaction of the oldest outstanding certificate of that character. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

If an instalment of stock remains unpaid by the original subscriber, an assignee who is willing to comply with the corporate regulations respecting the issue of stock certificates and the transfer of stock may, upon making a proper tender of the unpaid instalment, with the interest thereon, maintain an action in equity against the corporation to compel it to issue to him a stock certificate. As against such an action, the statute of limitations will begin to run from the time of such tender. *Iron R. Co.* v. *Fink*, 22 *Am. & Eng. R. Cas.* 20, 41 *Ohio St.* 321.—FOLLOWING Cleveland & M. R. Co. *v.* Robbins, 35 Ohio St. 483.

A certificate of stock issued by a corporation having legal power to issue such certificates is a continuing affirmation that the holder therein named is the owner of the amount of stock specified, upon which a purchaser or pledgee, dealing with the person named in the certificate or his assignee, has a right to rely as against the corporation. *Kisterbock's Appeal*, 127 *Pa. St.* 601, 18 *Atl. Rep.* 381.

A *bona fide* purchaser of shares of stock, for value, and without notice, either from the face of the stock certificates or otherwise, that the subscription price is unpaid, cannot be held by the corporation for the unpaid subscription price. *West Nashville Planing-Mill Co.* v. *Nashville Sav. Bank*, 86 *Tenn.* 252, 6 *S. W. Rep.* 340.

75. Rights of innocent purchaser of spurious stock.—An innocent purchaser of stock which has been fraudulently issued by the directors of the company may rescind his contract and recover back what he paid for the stock from the individuals from whom he purchased it, where they participated in the fraud attending its issue. *Fosdick* v. *Sturges*, 1 *Biss.* (*U. S.*) 255.

And the right to thus sue and recover back the amount paid for the stock may be exercised after the stock has been regularly transferred to the plaintiff on the books of the company, where there was nothing in the transaction to awaken his suspicion or put him on notice. *Fosdick* v. *Sturges*, 1 *Biss.* (*U. S.*) 255.

A large amount of stock having been thus fraudulently issued, the prior stockholders being entitled to reduce it, in the hands of parties with notice, to the amount actually paid for, the fraud, in which the vendor participated, is material in its effects upon the rights of the purchaser. *Fosdick* v. *Sturges*, 1 *Biss.* (*U. S.*) 255.

An assignee of shares of stock in a railroad company, claimed to have been issued in pursuance of a fraudulent scheme to which the assignor of such shares was a party, is not entitled to equitable relief as to acts of the directors and others in relation to other stock of the same issue which such assignee asks to have canceled. *Brown* v. *Duluth, M. & N. R. Co.*, 54 *Am. & Eng. R. Cas.* 219, 53 *Fed. Rep.* 889.

Spurious certificates of stock issued by an officer of a corporation who was clothed with the apparent authority to issue them, and which were genuine on their face, and which have been sold and are outstanding, constitute a cloud upon the title of the genuine stock which may be removed by a court of equity. *New York & N. H. R. Co.* v. *Schuyler*, 17 *N. Y.* 592, 7 *Abb. Pr.* 41; *reversing* 1 *Abb. Pr.* 417.—FOLLOWED IN Louisville, N. A. & C. R. Co. *v.* Ohio Valley I. & C. Co., 57 Fed. Rep. 42. QUOTED IN Barr *v.* New York, L. E. & W. R. Co., 23 Am. & Eng. R. Cas. 745, 96 N. Y. 444. REVIEWED IN Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730.

And the corporation, as the representative of the genuine stockholders, may maintain an action to remove such cloud. *New York & N. H. R. Co.* v. *Schuyler*, 17 *N. Y.* 592, 7 *Abb. Pr.* 41; *reversing* 1 *Abb. Pr.* 417.

And where such certificates have a common origin, and their invalidity consists in the same facts, all the holders thereof may be joined as defendants in one action, though they obtained their stock at different times, and under different contracts, and

claim to hold under different rights. *New York & N. H. R. Co.* v. *Schuyler*, 17 *N. Y.* 592, 7 *Abb. Pr.* 41; *reversing* 1 *Abb. Pr.* 417.

Where the president of a company fraudulently issues certificates of stock properly signed and sealed, in excess of the amount authorized by law, persons who buy this stock or take it as collateral security are entitled to relief as *bona fide* purchasers on the faith of certificates issued by the company, and which it cannot gainsay. *Willis* v. *Fry*, 13 *Phila.* (*Pa.*) 33.—QUOTING Bank of Ky. *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 251.

In an action to recover back from a stock-broker the price paid to him for railway scrip certificates, known in the market as Kentish Coast railway scrip, which the directors of the company alleged not to be genuine, the proper question for the jury is whether what the broker intended to buy was that which was sold in the market as Kentish Coast railway scrip. *Lambert* v. *Heath*, 15 *M. & W.* 486, 4 *Railw. Cas.* 302, 10 *Jur.* 481, 15 *L. J. Ex.* 297.

76. Purchasing with notice of, or subject to, equities.—A stockholder in a railroad company, who had agreed to sell his stock to a company which proposed to purchase the road, transferred his stock to a person who was in confidential relations with, and employed by, both companies. *Held*, that although the person purchasing the stock was not present at the meeting authorizing the sale, and had no notice thereof, yet the sale would not be set aside in an action at his instance, but that he would be required to transfer his stock to the purchasing company at its fair value, or, at his election, to take the benefit of the sale of the road. *Young* v. *Toledo & S. H. R. Co.*, 40 *Am. & Eng. R. Cas.* 514, 76 *Mich.* 485, 43 *N. W. Rep.* 632.

A certificate of corporation stock does not partake of the character of negotiable instruments; and a *bona fide* assignee, with a power to transfer the stock, takes the certificate subject to all equities existing against his assignor. *Mechanics' Bank* v. *New York & N. H. R. Co.*, 13 *N. Y.* 599; *reversing* 4 *Duer* 480.

77. Purchaser from one having no title.—Where an original stockholder sells his stock and assigns and delivers the certificate, and the purchaser has surrendered his certificate to the company and received another in his own name, and the proper entries are made upon the company's books, the original certificate and the rights of the original holder are extinguished, so that a subsequent sale of said stock by the original holder to a third party passes no title. *Houston & T. C. R. Co.* v. *Van Alstyne*, 9 *Am. & Eng. R. Cas.* 686, 56 *Tex.* 439.

78. Rights of assignee prior to transfer on books.—Where share certificates do not contain the name of the person holding them as an original proprietor, nor have any indorsement of the transfer to him, they do not show a title in him to convey the shares under sections 147 and 158, c. 107, 7 Wm. IV. *Hare* v. *Waring*, 3 *M. & W.* 362, 1 *H. & H.* 90.

No legal title passes to any one who receives from the owner a certificate of shares of stock, issued by a corporation, with a transfer indorsed thereon, and a power of attorney to transfer the same, even though the person to whom such stock was delivered advanced money on the receipt thereof; but the party receiving the same only acquires an equitable title, valid against the party named in the certificate, to compel a transfer of such shares on the books of the company, while the same remains in his name thereon. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

By a statute of Connecticut, passed in 1849, such an assignment is not valid against any but those making it and their representatives; and such law operates upon all transfers of the stock of the New York & New Haven company, whether made in Connecticut or New York. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

79. Rights of purchaser of certificate where company subsequently registers transfer to another without surrender of certificate.—Persons holding certificates of stock, valid when issued, and accompanied by an assignment and power, on which they have advanced money, may recover damages against the company when such certificates have been rendered of no value by the allowance of transfers on the books of the company without requiring a surrender of the certificates. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

A transfer on the books of the company, for value, to a *bona fide* holder, will pass to him the shares so transferred, although at the time the transferor had a certificate in his name outstanding for the same, which

he did not surrender at the time of the transfer, and the fact that the owner has pledged the certificate to a third party, as security for money borrowed, without notice thereof to the company, will not affect such transfer, nor the title of the transferee to the stock so transferred. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

The by-laws of a corporation requiring a surrender of the certificate before making a transfer are not binding on third persons, so as to affect their rights or deprive them of their property. *New York & N. H. R. Co* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

A railroad company issued certain certificates of stock reciting that they were transferable on the books of the company upon surrender of the certificates. A holder of these certificates sold the stock, and delivered to the purchaser the certificates with a blank power of attorney to enable him to have the stock transferred, but they were mislaid for some fifteen years. In the meantime the original holder assumed to sell the stock to other parties, and the company issued certificates to the purchasers, on the supposition that the original certificates had been lost. The first transferee having died, his administrator applied for a transfer of the stock and for an account of dividends, which demands were refused. The by-laws of the company provided that new certificates should issue only when the previous certificates had been surrendered and canceled, or upon proof that the prior certificates had been lost, and upon the giving of an indemnity bond. *Held*, that the issue of the new certificates to the second transferees was a breach of duty on the part of the company, and it was bound to replace the stock or account to the administrator for its value. *Cleveland & M. R. Co.* v. *Robbins*, 35 *Ohio St.* 483.—FOLLOWED IN Iron R. Co. *v.* Fink, 22 Am. & Eng. R. Cas. 20, 41 Ohio St. 321.

But in such case the company was not liable to account for the dividends paid on stock before it had notice of its transfer to the persons represented by plaintiff. Until the company had notice of the transfer it was justified in paying the dividends to the one in whose name the stock stood on its books. *Cleveland & M. R. Co.* v. *Robbins*, 35 *Ohio St.* 483.

And the statute of limitations did not begin to run until the transfer of the stock to the holders of the original certificate was refused, or they had notice of the transfer of the stock to other parties. *Cleveland & M. R. Co.* v. *Robbins*, 35 *Ohio St.* 483.

A certificate of stock recited that it was transferable by assignment, and that a new certificate would be issued to the assignee upon the surrender of the former one to the directors. The by-laws of the company authorized owners of stock to transfer it by written indorsement on the certificate, or on a separate paper, and delivery to the secretary, together with the original certificate. Plaintiff, who was an assignee of an original stockholder, and who held the original certificate, sued the company for the value of stock which had been issued to a subsequent assignee of the original holder. Plaintiff had not presented his stock and transfer to the secretary before the new stock was issued. *Held*: (1) that the company was estopped from denying that it would hold, for the benefit of the holder of the certificate, the amount of stock therein specified, until it was presented for cancellation and new stock issued; (2) that the non-production of the original certificate was notice to the company of a superior outstanding title to the stock; (3) that the legal title to the stock passed by a transfer of the certificate, without its being recorded on the books of the company. *Strange* v. *Houston & T. C. R. Co.*, 4 *Am. & Eng. R. Cas.* 338, 53 *Tex.* 162. —DISTINGUISHED IN Baker *v.* Wasson, 53 Tex. 150.

In such case the company was liable to the first assignee of the original stockholder, who held the original certificate. In the absence of a charter or statutory provision requiring a transfer of stock on the books of the company, as between a stockholder and his assignee, to pass title as against a creditor, the interest of the creditor must be subordinate to that of the *bona fide* assignee. *Strange* v. *Houston & T. C. R. Co.*, 4 *Am. & Eng. R. Cas.* 338, 53 *Tex.* 162.

After a sale of stock by the owner to whom the certificate had issued, the sale being evidenced by assignment and delivery of the certificate, and after the purchaser had surrendered said certificate to the company and received in lieu thereof a certificate in his own name, the transaction being properly evidenced on the books of the corporation, the original certificate and the rights of the original owner were extinguished, so that a subsequent assignment of said stock by said original owner to another

party would pass no right or title thereto. *Houston & T. C. R. Co.* v. *Van Alstyne*, 9 *Am. & Eng. R. Cas.* 686, 56 *Tex.* 439.

If by mistake a new certificate of stock has also issued to the second assignee, he, not being a purchaser for value and without notice, will not be entitled to the rights of an owner of stock. *Houston & T. C. R. Co.* v. *Van Alstyne*, 9 *Am. & Eng. R. Cas.* 686, 56 *Tex.* 439.

After a stockholder had assigned his certificate of stock, he presented an affidavit to the corporation stating that he had lost it, and thereby procured a new certificate, upon giving a bond to save the company harmless by reason of any loss that might come to it by reason of such new certificate. Thereupon the company refused to allow a transfer of the stock as represented by the original certificate, and the stock depreciated until it was worthless. *Held*, that an action on the case for such refusal could be maintained against the original stockholder, as well as against the company. *Greenleaf* v. *Ludington*, 15 *Wis.* 558.

In such case the holder of the original certificate brought a joint action against the company and against the original holder for damages, but recovered judgment against the company only; but it was insolvent; and he then brought an equitable action against the company, claiming the right to be subrogated to the rights of the company in such indemnity bond. *Held:* (1) that the judgment in favor of the individual defendant in the first action was a bar to the second suit; (2) that the indemnity bond, or its proceeds, was general assets of the insolvent company, and therefore plaintiff could not be subrogated. *Greenleaf* v. *Ludington*, 15 *Wis.* 558.

Where shares of stock stand upon the books of a company in the name of certain persons, although procured to be placed in their names by a forged transfer of the certificates, innocent purchasers to whom the stock is transferred by the registered holders are entitled to claim compensation from the company, which, upon discovery of the forgery, restores to the register the name of the rightful owner and erases the names of such innocent purchasers. *In re Bahia & S. F. R. Co.*, 37 *L. J. Q. B.* 176, *L. R.* 3 *Q. B.* 584, 16 *W. R.* 862, 18 *L. T.* 467, 9 *B. & S.* 844.—FOLLOWED IN Hart *v.* Frontino & B. S. A. G. Min. Co., L. R. 5 Ex. 111, 39 L. J. Ex. 93, 22 L. T. 30.

8. *The Transfer Book and List of Stockholders.*

80. Duty to keep record of ownership of shares.—Under the laws of New Hampshire, a record of the ownership of shares must be kept by railroad corporations in that state and by proper certifying officers resident therein. *Pinkerton* v. *Manchester & L. R. Co.*, 42 *N. H.* 424.

81. Inspection of transfer book and list of stockholders.*—Mandamus will not lie to compel a railway company to take the seal off the register of shareholders, on a suggestion that it was affixed without authority and contrary to sections 9, 66, 75 and 90 of the Companies Clauses Act. *Ex parte Nash*, 15 *Q. B.* 92, 14 *Jur.* 574, 19 *L. J. Q. B.* 296.

The right of inspection and perusal of the register of debenture stockholders, which by the Companies Clauses Act, 1863, § 28, is given to mortgagees, bondholders, debenture stockholders, shareholders, and stockholders of the company, includes a right to make copies. *Mutter* v. *Eastern & M. R. Co., L. R.* 38 *Ch. D.* 92.

A company organized under N. Y. Act of 1869, ch. 917, by the consolidation of various foreign and domestic railroad companies, is a domestic, not a foreign, corporation, and therefore the act of 1842, ch. 165, to compel transfer agents of foreign corporations to exhibit lists of their stockholders, has no application to it. *Sage* v. *Lake Shore & M. S. R. Co.*, 70 *N. Y.* 220, 18 *Am. Ry. Rep.* 555; *dismissing appeal from* 11 *Hun* 1.

Being a domestic corporation, it comes within and is controlled by 1 N. Y. Rev. St. 601, § 1, requiring the transfer book and books containing the names of stockholders of any incorporated company to be open for inspection for thirty days previous to the election of directors. *Sage* v. *Lake Shore & M. S. R. Co.*, 70 *N. Y.* 220, 18 *Am. Ry. Rep.* 555; *dismissing appeal from* 11 *Hun* 1.

The secretary of a corporation, who had charge and possession of the stock book, refused to deliver it to his successor in office; thereupon the directors proceeded to make a new stock book and stock-transfer book. *Held*, that it was proper for them to make a new book, making it a copy of the old one as far as possible, but as to entries, those made in the old one must govern in preference to the new. So where a question

*See also STOCKHOLDERS, 6–8.

arose as to who were stockholders and entitled to vote, and the old book was produced, it was error to reject it and follow the new as to entries made originally in the old book. *Schoharie Valley R. Co.'s Case*, 12 *Abb. Pr. N. S.* (*N. Y.*) 394.

Under N. Y. Laws 1842, ch. 165, it is the absolute duty of the transfer agent in that state, of any moneyed or other corporation existing beyond the jurisdiction of the state, to exhibit at all reasonable times, during the usual business hours, to the stockholders, when required, the transfer book and a list of the stockholders, if in his power so to do. He has no right to inquire into the motives and purposes of the stockholders. *People ex rel.* v. *Paton*, 5 *N. Y. S. R.* 313, 20 *Abb. N. Cas.* 195.

82. Necessity of entry of transfer to pass title to shares.—On the transfer of stock, the delivery will not be complete until an entry of such transfer is made upon the stock record, or proof be sent to the office for that purpose; and the omission thus to perfect the delivery will be *prima facie*, and if unexplained conclusive, evidence of a secret trust, and therefore, as matter of law, fraudulent and void as to creditors. *Pinkerton* v. *Manchester & L. R. Co.*, 42 *N. H.* 424.

Where the transfer was made at a distance from the office, and the old certificates were surrendered and new ones given by a transfer agent, appointed for that purpose and residing in a neighboring state, proof that the proper evidence of such transfer was sent, by the earliest mail communication, to the keeper of the stock record, to be entered, although not received until an attachment had intervened, will be sufficient explanation of the want of delivery, and such transfer will be good against the creditor. But where the pledge was made in Boston, on the eighth day of July, by a delivery over of the certificates, and nothing more was done until the third day of the following August, and then the old certificates were surrendered to the transfer agent there, and new ones received from him, and notice given by the first mail to the office at Manchester, N. H.—*held*, as against an attachment made between the obtaining the new certificates and the notice to the office, that the possession was not seasonably taken, and that the transfer, therefore, was not valid. *Pinkerton* v. *Manchester & L. R. Co.*, 42 *N. H.* 424.—DISTINGUISHED IN Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238.

A transfer of stock in a dividend-paying corporation not recorded in the record book of transfers is invalid against attaching creditors without notice. *Buttrick* v. *Nashua & L. R. Co.*, 62 *N. H.* 413.

A corporation attaching the stock is not chargeable with the knowledge of such transfer possessed by one of its directors who takes no part in causing and is not informed of the attachment. *Buttrick* v. *Nashua & L. R. Co.*, 62 *N. H.* 413.

83. Misrepresentations by transfer agents.—Where a company is bound to keep transfer books for the purpose of transferring stock, and on being applied to by persons about to purchase stock in the company, to know whether shares have been transferred to them, the officers and clerks give the information that shares have been transferred, and also give the certificate thereof, on which statements money is paid, when in fact no shares have been transferred, the party making the transfer having no stock to his credit to dispose of, the company is liable for any loss sustained. *New York & N. H. R. Co.* v. *Schuyler*, 38 *Barb.* (*N. Y.*) 534.

The mere fact that the transfer agent of a corporation is in possession of the transfer book, and is authorized to allow it to be used, does not authorize him to make representations as to the ownership of stock, so as to bind the company where such representations are false. *Henning* v. *New York & N. H. R. Co.*, 9 *Bosw.* (*N. Y.*) 283.

Nor does mere permission, given by the agent, to enter upon such books a transfer of reputed stock, there being no new certificate given, amount to a representation by him that the person making the transfer was the owner of any genuine stock. *Henning* v. *New York & N. H. R. Co.*, 9 *Bosw.* (*N. Y.*) 283.

84. Transfer book as evidence of title.—The transfer book kept by a company under the Railway Act, 7 Wm. IV., c. 107, § 158, in which the name of a person is entered as transferee, is not sufficient evidence of his title as a proprietor of the shares to hold a person who had contracted to buy them, and who pleads in an action on such contract that plaintiff was not the proprietor of the shares. *Hare* v. *Waring*, 3 *M. & W.* 362, 1 *H. & H.* 90.

85. Removal of name from list of shareholders.—A railway company is not justified in removing from the register of shareholders the name of a person without showing that the person whose name is substituted has a better title to the stock, and mandamus will lie to compel it to re-enter on the register the name originally there. *Ward* v. *South Eastern R. Co.*, 6 *Jur. N. S.* 890, 29 *L. J. Q. B.* 177, 2 *El. & El.* 812, 8 *W. R.* 468.

9. *Forged and Fraudulent Transfers.*

86. Liability of company to owner of shares fraudulently transferred.—A company is not liable in an action on the case for the fraud of its transfer agent in inducing a loan upon the faith of false and fraudulent certificates of stock issued by him, and transferred by him on the books of the company, but where no new certificate is given prior to making the loan. *Woodruff* v. *New York & N. H. R. Co.*, 18 *How. Pr.* (*N. Y.*) 419.—FOLLOWING Mechanics' Bank *v.* New York & N. H. R. Co., 13 N. Y. 599.

The owner of stock intrusted the certificates with blank powers of attorney to an agent for safe keeping, and the agent fraudulently transferred them to a third party, who in turn, without knowledge of the fraud, had them transferred to himself. *Held*, that the owner could not recover from the corporation for the loss. *Pennsylvania R. Co.'s Appeal*, 86 *Pa. St.* 80.

87. —— to owner whose name has been forged.—One whose name has been forged to a certificate of stock, whereby the company issues a new certificate, which is innocently purchased by a third person, is entitled to recover from the company the value of the shares at the time the company first refused to recognize him as a shareholder, with interest from that date. *In re Bahia & S. F. R. Co., L. R.* 3 *Q. B.* 584, 37 *L. J. Q. B* 176, 18 *L. T.* 467, 16 *W. R.* 862, 9 *B. & S.* 844.—FOLLOWED IN Hart *v.* Frontino & B. S. A. G. Min. Co., L. R. 5 Ex. 111, 39 L. J. Ex. 93, 22 L. T. 30.

88. Defenses.—A company which acts with due care and *bona fide* in issuing a certificate of stock under a forged transfer of an old certificate is not estopped from testing the validity of the former. *Waterhouse* v. *London & S. W. R. Co.*, 41 *L. T.* 553.

89. Damages.—Where stock is wrongfully transferred under a forged power of attorney, it seems that the measure of damages in an action against the company is the market price of the stock at the time the fraudulent transfer was made. *Pennsylvania Co.* v. *Philadelphia, G. & N. R. Co.*, 153 *Pa. St.* 160, 25 *Atl. Rep.* 1043; *affirming* 1 *Pa. Dist.* 301.

90. Remedy over of company against holder of forged certificate or transfer.—A firm, in good faith, advanced money upon railroad stock, pledged to it under a forged power to transfer. The railroad company, upon the receipt of the original certificates of the stock, in like good faith canceled them and issued new ones in the name of the firm. *Held*, that as between the firm and the railroad company (the rights of third parties not being involved) the loss must fall upon the former. *Hambleton* v. *Central Ohio R. Co.*, 44 *Md.* 551.—REVIEWING AND FOLLOWING Brown *v.* Howard F. Ins. Co., 42 Md. 384.—REVIEWED IN Boston & A. R. Co. *v.* Richardson, 135 Mass. 473.

The fact of the stock issued to the firm having been subsequently sold by them to third parties did not affect the case, it appearing that the sale was made by the firm with knowledge of the forgery. *Hambleton* v. *Central Ohio R. Co.*, 44 *Md.* 551.

Payment of the dividends on the stock to the firm by the agents of the railroad company after the company was informed of the forgery had no significance, and could not estop the company, it appearing that they were not paid by direction of the company, but through the mistake or inadvertence of the agent in overlooking or failing to observe the directions given by the officers of the company that they were in litigation, and were not to be paid till ordered by the court. *Hambleton* v. *Central Ohio R. Co.*, 44 *Md.* 551.

The issuing of the certificates to the firm by the railroad company, upon the faith of the forged powers of attorney, did not create an estoppel against the company. *Hambleton* v. *Central Ohio R. Co.*, 44 *Md.* 551.—DISTINGUISHING Knights *v.* Wiffen, L. R. 5 Q. B. 660; Continental Nat. Bank *v.* Commonwealth Nat. Bank, 50 N. Y. 575.

A company may maintain an action against a person presenting a forged transfer or power of attorney, upon the faith of which it issues a new certificate, although such person acted in good faith. *Boston & A. R. Co.* v. *Richardson*, 135 *Mass.* 473.—

REVIEWING Hambleton *v.* Central Ohio R. Co., 44 Md. 551.

Where a corporation issues a new certificate to a person, upon the faith of a forged power of attorney to transfer the stock, and afterwards brings action against such person, its measure of damages is: (1) the amount paid by the company for stock bought by it in good faith to replace the stock so transferred, although the stock at the time was higher than at the time of the forgery; (2) the costs and expenses of a suit against the company by the person whose name was forged, to compel an issue of new stock in place of that transferred; (3) any dividends which the company was obliged to pay to the person whose name was forged. *Boston & A. R. Co.* v. *Richardson*, 135 *Mass.* 473.

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I. RIGHTS AND POWERS.

1. *In General.*

1. Who are stockholders and how they become such. — Payment of the subscription makes the subscriber a stockholder. The certificates of the shares are but the evidence of the fact. *Wemple* v. *St. Louis, J. & S. R. Co.*, 30 *Am. & Eng. R. Cas.* 246, 120 *Ill.* 196, 11 *N. E. Rep.* 906, 9 *West. Rep.* 165.

Under the Missouri statute providing for the voluntary incorporation of railroad companies, one can only become a stockholder in such a corporation by signing the articles of association or by subscribing to the capital stock after its creation. *Sedalia, W. & S. R. Co.* v. *Wilkerson*, 25 *Am. & Eng. R. Cas.* 78, 83 *Mo.* 235.—APPROVING Troy & B. R. Co. *v.* Tibbits, 18 Barb. 297; Poughkeepsie & S. P. Plankroad Co. *v.* Griffin, 24 N. Y. 150.

There are two modes in which a person subscribing to stock may become a member of the corporation, under New York General Railroad Act, 1850: (1) by subscribing the articles of association and becoming a member of the corporation, as provided in sections 1, 2; (2) by subscribing to the capital stock, in the book opened by the directors, after the corporation is in existence. *Erie & N. Y. C. R. Co.* v. *Owen*, 32 *Barb.* (*N. Y.*) 616.

One who has only signed articles of association before the corporation came into being is not a member of the corporation, unless the articles so signed have been filed in the office of the secretary of state, as required by the statute. *Erie & N. Y. C. R. Co.* v. *Owen*, 32 *Barb.* (*N. Y.*) 616.

One whose name appears as a stockholder on the corporation books is, presumably, a stockholder, and the books are admissible to show the fact. *Pittsburgh, W. & K. R. Co.* v. *Applegate*, 16 *Am. & Eng. R. Cas.* 440, 21 *W. Va.* 172.

Subscription to a stock book is sufficient evidence of the party subscribing being a shareholder, under the definition of that term in the Railway Clauses Consolidation Act, and it is not necessary that scrip should be issued for the stock to constitute such subscriber a shareholder. *Smith* v. *Spencer*, 12 *U. C. C. P* 277.—FOLLOWED IN Fraser *v.* Hickman, 12 U. C C. P. 584.

Subscribing to a stock book of a railway company, and paying in an instalment, is sufficient to constitute one a stockholder. *Fraser* v. *Hickman*, 12 *U. C. C. P.* 584.—FOLLOWING Smith *v.* Spencer, 12 U. C. C. P. 277.

2. Who are not stockholders.—Where a railroad charter authorizes the president and directors to make a conditional disposition of the unsubscribed stock, purchasers of such stock are not stockholders of the company till that condition is fulfilled. *McMillan* v. *Maysville & L. R. Co.*, 15 *B. Mon.* (*Ky.*) 218.—APPROVED IN Paducah & M. R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. Rep. 842. DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170. FOLLOWED IN Henderson & N. R. Co. *v.* Leavell, 16 B. Mon. (Ky.) 358. REVIEWED IN North Mo. R. Co. *v.* Winkler, 29 Mo. 318.

The mere subscribing to the stock of an incorporated company does not constitute the subscriber a stockholder, but puts it in his power to become such by compelling the corporation to give him the legal evidence of his being a stockholder, upon his complying with the terms of the subscription. *Busey* v. *Hooper*, 35 *Md.* 15.

A person does not become a stockholder in an existing corporation by merely subscribing for stock, and is not entitled to a certificate therefor, nor can he be regarded as a member of the corporation until the stock for which he has subscribed is paid for. *Baltimore City Pass. R. Co.* v. *Hambleton*, 77 *Md.* 341, 26 *Atl. Rep.* 279.

3. Stockholder's interest in the corporate property.—The owner of all the stock and bonds of a corporation does not own the corporate property. The corporate property, which includes all rights of action and claims for damages, belongs to the corporation, and is subject to the management and control of its board of directors. *Fitzgerald* v. *Missouri Pac. R. Co.*, 50 *Am. & Eng. R. Cas.* 622, 45 *Fed. Rep.* 812.

While a stockholder in a corporation has a right to participate in the profits earned, he cannot be said to be a joint owner of the property of the corporation. *Spurlock* v. *Missouri Pac. R. Co.*, 90 *Mo.* 199, 2 *S. W. Rep.* 219.

A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared. *Boardman* v. *Lake Shore & M. S. R. Co.*, 4 *Am. & Eng. R. Cas.* 265, 84 *N.*

Y. 157.—FOLLOWED IN Beveridge *v.* New York El. R. Co., 112 N. Y. 1, 19 N. E. Rep. 489, 20 N. Y. S. R. 962.

The bondholders and stockholders of a railroad company may unite for the purchase of the property, at a sale made in good faith, to prevent a sacrifice thereof. *Pennsylvania Transp. Co.'s Appeal*, 101 *Pa. St.* 576.

4. Position of a state as a stockholder.—Where the state is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for by becoming such it lays aside its character as sovereign and places itself on a footing of equality with the individual stockholders. *Marshall* v. *Western N. C. R. Co.*, 20 *Am. & Eng. R. Cas.* 578, 92 *N. Car.* 322.

The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the state is like any other stockholder. So where a statute provides for a sale of the state's interest in a railroad company in which the state is a stockholder, it is only a sale of the stock. *Marshall* v. *Western N. C. R. Co.*, 20 *Am. & Eng. R. Cas.* 578, 92 *N. Car.* 322.

Whether such sale would vest in the purchasers of the state's stock all the powers and privileges which the charter of the company had conferred on the state, *quære*. *Marshall* v. *Western N. C R. Co.*, 20 *Am. & Eng. R. Cas.* 578, 92 *N. Car.* 322.

5. Estoppel of stockholder to impeach validity of corporate acts.—A stockholder who buys into a corporation, with knowledge that it is acting on an assumed power to invest in the stock of corporations outside the state, will be regarded as thereby impliedly recognizing such power. *Venner* v. *Atchison, T. & S. F. R. Co.*, 28 *Fed. Rep.* 581.

2. *Right to Inspect Corporate Books.**

6. In general.—Stockholders have the right to inspect the books of the corporation at all reasonable times. *Deaderick* v. *Wilson*, 8 *Baxt.* (*Tenn.*) 108.

Under New York Laws 1842, ch. 165, it is the absolute duty of a transfer agent of any moneyed or other corporation existing beyond the jurisdiction of the state to exhibit at all reasonable times during the usual business hours, to any stockholder, when required, the transfer book and a list of the stockholders, if in his power so to do; but a demand for the exhibition of the stock book is not a sufficient demand for the transfer book. *Kennedy* v. *Chicago, R. I. & P. R. Co.*, 14 *Abb. N. Cas.* (*N. Y.*) 326.

7. Mandamus to compel exhibition of books.—Mandamus is the proper remedy for a shareholder who is denied his right to inspect the books of the corporation. *State ex rel.* v. *St. Louis & S. F. R. Co.*, 29 *Mo. App.* 301.

An application under N. Y. Act of 1842, ch. 165, for a mandamus to compel a corporation to exhibit its transfer books to a stockholder, is addressed to the sound discretion of the court, and should be exercised with great care. The applicant should show that he is a *bona fide* stockholder, and that he is not attempting to use the writ to accomplish personal or speculative ends. *People ex rel.* v. *Northern Pac. R. Co.*, 18 *J. & S.* (*N. Y.*) 456.

8. Right to make a copy. — Under Pa. Const. art. 17, § 2, providing that corporations shall keep a list of stockholders which shall be open to the inspection of stockholders and creditors, a mandamus will not lie to compel a company to allow a stockholder to copy the list, when no grounds for doing so are given except that he wished to solicit other stockholders to join him in litigation against the company. *Com.* v. *Empire Pass. R. Co.*, 134 *Pa. St.* 237, 19 *Atl. Rep.* 629.—QUOTING Com ex rel. *v.* Phœnix Iron Co., 105 Pa. St. 111.

Under the Companies Clauses Act, 1863, § 28, the right of inspection and perusal of the register of debenture stock, including the right to take copies of entries therein, is given to mortgagees, bondholders, debenture stockholders, shareholders and stockholders. *Mutter* v. *Eastern & M. R. Co., L. R.* 38 *Ch. D.* 92.

The fact that a person has taken his stock in a company at the instance of a rival company, and for the purpose of serving the interests of the rival company, does not disentitle him to the assistance of the court in enforcing this statutory right. *Mutter* v. *Eastern & M. R. Co., L. R.* 38 *Ch. D.* 92. — DISTINGUISHING Forrest *v.*

* See also STOCK, 81.

Manchester, S. & L. R. Co., 4 De G., F. & J. 126.

3. *Meetings.*

9 Notice—Call—Report.—Notice of the time and place of holding meetings of the stockholders of a company for the transaction of business, to be effectual, must be given in the mode prescribed by the charter. *Shelby R. Co.* v. *Louisville, C. & L. R. Co.*, 12 *Bush* (*Ky.*) 62, 18 *Am. Ry. Rep.* 213.

Evidence of a stockholders' meeting to ratify a consolidation agreement is properly objected to if no proof has been offered of legal notice of such meeting. *Rodgers* v. *Wells*, 44 *Mich.* 411, 6 *N. W. Rep.* 860.

Notice was given to stockholders of a meeting to be held for the purpose of voting an increase of the bonded indebtedness of the company, but before the time fixed all of the stockholders had consented in writing to such increase, and before the time fixed for the meeting the directors met, and the action of the stockholders was reported, and the increase authorized, and a report of the meeting filed with the secretary of state. *Held*, that this was a sufficient compliance with the Alabama statute. *Coe* v. *East & W. R. Co.*, 52 *Fed. Rep.* 531.

10. Right to preside.—Where a corporation has failed to hold its annual meeting, a justice of the peace, who is a stockholder, may, on application, issue his warrant for such meeting, under N. H. Gen. St. ch. 133, §§ 15, 16—that being merely a ministerial act—and, being elected chairman, may legally preside in such meeting. *Concord R. Co.* v. *Elliot*, 57 *N. H.* 397, 13 *Am. Ry. Rep.* 491.

A person who has been chosen to preside at a corporate meeting is entitled to call an adjourned meeting to order and to continue to preside unless superseded in some orderly and recognized parliamentary manner. *Com. ex rel.* v. *Patterson*, 158 *Pa. St.* 476, 27 *Atl. Rep.* 998.

11. Quorum.—Where a meeting of the stockholders of the Philadelphia & Reading R. Co. was held under and by virtue of the fifth and not by virtue of the twenty-first section of the charter, it was not necessary that a majority in interest of the stockholders should be present at such meeting in order to validate its proceedings, and therefore those persons who received a majority of the votes that were then cast were duly and legally elected officers of the company for the ensuing year. *Appeal of Gowen*, 1 *Am. & Eng. R. Cas.* 437, 10 *W. N. C.* (*Pa.*) 85.

12. Ratification of action of meeting irregularly called.—Where a board of directors orders an act to be done without objection then, or subsequently, as to an irregularity of the meeting, and the act thus authorized is afterward performed, its legality cannot afterward be questioned in a suit in equity on the ground of irregularity. *Samuel* v. *Holladay*, *Woolw.* (*U. S.*) 400.

An arrangement for the payment of interest or interest dividends to stockholders while the road is in process of construction is equitable and just; and any mere defect in the notice calling a meeting of the directors to authorize such payment may be subsequently cured. *Richardson* v. *Vermont & M. R. Co.*, 44 *Vt.* 613.—QUOTING Wright *v.* Vermont & M. R. Corp., 12 Cush. (Mass.) 68. REVIEWING Waterman *v.* Troy & G. R. Co., 8 Gray (Mass.) 433; Barnard *v.* Vermont & M. R. Co., 7 Allen (Mass.) 512; Cunningham *v.* Vermont & M. R. Co., 12 Gray 411.

And the subsequent act of the corporation in paying the interest to stockholders in pursuance of such vote, and the act of the corporation and its directors in voting to issue certificates to pay such interest, is a sufficient ratification to make the arrangement valid. *Richardson* v. *Vermont & M. R. Co.*, 44 *Vt.* 613.

13. Withdrawal from meeting—New meeting.—A disorder occurred at a corporate meeting in which all parties participated. After the disorder had ceased, a portion of the stockholders withdrew for the purpose of carrying out a preconceived scheme to organize and run the meeting in their own interests. Their call to withdraw was not to all stockholders, but only to members of their own faction. They organized another meeting, but before voting sent an invitation to the other stockholders to come and vote. *Held*, that the acts of such meeting were illegal and that the invitation to the other stockholders was ineffectual to cure the radical defects of organization. *Com. ex rel.* v. *Patterson*, 158 *Pa. St.* 476, 27 *Atl. Rep.* 998.

Where the shareholders request the directors to call a general meeting for certain specified legal and proper purposes, and the directors issue a notice for a meeting for a

part only of such purposes, and the requisitionists do not attend such meeting, but themselves issue a notice under the Companies Clauses Act, § 70, calling a meeting for the purposes mentioned in their requisition, the court will not, in an action brought by the directors in the name of the company, restrain the requisitionists from holding a meeting. *Isle of Wight R. Co.* v. *Tahourdin*, *L. R.* 25 *Ch. D.* 320, 53 *L. J. Ch. D.* 353, 50 *L. T.* 132, 32 *W. R.* 297.

4. *Right to Vote.*

14. In general, and as dependent upon agreement.—*Prima facie* the right to vote stock accompanies the legal title, but when the title is divided, and an equity exists, as between pledgor and pledgee, trustee and *cestui que trust*, or between vendor and vendee, with a title inchoate until payment, the right to vote is subject to the agreement of the parties. This is the rule, not only of the common law, but also of the Pennsylvania Act of May 7, 1889. *Com. ex rel.* v. *Patterson*, 158 *Pa. St.* 476, 27 *Atl. Rep.* 998.

In general, the right to vote on stock cannot be separated from the ownership in such a sense that the elective franchise shall be in one man and the entire beneficial interest in another. The person who votes must, consequently, be an owner, but it does not follow from this that he must be the only one. *Shelmerdine* v. *Welsh*, 20 *Phila.* (*Pa.*) 199.

When shares of stock are pledged as collateral the question as to whether the vote shall be cast by the debtor or the creditor may be determined by agreement between them, and they may likewise appoint a third person to hold the certificate for them and exercise the right to vote also. *Shelmerdine* v. *Welsh*, 20 *Phila.* (*Pa.*) 199.

15. Requisites of the subscription to entitle subscriber to vote.—A corporation was created with a defined capital, only part of which was subscribed. *Held*, that the directors had power to receive subscriptions and issue certificates for the untaken stock, and the holders became stockholders and were entitled to equal rights with the original stockholders. If a stockholder has not paid his subscription in full, he owes for what is unpaid, but he is none the less a shareholder, and can vote as such. *Curry* v. *Scott*, 54 *Pa. St.* 270.

Where a subscription to stock is not in writing, and is made for the purpose of creating an amount of stock sufficient to equal a proposed mortgage, but is not accepted by the treasurer of the company, and such subscription has not been paid in whole or in part, the stock so subscribed cannot be voted at a corporate meeting. *Com. ex rel.* v. *Patterson*, 158 *Pa. St.* 476, 27 *Atl. Rep.* 998.

16. Conveyance of voting power—Reinstatement.—The conveyance by a stockholder of his voting power to a trustee under an agreement for the security of corporate creditors does not constitute the stockholder a surety of the corporation so that a modification in the agreement by the trustee will reinvest the stockholder with the voting power. *Mobile & O. R. Co.* v. *Nicholas*, 98 *Ala.* 92, 12 *So. Rep.* 723.

Where an agreement between the stockholders of a railroad company, its creditors and others provided for the issue of secured debentures to the creditors in lieu of their original evidences of debt, which were transferred to a trustee; and under a trust deed, with an irrevocable power of attorney, the right to vote the stock was vested in the trustees and the debenture holders until the debentures were paid, and by subsequent agreement the issue of general mortgage bonds for the benefit of the company was authorized, and it was provided therein that debentures might be surrendered to the trustee, and bonds be issued in lieu thereof; "that the lien of the debentures deposited with the trustee shall be maintained for the security and benefit of the bonds issued under said new mortgage; that the sinking fund under the debenture deed of trust shall be continued and maintained until all the debentures not held by the sinking fund shall be deposited with the trustees of the general mortgage"—*held*, that the surrender of the debentures in exchange for bonds under the latter agreement did not extinguish the debentures so as to reinvest in the stockholders the voting power conveyed for the benefit of the debenture holders under the first agreement. *Mobile & O. R. Co.* v. *Nicholas*, 98 *Ala.* 92, 12 *So. Rep.* 723.

Where a state sells stock that it has held in a railroad corporation, and the certificate thereof is duly certified and assigned by the governor of the state to the purchaser, he has the right to vote thereon in the election of directors, unless some statute or by-law

of the corporation prescribes a different mode. *People ex rel.* v. *Devin*, 17 *Ill.* 84.

17. Voting stock deposited or held in escrow.—It is provided by Conn. Gen. St., § 1927, that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting, and no such power shall be used at more than one annual meeting of such corporation." The power given by a trust agreement to a trust company to vote upon the stock of the syndicate had been given more than a year before a vote, and had been used at one annual meeting. *Held*, that the power thus given was equivalent to a power of attorney, and that under the policy of our law, as declared by the statute mentioned, this power could not be legally given for five years or for an indefinite period. *Shepaug Voting Trust Cases*, 60 *Conn.* 553, 24 *Atl. Rep.* 32.—QUOTING Griffith *v.* Jewett, 15 Ohio Wkly. L. Bull. 419.

It is the policy of the law that an untrammeled power to vote shall be incident to the ownership of stock in a corporation, and a contract by which the real owner's power is hampered by a provision that he shall vote as some one else dictates is entitled to no favor. *Shepaug Voting Trust Cases*, 60 *Conn.* 553, 24 *Atl. Rep.* 32.

This is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes to his fellow-stockholders to use his vote for the general interest. *Shepaug Voting Trust Cases*, 60 *Conn.* 553, 24 *Atl. Rep.* 32.

Stockholders may place their stock in the hands of a depositary with direction to vote it as directed by a committee appointed by themselves and subject to their control. *Ohio & M. R. Co.* v. *State ex rel.*, 49 *Ohio St.* 668, 32 *N. E. Rep.* 933.

A person owning stock entered into a contract of present sale of the stock, and parted with possession of it by delivery to a third party to be held in escrow until the vendee should comply with the terms of the sale, and agreed that in the meantime the right to vote the stock should be in the vendee. *Held*, that the vendor was not a present owner of the stock in any such sense as to entitle him to vote it. *Com. ex rel.* v. *Patterson*, 158 *Pa. St.* 476, 27 *Atl. Rep.* 998.

18. Proxies.—A testator directed that certain stock should be voted as his son should direct and appoint, and that his executor should give a proxy or authority to vote said stock as the son might desire, the son being one of the executors. *Held*, that, not having received such a proxy or authority, the son could not vote the stock in the face of a dissent by his coexecutors. Whether or not he could compel his coexecutors to give him such a proxy or authority was not decided. *Tunis* v. *Hestonville, M. & F. Pass. R. Co.*, 149 *Pa. St.* 70, 24 *Atl. Rep.* 88, 1 *Pa. Dist.* 207.

19. Right to vote preferred stock.—The ownership of stock, as a general rule, carries with it the right to vote upon the same at any meeting of the holders; but to this rule there may be exceptions, and it is competent for a company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote the same, or as owners of the same, at any meeting of the stockholders. *Miller* v. *Ratterman*, 43 *Am. & Eng. R. Cas.* 339, 47 *Ohio St.* 141, 24 *N. E. Rep.* 496.

20. Right to vote as affected by illegal consolidation.—Certain persons, having obtained a majority of the stock of a railroad company, organized a second company, to which the stock was transferred with an agreement requiring it to be held in a block. This stock was deposited with a trust company as collateral to secure the issue of bonds. The second company then transferred all its capital stock to a third company, a corporation which controlled several lines competing with the original road, whereby the third company was enabled to elect a directory to serve its interests. This directory made a lease of the original road to the third company, which lease was enjoined as being in conflict with art 4, § 2, par. 4 of the Constitution of Georgia of 1877, forbidding merger of competing corporations. The election of another board of directors was ordered by the court, and the stock obtained from the second company, together with 2200 shares acquired by the third company from other sources and deposited with the trust company, was ordered not to be voted at such election unless transferred in good faith. The second company, nominal owner of the 40,000 shares, and the third company, as owner of 2200 shares, surrendered to the

trust company all or any right which they had to vote the stock. *Held*, that the trust company had no interest in the stock other than as a mere stakeholder and was not entitled to vote it. *Clarke* v. *Central R. & B. Co.*, 52 *Am. & Eng. R. Cas.* 115, 50 *Fed. Rep.* 338.

The circumstance of the trust company being a trustee for a large indebtedness of the original railroad company also prevented its voting the stock. *Clarke* v. *Central R. & B. Co.*, 52 *Am. & Eng. R. Cas.* 115, 50 *Fed. Rep.* 338.

The trust company was disqualified to vote the stock because its president was engaged in an attempt to cause a merger of the original railroad company with competing lines in the state of Georgia, contrary to the Constitution of the state. *Clarke* v. *Central R. & B. Co.*, 52 *Am. & Eng. R. Cas.* 115, 50 *Fed. Rep.* 338.

5. *Rights upon Dissolution.*

21. Stockholders become deferred creditors.—A railroad company sold its property for sixteen per cent. more than enough to pay mortgage debts, which was by agreement to be paid to the stockholders. *Held*, that this fund was the property of the corporation and not that of the individual stockholders, and was liable for corporation debts. *Chicago, R. I. & P. R. Co.* v. *Howard*, 7 *Wall.* (*U. S.*) 392.

The general rule is that stockholders are to be paid only after other lienholders; and where they come forward and insist upon having priority of payment over mortgage creditors, a specific lien must be clearly shown to exist in their favor. *King* v. *Ohio & M. R. Co.*, 9 *Biss.* (*U. S.*) 278.

Stockholders are not entitled to any division of the profits and moneys of a corporation until after its debts have been paid. *Ryan* v. *Leavenworth, A. & N. W. R. Co.*, 21 *Kan.* 365.

After a corporation has been dissolved or its charter declared forfeited, the stockholders occupy toward it the position of deferred creditors, and they may in such case sue as any other creditor to have its assets administered. *Crumlish* v. *Shenandoah Valley R. Co.*, 28 *W. Va.* 623.

22. Accountability of majority to minority.—A majority of stockholders have no right to exercise control over the corporate management which legitimately belongs to them for the purpose of appropriating the corporate property or its avails to themselves, or to any of the shareholders to the exclusion or prejudice of the others, as by purchasing the property at an unfair appraisal. *Ervin* v. *Oregon R. & N. Co.*, 20 *Fed. Rep.* 577.

23. Right to sue on behalf of dissolved corporation.—Tenn. Code, §§ 1492-97, continues dissolved corporations for five years for the purpose of bringing suits to wind up the business. *Held*, that a stockholder of the corporation might bring a suit within the five years, where it appears that it was not collusive, and that the directors had been applied to and refused to bring suit. *Lafayette County* v. *Neely*, 17 *Am. & Eng. R. Cas.* 242, 21 *Fed. Rep.* 738.

But where a railroad company is indebted to the state for aid extended it, and is in the hands of a receiver appointed by the governor, under the above statute, he is the proper manager of the company, and the proper person to bring suits in the name of the corporation after its dissolution; and if the suit be to compel him to account, what is known as the ninety-fourth rule in equity does not apply, as he cannot be asked to sue himself; and the stockholders may proceed without compliance with the rule. *Lafayette County* v. *Neely*, 17 *Am. & Eng. R. Cas.* 242, 21 *Fed. Rep.* 738.

II. LIABILITY TO CREDITORS.

1. *Upon Unpaid Subscriptions.*

24. In general.*—The liability of a stockholder to a creditor of the corporation for unpaid stock becomes fixed by the insolvency and dissolution of the corporation, and then becomes a primary liability. *Garesché* v. *Lewis*, 15 *Mo. App.* 565; *affirmed in* 93 *Mo.* 197.

The stockholders of an insolvent corporation who have not paid the full amount of their stock are liable to the creditors of the corporation to the extent of what remains unpaid upon their several shares of stock, or so much thereof as may be necessary to supply the deficiency in the assets of the corporation in order to pay its debts. *Morgan* v. *New York & A. R. Co.*, 10 *Paige* (*N. Y.*) 290.

A corporation, being the lessee of property, permitted waste thereon, for which the lessor, in an action for damages, re-

* Liability of stockholders to corporation creditors for corporate debts, see notes, 3 AM. ST. REP. 806, 816.

covered a judgment for $5300, and the corporation being insolvent, brought suit against a stockholder thereof, on whose stock more than that amount was then unpaid, to enforce the payment of the judgment. *Held*, that whether the original claim of the plaintiff for damages was or was not an "indebtedness" of the corporation within the scope of Oreg. Const. art. 11, § 2, which declares that a stockholder of a corporation "shall be liable for the indebtedness" of the same to the amount unpaid on his stock, the judgment obtained thereon is such an "indebtedness"; and any stockholder of the corporation is liable therefor to the amount unpaid on his stock. *Powell* v. *Oregonian R. Co.*, 13 *Sawy.* (*U. S.*) 535, 36 *Fed. Rep.* 726; *see* 38 *Fed. Rep.* 187.

25. Unpaid subscriptions are a trust fund for the payment of corporate debts.* — Unpaid subscriptions are part of the capital stock of a corporation, and like other debts due constitute a fund to which creditors may look for the payment of their claims, and when the corporation neglects to call them in, a court of equity will enforce their payment. *Baines* v. *Babcock*, 95 *Cal.* 581, 27 *Pac. Rep.* 674, 30 *Pac. Rep.* 776.

The capital stock of a company and its profits constitute a trust fund for the payment of its debts and liabilities, and the stockholders are only entitled to such surplus as may remain after their payment. Being a trust fund it may be followed by the creditors into the hands of any persons who received it with notice of the trust, and the stockholders themselves are considered as affected with ample notice. *Dudley* v. *Price*, 10 *B. Mon.* (*Ky.*) 84.

Where subscribers have not paid all they agreed to pay for their stock, that, when recovered, should constitute a fund for all the creditors, whether with or without notice, for as to that fund creditors without notice have no priority over others. *Mathis* v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

26. Creditor may proceed only after execution against company returned unsatisfied.†—Where a statute makes the shareholders of a railroad liable for the debts of the company, upon the return of an execution against the company *nulla bona*, the action may be maintained after one such return, without sending an execution to each county through which the road runs. If the shareholder knows of goods of the company to satisfy the execution, or which are fraudulently concealed, the onus is on him to show it. *Jenkins* v. *Wilcock*, 11 *U. C. C. P.* 505.

27. Remedy by garnishment. — It seems that a statute which merely gives a remedy at law where it could previously have been available in equity only, or *vice versa*, may consistently with the Constitution operate retrospectively; but whether Ala. Act of 1841, which gives the remedy by garnishment to the creditor of a corporation against a stockholder, where the latter stipulates to pay his subscription for stock as calls are made for it, entitles the creditor to garnishee the stockholder for what is due for the unpaid stock of a railroad where he has paid all the calls of the company, is an open question. *Paschall* v. *Whitsett*, 11 *Ala.* 472.

28. Remedy by mandamus.*—Mandamus will not lie to compel the board of directors of a street-railroad company to collect an instalment due from the subscribers on the stock of the company, where, by a clause in the charter of the company, a discretion as to the time and the manner of making the collection is vested in the board of directors. *State ex rel.* v. *Canal & C. Sts. R. Co.*, 23 *La. Ann.* 333.

29. Remedy by scire facias. — (1) *When granted.* — A rule for execution to issue against a shareholder without a *scire facias* will be granted at the instance of a judgment creditor of the company. *Burke* v. *Dublin Trunk Connecting R. Co.*, 37 *L. J. Q. B.* 50, 16 *W. R.* 107, *L. R.* 3 *Q. B.* 47, 8 *B. & S.* 773.

A judgment creditor of a railway company is entitled to a *scire facias* for execution against a shareholder, where the company has been ordered to be wound up, and an execution against it has been returned *nulla bona*, and there is no reasonable prospect of the debt being paid out of the fund in court within a reasonable time. *Mackenzie* v. *Sligo & S. R. Co.*, 4 *El. & Bl.* 119, 24 *L.*

* Unpaid subscriptions to stock constitute trust fund for benefit of creditors, see note, 3 AM. ST. REP. 808.

† Corporate creditor must exhaust his remedies against corporation before proceeding in equity against stockholders for unpaid subscriptions, see note, 3 AM. ST. REP. 814.

* Mandamus by corporate creditors to compel officers to make calls on subscriptions to stock, see note, 3 AM. ST. REP. 807.

J. Q. B. 17. *S. P., Palmer* v. *Justice Ins. Soc.*, 6 *El. & Bl.* 1015, 3 *Jur. N. S.* 44, 26 *L. J. Q. B.* 73. *Hill* v. *London & C. Assur. Co.*, 1 *H. & N.* 398, 26 *L. J. Ex.* 89.

Where a judgment creditor of a company is entitled to issue execution against shareholders, the court will grant a mandamus to the company to produce the register of shareholders for his inspection. *Reg.* v. *Derbyshire, S. & W. J. R. Co.*, 3 *El. & Bl.* 784, 18 *Jur.* 1054, 23 *L. J. Q. B.* 333.

Although no proceedings were taken to procure satisfaction in Ireland of a debt against an Irish railway company, and the affidavits do not expressly negative the existence of property there, the court granted a *scire facias* against a director who had stated at a meeting in London that, in consequence of the shareholders not paying calls, the directors had no funds to meet the claims. *Devereux* v. *Kilkenny & G. S. & W. R. Co.*, 1 *L., M. & P.* 788, 5 *Ex.* 834, 14 *Jur.* 1028, 20 *L. J. Ex.* 37.

Where one creditor of a company has already obtained a *scire facias* against a shareholder to the full amount of his shares, and received payment under the same, the court will not make an order for a *scire facias* against such shareholder on the application of another creditor. *Burke* v. *Dublin Trunk Connecting R. Co.*, 8 *B. & S.* 773, 37 *L. J. Q. B.* 50, *L. R.* 3 *Q. B.* 47, 16 *W. R.* 107.

(2) *Procedure.*—An affidavit on which an application is founded for an execution against shareholders is sufficient if it states that the execution had been issued against the company and returned *nulla bona;* that the party was a shareholder and had been served with notice of a motion; and that the company had not at the date of the judgment, nor at any time since, any lands, title or effects, in England, Ireland or elsewhere, whereon the amount of the judgment could be levied. *Nixon* v. *Kilkenny & G. S. & W. R. Co.*, 1 *H. & N.* 47, 2 *Jur. N. S.* 427, 25 *L. J. Ex.* 249. *S. P., Wyatt* v. *Darent Valley R. Co.*, 2 *C. B. N. S.* 110.

In an application for a *scire facias* against a shareholder, the affidavit shows that the party against whom the writ is asked is a shareholder if it alleges that the deponent failed to obtain sight of the registry, instituted inquiries, and was informed by persons officially connected with the company that the party in question was duly registered as a shareholder. *Rastrick* v. *Derbyshire, S. & W. J. R. Co.*, 9 *Ex.* 149, 7 *Railw. Cas.* 799, 17 *Jur.* 977, 23 *L. J. Ex.* 2.

Motion for a *scire facias* is a proper course to pursue in order to obtain execution against a shareholder of a public company under 8 & 9 Vict. c. 16, § 36. *Hitchins* v. *Kilkenny & G. S. & W. R. Co.*, 10 *C. B.* 160, 1 *L., M. & P.* 712, 15 *Jur.* 336, 20 *L. J. C. P.* 31.

Upon application for leave to issue execution against shareholders, it is not enough to show that the execution against the company has been returned *nulla bona;* the court must be satisfied by the affidavit that due diligence has been used to discover property of the company. *Hitchins* v. *Kilkenny & G. S. & W. R. Co.*, 15 *C. B.* 459.

The discretion of the court in granting or refusing a *scire facias* against stockholders in favor of a creditor of the company is a judicial discretion to be exercised according to the rules of law. A suggestion of fraud, or that parliament has been imposed upon by false recitals in a special act, will not, where a fair *prima facie* case is made out, constitute ground for refusing the writ. *Lee* v. *Bude & T. J. R. Co., L. R.* 6 *C. P.* 576, 40 *L. J. C. P.* 285, 24 *L. T.* 827, 19 *W. R.* 954.

The rule *nisi* for *scire facias* against a shareholder may be served upon an attorney authorized by him to accept service. *Ilfracombe R. Co.* v. *Devon & S. R.* [illegible] *L. R.* 2 *C. P.* 15.

A rule for execution against a shareholder cannot be served by delivering it to his attorney, though at his request; the service must be personal or by leaving it at his place of abode. *Edwards* v. *Kilkenny & G. S. & W. R. Co.*, 1 *C. B. N. S.* 409.

Shareholders against whom a judgment creditor of the company issues execution may tender the amount claimed under protest, and such tender will be good. *Scott* v. *Uxbridge & R. R. Co., L. R.* 1 *C. P.* 596, 12 *Jur. N. S.* 602, 35 *L. J. C. P.* 293.

Shareholders will be given an opportunity of questioning the validity of an order under 8 & 9 Vict. c. 16, § 36, for an execution against shareholders of a company which has been ordered to pay a sum of money and has failed in so doing; but the court is not bound to do so by directing the issuance of a *scire facias. Healey* v. *Chichester & M. R. Co., L. R.* 9 *Eq.* 148, 21 *L. T.* 811, 39 *L. J. Ch.* 387, 18 *W. R.* 270.

30. Remedy by action at law.—In an action to recover of an individual stockholder a debt due from a railroad corporation, the declaration must contain a special averment that the defendant had notice, before suit, of neglect by the corporation to pay the debt, or expose sufficient personal property, within sixty days after demand. *Hicks* v. *Burns*, 38 *N. H.* 141.

Since the passage of N. H. Act of June 27, 1857, ch. 1962, assumpsit, debt or other action at law cannot be maintained against an individual stockholder in a railroad corporation, for a debt of the corporation, even though demand has been legally made upon such corporation and proper notice given to such individual stockholder. *Hadley* v. *Russell*, 40 *N. H.* 109.

In a proceeding to recover an assessment from a stockholder in a railway corporation, on his statutory liability to pay its debts, the petition did not contain a statement that the stockholder was such while the debt for which judgment had been obtained against the corporation was incurred, and in the other pleadings in the cause it appeared that in fact he was not such stockholder. *Held*, that it was error to render judgment by default against such stockholder for an assessment, inasmuch as the petition omitted a constitutive fact under the Code, and no such fact could be presumed to have been proved when no trial was had and no proof exhibited. *Hooker* v. *Kilgour*, 2 *Cin. Super. Ct.* 350.

Texas Rev. St., art. 595, provides for executions against stockholders to the amount of their unpaid stock. Upon reorganizing a corporation the old stockholders took stock in the new, and also certain bonds and cash, but the stock taken had no market value. *Held*, that the court, on its law side, had no power to enforce the statute at the application of one who became a creditor of the new or reorganized company and who had obtained judgment against it. There was in fact no unpaid balance due on such stock. *Thomson-Houston Elec. Co.* v. *Dallas Con. T. R. Co.*, 54 *Fed. Rep.* 1001.—FOLLOWING Grant *v.* East & W. R. Co., 54 Fed. Rep. 569.

It is necessary to ascertain who among the subscribers are solvent and who are insolvent, that the solvent ones may be required, as far as their subscriptions suffice, to contribute enough to make up the deficiencies arising from the insolvency of the others. *Mathis* v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

Where a shareholder in a railroad is made liable for the amount of his unpaid subscription, after the return of an execution against the company *nulla bona*, it is proper to proceed against the shareholder by action, and not by *sci. fa.* *Fraser* v. *Hickman*, 12 *U. C. C. P.* 584.

31. Remedy by suit in equity.—The capital stock of a corporation, when it becomes insolvent, is, in law, assets of the corporation, to be appropriated to the payment of its debts, and creditors have the right to assume that the stock issued by the corporation and held by its stockholders as paid-up stock has been paid up; and if unpaid, a court of equity will require it to be paid. *Richardson* v. *Green*, 43 *Am. & Eng. R. Cas.* 380, 133 *U. S.* 30, 10 *Sup. Ct. Rep.* 280.—QUOTING Wabash, St. L. & P. R. Co. *v.* Ham, 114 U. S. 587.

When stockholders in a corporation, after calls regularly made, are in default, a judgment creditor has a complete remedy at law against them, and therefore will not, for this cause only, be allowed to proceed in equity, but as to stockholders who are not in default to the corporation by reason of no call having been made, but whose subscriptions to the capital stock have not been paid, a court of equity has jurisdiction to compel payment at the instance of an execution creditor of the corporation. *Allen* v. *Montgomery R. Co.*, 11 *Ala.* 437.

A judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same. *Baines* v. *Babcock*, 95 *Cal.* 581, 27 *Pac. Rep.* 674, 30 *Pac. Rep.* 776.

Equity will compel individual stockholders to pay in a sufficient amount of their unpaid stock to discharge a corporate debt. *Dalton & M. R. Co.* v. *McDaniel*, 56 *Ga.* 191.

The mere fact that a fund is a trust fund for the payment of the debts of a railroad corporation does not authorize an application to the chancellor to follow it into the hands of the stockholders and decree its payment over to a creditor, unless facts are alleged which show that his legal remedy

would be unavailing and the intervention of a court of equity necessary to enable him to obtain payment of his demand. *Dudley* v. *Price*, 10 *B. Mon. (Ky.)* 84.

A bill in chancery in the form of a creditor's bill will lie against the stockholders of an incorporated railroad company to subject unpaid subscriptions of stock, and the stockholders may be proceeded against in this way though they omitted to pay at the time of subscription the five per cent. required by the charter. *Henry* v. *Vermillion & A. R. Co.*, 17 *Ohio* 187. — QUOTED IN Robertson *v.* Sibley, 10 Minn. 323 (Gil. 253).

Under a statute making shareholders of a railroad liable for the debts of the company to the amount of their unpaid stock, after execution against the company returned *nulla bona*, it is not necessary in order to recover against the shareholders to show that the stock had been called for. *Jenkins* v. *Wilcock*, 11 *U. C. C. P.* 505.

32. Effect of the appointment of a receiver.—Where an order of sequestration and for the appointment of a receiver is issued against a corporation, upon the application of creditors, the right to collect any unpaid balances on stock vests in the receiver, and not in a judgment creditor; and he will be restrained from proceeding, where the action was commenced after the making of the order but before the appointment of the receiver was perfected. *Rankine* v. *Elliott*, 16 *N. Y.* 377; *affirming* 14 *How. Pr.* 339.

A creditor of a railroad corporation recovered judgment at law, issued execution, had it returned unsatisfied, and filed his bill in chancery under the statute relating to "proceedings against corporations in equity" (2 N. Y. Rev. St. 463, § 36), for a sequestration of the effects of the corporation and the appointment of a receiver. The receiver appointed in that suit then instituted a suit in equity against a stockholder to recover the unpaid balance of his subscription. The stockholder sued had paid all the calls made by the corporation, pursuant to the terms of his subscription, and other stockholders who had not paid their subscriptions were not made parties. *Held*, that the bill could not be sustained. *Mann* v. *Pentz*, 3 *N. Y.* 415; *reversing* 2 *Sandf. Ch.* 257.

33. Effect of bankruptcy of stockholder proceeded against.—The charter of a railroad company provided that in case of default of any stockholder to pay an assessment on his stock, after a prescribed notice, the stock and any payments made thereon should be forfeitable to the company. The company had failed to pay interest accrued on its mortgage bonds. The complainants, holders of such bonds, were about, for themselves and the other creditors of the company, to institute proceedings against it to compel an assessment on the stock to supply the means to pay such interest. The company had issued certificates of the stock, which stated that the shares were fully paid for. The complainants alleged that either the certificates were in this respect wholly untrue, or the stock had not been properly paid for. A firm holding such stock had been adjudged bankrupt, and there had been extraordinary delay in the bankruptcy. The purpose of the bill was to restrain distribution of the assets in bankruptcy until proof could be made of the expected assessments on the shares of the bankrupts as a debt in the bankruptcy. The railroad company was not, and could not be made, a party defendant, and the proposed proceedings against it were to be under a competent jurisdiction elsewhere. The right of compelling the assessment, under such proceedings, of any amount which could be prospectively liquidated, was not considered unquestionable. For this reason, and in consideration of the delay, a temporary injunction to restrain generally distribution in the bankruptcy was refused. But an injunction to restrain temporarily the disposal of the stock was granted. *Gibson* v. *Lewis*, 11 *Phila. (Pa.)* 476.

34. Liability as to stock assigned for benefit of creditors. — A suit was instituted by creditors of a railroad against a stockholder to compel payment of his stock. It appeared that a part of his stock had been assigned for the benefit of creditors. *Held*, that the same measure of liability applied to the assigned stock as to that held in the stockholder's own name. *Lloyd* v. *Preston*, 146 *U. S.* 630, 13 *Sup. Ct. Rep.* 131.

35. Conclusiveness of the judgment against the corporation. — A judgment against a corporation for the recovery of money is conclusive evidence, in a suit against a stockholder for the collection of said judgment, of the existence of the corporation, and its liability to plaintiff therein, as thereby determined; and such judgment, whether given in an action *ex*

contractu or *ex delicto*, is an indebtedness of the corporation for which a stockholder is liable to the amount due on his stock. *Powe'l* v. *Oregonian R. Co.*, 13 *Sawy.* (*U. S.*) 535, 36 *Fed. Rep.* 726; *see* 38 *Fed. Rep.* 187.

A stockholder cannot go behind the judgment against the company, except in a case of fraud or collusion, and is not therefore entitled to raise a question as to the judgment being properly recoverable against the company. *Ray* v. *Blair*, 12 *U. C. C. P.* 257.

In an action by a creditor of a company against a shareholder, under 14 & 15 Vict. c. 51, § 19, the record of the judgment against the company showed it to have been obtained on the latter's confession in an action on a promissory note. *Held*, that defendant could not object to the validity of such judgment on the ground that the company could not make a note. It was sufficient to prove a return of *nulla bona* by the sheriff to the *fi. fa.*, though such return had not been filed. *Tyre v. Wilkes*, 18 *U. C. Q. B.* 126.

36. Liability of directors under the English law. — Where, under a power in the articles of association to receive payment of calls in advance, the directors pay into the bank the amount remaining uncalled on their shares, and on the same day appropriate the money in payment of their fees, for which there were at the time, as they knew, no other available assets, there is no *bona fide* payment in anticipation of calls, and the directors are not relieved from liability upon their shares. *In re European C. R. Co., L. R.* 13 *Eq.* 255, 41 *L. J. Ch.* 251, 26 *L. T.* 92.

The lapse of several years during which a railway company has not treated as shareholders certain persons nominated as directors in the special act of incorporation is strong evidence that it has abandoned all rights against them. *Kipling* v. *Todd, L. R.* 3 *C. P. D.* 350, 47 *L. J. C. P. D.* 617, 39 *L. T.* 188, 27 *W. R.* 84.—FOLLOWED IN Mammatt *v.* Brett, 54 L. T. 165.

2. *Additional or Statutory Liability.**

37. In general.—A construction company, organized for the purpose of furnishing materials for building and equipping railways, is a railway corporation within the meaning of the statute exempting stockholders from liability beyond the amount of their stock. (Beck and Adams, JJ., dissenting.) *First Nat. Bank* v. *Davies*, 43 *Iowa* 424.—FOLLOWED IN Langan *v.* Iowa & M. Constr. Co., 49 Iowa 317.

The members of a corporation organized under the laws of the state, for the purpose of transporting persons or property for hire, are not liable individually, or *in solido*, for the obligations of the corporation executed by its authorized officers. *Reinhold* v. *Ludeling*, 29 *La. Ann.* 552.

Where a charter is held subject to the right of repeal or modification, a stockholder holds his shares subject to such liability as may attach to him in consequence of an extension or renewal of the charter, even without his consent or application; and the same rule applies where his estate holds the shares after his death. *Bailey* v. *Hollister*, 26 *N. Y.* 112.

The stockholder or his personal representative can, it seems, relieve himself only by selling the stock. *Bailey* v. *Hollister*, 26 *N. Y.* 112.

38. Under constitutional provisions.*—A railroad charter provided that stockholders should not be liable beyond the amount of stock subscribed, and that the charter should not be amended, except by the consent of the stockholders. Subsequently the state Constitution was amended, providing for a double liability on stockholders. *Held*, that this did not act as an amendment of the charter so as to increase the liability of the stockholders, where such increase was never assented to by them. *Steacy* v. *Little Rock & Ft. S. R. Co.*, 5 *Dill.* (*U. S.*) 348.

Where a state Constitution makes stockholders liable for the debts of the corporation beyond the amount of their stock, and a corporation is authorized to sell new stock, but it is not sold until after the Constitution is amended so as to make stockholders liable only for the amount of their

* Nature of statutory liability of stockholders for corporate debts, see note, 3 AM. ST. REP. 846.

Legislative power to impose, repeal or modify statutory liability of stockholders for corporate debts, see note, 3 AM. ST. REP. 867

Survival of statutory liability for corporate debts against stockholders' personal representative, see note, 3 AM. ST. REP. 869.

Estoppel in actions to enforce statutory liability of stockholders for corporate debts, see note, 3 AM. ST. REP. 872.

* Personal liability of stockholders for corporate debts can be imposed by constitutions, charters or statutes only, see note, 3 AM. ST. REP. 835.

stock, the stockholders are not liable under the old Constitution. And the fact that the corporation was in debt before the Constitution was amended does not render the new Constitution invalid, as impairing the obligation of a contract between the corporation and its creditors. *Ochiltree* v. *Iowa R. Contracting Co.*, 21 *Wall.* (*U. S.*) 249, 7 *Am. Ry. Rep.* 525.

Under Mo. Const. of 1865, § 6, as amended, a stockholder cannot be made liable to a creditor when his stock is fully paid up. *State ex rel.* v. *Boothe*, 68 *Mo.* 546.—FOLLOWING Schricker *v.* Ridings, 65 Mo. 208.

The legislature has no power, under the present Constitution of Ohio, to create railroad corporations without securing the individual liability of their stockholders, at least to the minimum amount required by the Constitution; and if the act of incorporation does not secure this, either by express provision or by requiring from the corporators or stockholders such acts of organization or otherwise as will subject them to the constitutional provision, the act will be unconstitutional and void. *State* v. *Sherman*, 22 *Ohio St.* 411.

Tex. Const. art. 12, § 6, does not change the rule long established by courts of equity that stockholders of a corporation are liable to creditors for the par value of the capital stock subscribed for and held by them. *Mathis* v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

39. The liability is strictly construed and limited.*—The members of a corporation established by law are not personally responsible for the debts of the company beyond the amount of stock which they individually hold. *Chase* v. *Ludeling*, 27 *La. Ann.* 607.

Under N. H. Comp. St. ch. 147, § 1, providing that the stockholders and officers of all corporations having for their object a dividend of profits among the stockholders shall be personally liable for the debts and civil liabilities of such corporations, stockholders in a railroad are not liable for a debt of the corporation contracted before they became stockholders. *Chesley* v. *Pierce*, 32 *N. H.* 388.

40. Necessity of judgment and execution against corporation.*—Under Ill. Act. of 1849, relating to railway corporations, if a claim is owing by a railway for services, a stockholder is not liable until an execution against the corporation shall be returned unsatisfied, and then the amount due on such execution is the amount recoverable, with costs, against the stockholder. *Cutright* v. *Stanford*, 81 *Ill.* 240.

41. Repeal of statute and its effect.—When the charter of a railroad makes the individual stockholders liable for the debts of the corporation to the amount of their stock, a statute repealing this provision is unconstitutional, as impairing the obligation of contracts, as to debts contracted on the faith of such liability. *Hawthorne* v. *Calef*, 2 *Wall.* (*U. S.*) 10.

New York Act of May 13, 1845, which made stockholders in railroad companies liable for debts of the corporation improperly contracted with their knowledge, was repealed by the General Railroad Act of 1848, as amended in 1850, as to all railroads created thereunder. *Rochester* v. *Barnes*, 26 *Barb.* (*N. Y.*) 657.

42. Rule in Missouri—Double liability.—Statutes designed to carry out the "double-liability" clause of Mo. Const. art. 8, § 6, may limit the enforcement of such liability as to time. *Perry* v. *Turner*, 55 *Mo.* 418.

A company became indebted in October, 1870, prior to the repeal of the "double-liability" clause of the Constitution, in the sum of $7858. In suit against a stockholder for this amount, plaintiff, among other matters, alleged in general terms that the company had become insolvent, and had dissolved in December, 1870. *Held:* (1) that under a proper construction of art. 1, § 22, of the statute touching corporations, defendant could not be held liable for the entire amount of the debt, but only in a sum equal to the amount of stock owned by him, together with the amount of his unpaid subscription; (2) that the general averment of the insolvency and dissolution of the company was sufficient without a further statement of the particular facts upon which the averment was based; (3) that suits of the above description, whether

* Construction of statutes imposing personal liability on stockholders for corporate debts, whether strictly or liberally construed, see note, 3 AM. ST. REP. 836.

* Judgment against corporation, when conclusive in action to enforce stockholder's statutory liability, see note, 3 AM. ST. REP. 858.

in law or in equity, will not lie against defendants jointly, but must be against each one severally, and under our law the stockholder thus compelled to pay must resort to his remedy for contribution. *Perry* v. *Turner*, 55 *Mo.* 418.

The double liability of a stockholder created by Mo. Constitution of 1865 cannot be enforced by the corporation. *Liberty Female College Assoc.* v. *Watkins*, 70 *Mo.* 13.—EXPLAINING Karnes *v.* Rochester & G. V. R. Co., 4 Abb. Pr. N. S. (N. Y.) 107.

Where bonds are issued by a corporation while double liability attached to its stock, the holder of such bonds, though he became such after the repeal of the double-liability clause, may enforce the liability against a stockholder. The double liability of a stockholder is not a penalty, but a right arising out of contract, and the assignee of the obligation of the corporation takes all the rights of the assignor. *Blakeman* v. *Benton*, 9 *Mo. App.* 107.

The provisions of Mo. Const. of 1865, art. 8, § 6, as to double liability, were not carried into effect until the passage of the act of March 19, 1866, and the double liability did not attach in favor of bonds issued prior to that date. *Blakeman* v. *Benton*, 9 *Mo. App.* 107.

43. —— repeal of double-liability clause by constitutional amendment. — A stockholder in a corporation who becomes such after the repeal of the double-liability clause in Mo. Constitution of 1865, art. 8, § 6, is not liable in double the amount of his stock for debts owing by the corporation prior to the repeal. *Ochiltree* v. *Iowa R. Contracting Co.*, 54 *Mo.* 113, 12 *Am. Ry. Rep.* 361.

Mo. Constitution of 1865 went into force July 4 of that year, but the double-liability clause contained in it was not carried into effect by appropriate legislation till the act of March 19, 1866. Between these dates certain bonds were issued by a railroad. This double liability was abolished by the constitutional amendment of November 8, 1870. *Held*, in an action brought after 1870, that the holders of the bonds were not entitled to enforce against the stockholders of the company the double liability provided by the Constitution of 1865. *Jerman* v. *Benton*, 79 *Mo.* 148.

By Mo. Rev. St. of 1855 the holders of stock in railroad companies were not subject to the double liability imposed on stockholders in other corporations. *Jerman* v. *Benton*, 79 *Mo.* 148. *Blakeman* v. *Benton*, 9 *Mo. App.* 107.

44. Statutory liability to laborers. —The recovery of a judgment before a justice of the peace against a street-railway company for labor performed for the company, and the return unsatisfied of an execution issued thereon, will support an action against a stockholder, under How. Mich. St. § 3559, which provides that no suit shall be brought against any individual stockholder for any such labor debt until judgment on the demand shall have been obtained against the company and execution thereon returned unsatisfied in whole or in part. *Voight* v. *Dregge*, 97 *Mich.* 322, 56 *N. W. Rep.* 557.

New York General Railroad Act of 1850, § 10, provides that stockholders shall be jointly and severally liable for debts due laborers and servants, for services performed for the corporation. *Held*, that in an action under this statute it is essential that the complaint should show the money claimed to be due or owing to a laborer or servant of the company for services performed for it. *Boutwell* v. *Townsend*, 37 *Barb.* (*N. Y.*) 205.

45. Liability of corporation for torts not enforceable against stockholders. — A stockholder of a railroad company is not liable for the negligence of the officers, agents or employés of the company in the operation of its road. *Atchison, T. & S. F. R. Co.* v. *Cochran*, 41 *Am. & Eng. R. Cas.* 48, 43 *Kan.* 225, 7 *L. R. A.* 414, 23 *Pac. Rep.* 151.—QUOTING Atchison, T. & S. F. R. Co. *v.* Davis, 34 Kan. 209; Pullman Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587.

The claim of a passenger for injuries caused by the negligence of the agents of a carrier is not one which, after judgment against the company and execution returned unsatisfied, affords a ground of action against the stockholders under Mich. Comp. Laws 1871, §§ 2478–2480. *Bohn* v. *Brown*, 33 *Mich.* 257.

46. Liability enforceable by creditors only, not by one stockholder against another.—Where a stockholder is sued by a creditor of the corporation, under a statute making stockholders liable for the debts of the company, it is a good defense that the plaintiff was a stockholder also at the time of acquiring his demand,

Wait v. *Ferguson*, 14 *Abb. Pr.* (*N. Y.*) 379.

47. Liability imposed by particular statutes.—A street-railway company restricted to horse power within the city limits only, and with no restriction as to what shall be carried, is a railroad company within the meaning of the statute of 1855 defining the stockholders' liability. *Jerman* v. *Benton*, 79 *Mo.* 148.

The liability imposed by section 78 of the act for the creation and regulation of incorporated companies, on the stockholders of certain corporations therein named, among them railroads, in addition to their stock subscribed, is a security provided by law for the exclusive benefit of the creditors, over which the corporate authorities have no control. *Umsted* v. *Buskirk*, 17 *Ohio St.* 113.

The individual or personal liability of stockholders, under section 8 of Ohio Act of April 10, 1861, regulating street-railroad companies, attaches in favor of creditors at the time the debt was contracted or the liability incurred by the corporation. *Brown* v. *Hitchcock*, 4 *Am. & Eng. R. Cas.* 352, 36 *Ohio St.* 667.

Though the charter of an express company did not make the stockholders personally liable for the debts of the company, the assessment act passed subsequent to the charter has so far modified the charter as to make them personally liable. *Anderson* v. *Com.*, 18 *Gratt.* (*Va.*) 295.

The statute 20 Vict. c. 145, § 21, does not exempt the shareholders of the company by that act revived from personal responsibility and liability for debts contracted under the previous statute. *Ray* v. *Blair*, 12 *U. C. C. P.* 257.

3. *Partnership or Individual Liability.**

48. In general.—The liability of stockholders for the capital stock of a company is several and not joint. *Baines* v. *Babcock*, 95 *Cal.* 581, 27 *Pac. Rep.* 674, 30 *Pac. Rep.* 776.

A stockholder is not a party to a judgment against the corporation, and such judgment will not bind his individual property. *Wilson* v. *St. Louis & S. F. R. Co.*, 108 *Mo.* 588, 18 *S. W. Rep.* 286.—QUOTING Hitchins *v.* Kilkenny & G. S. & W. R. Co., 20 L. J. C. P. 31.

The subdivision of the General Incorporation Law entitled "Corporations" applies to railroad companies organized under said law, and a failure to comply with its provisions renders the stockholders individually liable for the corporate debts. *White* v. *Blum*, 4 *Neb.* 555.

A judgment creditor of an insolvent railroad corporation may join in the same action a claim to compel payment of unpaid subscriptions for stock and a claim to enforce the individual liability of stockholders for the satisfaction of his judgment. *Warner* v. *Callender*, 20 *Ohio St.* 190.

49. Liability as partners.— Defendants were sued as stockholders in a joint-stock company, making them liable as partners, and the certificates issued to them recited that the holders might be liable for further payment, but they defended that they received such certificates without examining them. *Held*, that it was their duty to examine them, and to ascertain their actual position and liability, but whether they were liable on account of the actual status of the company not being disclosed to them was for the jury. *National Park Bank* v. *Nichols*, 2 *Biss.* (*U. S.*) 146.

If a shareholder assumes the benefits and advantages of a partner, he cannot, when called upon to respond for the contracts of the corporation, deny his liability. *National Park Bank* v. *Nichols*, 2 *Biss.* (*U. S.*) 146.

In Nebraska, where the amount due from each stockholder in a railroad corporation on account of subscriptions to its capital stock equals or exceeds the demand of a creditor of such corporation, a joint judgment therefor may be rendered against all of said stockholders. The stockholders in such case are treated as partners. *White* v. *Blum*, 4 *Neb.* 555.

50. Extent of the liability—Irregular incorporation.* — Defendant, an individual, owned a short railroad, and organized a new company to which he sold the road for many times its actual value, taking payment in stock and bonds. He was the only stockholder, except certain individuals who held a nominal amount of stock, without having paid therefor, to enable them to become corporators and

* Individual liability of stockholders for corporate debts, at common law, see note, 3 AM. ST. REP. 834.

* Extent in general of individual liability of stockholders for corporate debts, see note, 3 AM. ST. REP. 836.

officers. Complainants held a portion of these bonds, taken in payment of a debt owed to them by defendant, amounting to about three times the value of the road, after having refused to take the entire road in payment, it being doubtful whether they knew that the company was organized to make use of the road to pay debts. *Held*, that the stockholders were liable for the payment of a judgment rendered for the amount of the bonds, though these recited that stockholders should not be individually liable. *Preston* v. *Cincinnati, C. & H. V. R. Co.*, 36 *Fed. Rep.* 54.

4. *Liability as Affected by Transfer or Surrender of Shares.*

51. Assignments and transfers, generally.—When stock partially paid for is transferred by the stockholder *bona fide* to another person, and he is accepted by the corporation as the holder of the stock, this is a discharge of the original stockholder, and he cannot afterwards be pursued by a creditor. *Allen* v. *Montgomery R. Co.*, 11 *Ala.* 437.

The liability of a stockholder in a street-railway company, under How. Mich. St. § 3557, which provides that the stockholders of every such company shall be jointly and severally liable, in their individual capacity, for all labor performed for the company, is not affected by a sale and transfer of his stock after the labor has been performed and before a suit is brought against the company to recover for the same. *Voight* v. *Dregge*, 97 *Mich.* 322, 56 *N. W. Rep.* 557.

After a personal liability attaches to a stockholder of a railroad, it is not discharged by the subsequent assignment or transfer of his stock; but the successive assignees or holders, by accepting the stock and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him as stockholder while he held the stock. *Brown* v. *Hitchcock*, 4 *Am. & Eng. R. Cas.* 352, 36 *Ohio St.* 667.

In a suit by creditors to enforce the personal liability against the stockholders of an insolvent railroad, the existing stockholders are severally chargeable with the payment of such liability, and if, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency. *Brown* v. *Hitchcock*, 4 *Am. & Eng. R. Cas.* 352, 36 *Ohio St.* 667.

Under Va. Code of 1873, ch. 57, § 25, forbidding the assignment of unpaid stock on the books of the company, a stockholder of record is liable for any unpaid instalments, though he may have parted with the stock or held it in trust for others. *Hawkins* v. *Glenn*, 131 *U. S.* 319, 9 *Sup. Ct. Rep.* 739.

52. Transfer pursuant to condition in subscription.—A large number of persons, all residents of a certain city, subscribed to the original articles of incorporation of a railroad, each in sums of $1000 to $5000, with a proviso that if the city should subscribe $50,000 or more, it should be lawful for such individuals to transfer all of their subscriptions above $300 each to the city as part of its subscription. The city subscribed $400,000, and the transfers were made accordingly. *Held*, that such transfers were valid, and that creditors of the company could not require such subscribers to pay in the residue of their subscriptions above the $300. The general rule that conditions attached to subscriptions made before incorporation are void, does not apply. *Burke* v. *Smith*, 16 *Wall.* (*U. S.*) 390, 4 *Am. Ry. Rep.* 37.

It was objected that the city never accepted such transfer. While it is true that a mere assignment of the shares of a subscriber will not relieve him until the assignee is substituted in his stead, yet, in the absence of a written transfer, where there is proof that the mayor and members of the council assented thereto, and that the stock was not charged to the subscribers on the books of the company, it cannot be said, after the lapse of nine years, that the transfer was not made. *Burke* v. *Smith*, 16 *Wall.* (*U. S.*) 390, 4 *Am. Ry. Rep.* 37.

It was further objected that such transfer was illegal because the directors of the company who ordered the transfer were themselves stockholders. *Held*, not to affect the transfer, the original subscriptions with the provision for the transfer being legal in themselves. *Burke* v. *Smith*, 16 *Wall.* (*U. S.*) 390, 4 *Am. Ry. Rep.* 37.

53. Assignment of shares for benefit of creditors. — Defendant, a subscriber to the stock of a railway, made an assignment under the Insolvent Act of 1869, but before doing so he had procured

the execution by the required majority of his creditors of a deed of composition and discharge, apparently under section 94 of the act. Plaintiff, as a creditor of the same company, sued out a writ of *sci. fa.* against defendant to compel payment to him of the balance due upon the said stock. Defendant pleaded that he was not a shareholder in the company, as the property in the stock had passed to the assignee. It did not appear whether or not the assignee had accepted or rejected this stock, or had done any act beyond accepting the assignment made him. Defendant had obtained his discharge in the usual way, the unpaid balance upon the stock, however, not having been scheduled as a liability of defendant, and no claim having been proved in respect of it. *Held*, that plaintiff was entitled to recover, and that the property in the stock had not passed to the official assignee. *Denison* v. *Smith*, 43 *U. C. Q. B.* 503.

54. Forfeiture of stock to company.—When a corporation has proceeded under its charter to forfeit stock partially paid out, this dissolves the connection of the stockholders when shares are forfeited with the corporation, and a creditor cannot charge them with the amount unpaid. *Allen* v. *Montgomery R. Co.*, 11 *Ala.* 437.

It is error to decree against a stockholder of a company, when it is alleged that his stock has been forfeited to the company. If the stock is forfeited he is absolved from further liability to the company or its creditors. *Lexington & O. R. Co.* v. *Bridges*, 7 *B. Mon.* (*Ky.*) 556.

One whose shares of stock have been forfeited for non-payment of calls is not a stockholder within the meaning of New York General Railroad Act of 1850, § 10, so as to render him liable to a creditor of the company for the amount unpaid on the stock, although the debt was contracted by the company before the stock was forfeited. (Hunt, C.J., and Woodruff, J., *contra.*) *Mills* v. *Stewart*, 41 *N. Y.* 384.

Where the law makes stockholders liable for debts of the corporation to the extent of their unpaid subscriptions, a stockholder in a railroad is not relieved of such liability by a resolution of the directors declaring the stock forfeited for non-payment of calls, and that it would be sold on a day named, if not redeemed, but where no sale was ever had. *Fraser* v. *Robertson*, 13 *U. C. C. P.* 184.

55. Surrender of stock to company.—One who continues to hold the certificates of his shares in a railway company is liable to creditors as a stockholder although he had offered by letter to surrender his shares to the directors, who passed a resolution that the surrender was accepted, no further steps being taken to effectuate the surrender or transfer. *Barry* v. *Navan & K. R. Co.*, 11 *Ir. R., C. L.* 403.

Scire facias on a judgment against a railway company cannot be maintained against persons nominated as directors, but to whom no shares were ever allotted and from whom the company has accepted a surrender of the inchoate right to shares which they possessed under the special act of incorporation wherein they were nominated as directors. *Kipling* v. *Todd*, *L. R.* 3 *C. P. D.* 350, 47 *L. J. C. P. D.* 617, 39 *L. T.* 188, 27 *W. R.* 84.—FOLLOWED IN Mammatt *v.* Brett, 54 L. T. 165.

One who surrenders to a corporation stock issued to him as "full paid," but for which he has paid nothing, and which stock the corporation issues, for value, to *bona fide* subscribers, is not liable as a stockholder to one who becomes a creditor of the corporation long subsequent to such surrender. *Erskine* v. *Peck*, 13 *Mo. App.* 280; *affirmed in* 83 *Mo.* 465.

A stockholder who surrenders unpaid stock to the corporation is not liable thereon to a creditor of the corporation whose demand accrued after the surrender. *Johnson* v. *Lullman*, 15 *Mo. App.* 55

5. *Enforcement of the Liability.*

56. In general — Jurisdiction — Notice.* — Sufficient notice required by Mo. Rev. St. 1879, § 736, to a person sought to be charged on execution as a stockholder of an insolvent corporation, must be a personal notice served within the state. *Wilson* v. *St. Louis & S. F. R. Co.*, 108 *Mo.* 588, 18 *S. W. Rep.* 286.

The right of a creditor to sue an individual stockholder to recover an unpaid subscription and apply it upon his debt does not involve an accounting and marshaling of assets and distribution of all the proceeds.

*How statutory liability of stockholders for corporate debts is enforced, see notes, 100 AM. DEC. 552; 3 AM. ST. REP. 854.

Enforcing liability outside of state in which corporation is organized, see note, 3 AM. ST. REP. 868.

Mathis v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

57. Who are stockholders liable to creditors.* — Where a subscriber's agreement of a proposed railway company empowers the directors to abandon the undertaking, or any part thereof, and also to make application to parliament for an act for any of the purposes aforesaid; also to fix upon, and from time to time to alter or vary, the *termini*, route, course or line of the railway, and to determine whether and how far the undertaking shall be carried into effect, a subscriber to such agreement is liable as a shareholder to the creditors of the company, although the act of parliament incorporates a different company from that named in the agreement, having different *termini* and less amount of capital divided into shares of a less amount each. *Nixon* v. *Brownlow*, 2 *H. & N.* 455, 26 *L. J. Ex.* 273.

One's liability as a stockholder of a railroad corporation to the creditors thereof depends upon his legal relation to the corporation. If he is a stockholder, as between himself and the corporation, he will be liable, as such, to the creditors of the corporation, but otherwise not. *Union Sav. Assoc.* v. *Seligman*, 92 *Mo.* 635, 15 *S. W. Rep.* 630.—DISTINGUISHING Upton *v.* Tribilcock, 91 U. S. 45; Sanger *v.* Upton, 91 U. S. 56; Webster *v.* Upton, 91 U. S. 65. FOLLOWING Burgess *v.* Seligman, 107 U. S. 20.

To create a liability it is not necessary that shares of stock should have been actually issued and delivered to any of the subscribers. Their subscription fixes their liability. *Mathis* v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

The fact of defendant's name appearing in the act incorporating a company, as one of the provisional directors, will not authorize the court to presume that he ever became a subscriber for shares; more especially when there is no proof of his having acted as a provisional director, or that he had attended any of the meetings of the company. *Rogers* v. *Hersey*, 15 *Low. Can.* 141.

Plaintiff, a creditor of a company, sued defendant as a shareholder for the amount unpaid on his shares. It appeared that defendant had signed the stock book of the company for forty shares, but he alleged that this was done upon the faith of a verbal agreement with one L., a provisional director and chief promoter of the company, that defendant and another should receive the contract for building the road. There was no proof that defendant had received any formal notice of the allotment of the shares, but he paid 10 per cent thereon, because, as he alleged, L. told him that he would not get the contract unless he paid it. He also attended a meeting of the shareholders, and seconded a resolution granting an allowance to the creditors. *Held*, that the payment of the 10 per cent. made him a shareholder, and that he could not repudiate his liability on the ground that he had not been awarded the contract, for L. had no power to bind the company by annexing such an agreement to his subscription. *Wilson* v. *Ginty*, 3 *Ont. App.* 124.

58. Liability of persons holding shares in trust, or as collateral security.—By a statute of Missouri, stockholders of a corporation at its dissolution are liable for its debts; but no person holding stock as executor, administrator, guardian or trustee, and no person holding stock as collateral security, shall be personally subject to such liability, but the persons pledging such stock shall be considered as holding the same and liable; and the estates and funds in the hands of executors, etc., shall be liable. *Held:* (1) that persons to whom stock of a railroad is pledged as collateral security by the corporation itself are within the exemption of the statute; (2) that certificates of the stock, absolute on their face, issued to a creditor as collateral security, or in trust, may be shown to be so held by evidence *in pais*. *Burgess* v. *Seligman*, 9 *Am. & Eng. R. Cas.* 655, 107 *U. S.* 20, 2 *Sup. Ct. Rep.* 10.

The holder of such stock as collateral security, or in trust, though he votes on such stock, is not thereby estopped from showing that the stock belongs to the company and not to him, and that he only holds it as collateral security. *Burgess* v. *Seligman*, 9 *Am. & Eng. R. Cas.* 655, 107 *U. S.* 20, 2 *Sup. Ct. Rep.* 10.

Wag. Mo. St. p. 301, § 9, in relation to railroad companies, provides that "no person holding stock in any such company * * * as collateral security shall be personally subject to any liability as a stockholder of such company; but the person

*Who are stockholders personally liable for corporate debts, see notes, 3 AM. ST. REP. 829, 858.

pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." *Held*, that this section has no application to stock which has not been issued in the usual course of business, and therefore does not exempt from liability a person holding as collateral security unsubscribed stock issued to him by the company. (Norton, J., dissenting.) *Griswold* v. *Seligman*, 4 *Am. & Eng. R. Cas.* 371, 72 *Mo.* 110.—DISTINGUISHING McMahon *v.* Macy, 51 N. Y. 155. NOT FOLLOWING Matthews *v.* Albert, 24 Md. 527.

No person will be regarded as holding stock as a "trustee" or by way of "collateral security," within the meaning of the above section, and therefore exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation, in the ordinary course of business. *Fisher* v. *Seligman*, 9 *Am. & Eng. R. Cas.* 670, 75 *Mo.* 13.

One who accepts a certificate of stock, under an agreement in writing that it is held by him only as collateral security, is not thereby rendered liable as a stockholder, either to the corporation or its creditors. *Union Sav. Assoc.* v. *Seligman*, 92 *Mo.* 635, 15 *S. W. Rep.* 630.

Where stock is held under a written agreement only as collateral security, the act of voting it, by the parties so holding it, would not make them absolute stockholders, as between themselves and either the corporation or creditors of the corporation, and in either case such holders would have the right to show that they held the stock as collateral security. *Union Sav. Assoc.* v. *Seligman*, 92 *Mo.* 635, 15 *S. W. Rep.* 630.

In an action by a creditor of a railroad company organized under N. Y. Laws of 1850, ch. 140, against a stockholder, to enforce the liability shown by section 10 of the act (as amended in 1854, ch. 284), evidence is proper, upon the part of defendant, to show that an assignment of stock, absolute upon its face, was in fact given to him as collateral security, and was held by him for that purpose only. *McMahon* v. *Macy*, 51 *N. Y.* 155, 4 *Am. Ry. Rep.* 393.—DISTINGUISHED IN Griswold *v.* Seligman, 4 Am. & Eng. R. Cas. 371, 72 Mo. 110; Stephens *v.* Fox, 83 N. Y. 313.

Where by agreement a railway company allots paid-up shares to certain persons, as trustees for a banking company, as securities for overdrafts, and the certificate states that the shares are registered as paid up, but in the register there is no such entry, while in the call book they are stated to have been deposited as securities for overdrafts, the trustees are not liable to judgment creditors of the railway company on such shares. *Guest* v. *Worcester, B. & L. R. Co.*, 38 *L. J. C. P.* 23.

59. Effect of voting stock held in trust or as collateral.—One may render himself liable as a stockholder in a corporation as well by his conduct in respect to the stock of the corporation as by formal subscription to and acceptance of stock. Accordingly, where defendants advanced money to a corporation, and to secure the advances, received from the corporation a certificate for a majority of its capital stock, which was absolute and unconditional on its face, but was to be held by them "in trust" as declared by a resolution of the board of directors, or "in escrow," as it was expressed in an entry on the stock book of the corporation; and while so holding the stock, defendants voted it at one election and thus elected the directors and other officers, and thereby obtained complete control of the corporation—*held*, that they were estopped to deny that they were stockholders, and were liable as such, both to the corporation and its creditors; and this, so far as the creditors were concerned, whether they became such before defendants had so treated the stock or not. *Griswold* v. *Seligman*, 4 *Am. & Eng. R. Cas.* 371, 72 *Mo.* 110.—CRITICISING Vice *v.* Anson, 1 M. & R. 113.—FOLLOWED IN Bray *v.* Seligman, 9 Am. & Eng. R. Cas. 653, 75 Mo. 31; Fisher *v.* Seligman, 9 Am. & Eng. R. Cas. 670, 75 Mo. 13.

And where a corporation deposits its own unpaid and unsubscribed stock with a banking firm as security for advances to the corporation, to be held by the firm for the period of one year, but with no provision for voting the stock, and after the lapse of the year the firm did vote it and thereby elected its own board of directors and so ultimately obtained complete control of the corporation, the members of the firm thereby brought themselves within the rule of liability laid down in the above case. *Fisher* v. *Seligman*, 9 *Am. & Eng. R. Cas.* 670, 75

Mo. 13.—FOLLOWED IN Bray *v.* Seligman, 9 Am. & Eng. R. Cas. 653, 75 Mo. 31.

60. Necessity of call by corporation to render subscriber liable.—A sheriff levying under an execution against the company upon the unpaid subscription to stock of one of its stockholders acquires none of the rights which a creditor of the company might have against the stockholder, but only those which the company might have against him, and in suing for the unpaid subscription must sue (under the statute authorizing him to collect debts levied on) as for a debt due from the stockholder to the company. *Robertson* v. *Sibley*, 10 *Minn.* 323 (*Gil.* 253).

The terms of the subscription being to pay the amount when called by the company in instalments not exceeding ten per cent. each upon thirty days' notice, the sheriff, levying upon and suing for an unpaid subscription, cannot recover without proving a call by the company upon the whole stock for an amount not exceeding ten per cent., and notice. The insolvency of the company, or its refusal to make calls or make provision for the payment of its debts and total abandonment of its work and organization, do not remove this necessity. *Robertson* v. *Sibley*, 10 *Minn.* 323 (*Gil.* 253). —QUOTING Henry *v.* Vermillion & A. R. Co., 17 Ohio 187.

61. Parties.*—Where there are other stockholders at the time a debt is contracted, a bill in chancery cannot be maintained against the individual stockholder alone, for the debt of the corporation, but those against whom such stockholder would have a remedy over for contribution must be made parties with him. *Hadley* v. *Russell*, 40 *N. H.* 109.

Where the creditor of an insolvent corporation, whose execution against the corporate property has been returned unsatisfied, is ignorant of the names of the stockholders whose shares of the capital stock have not been paid in full, he may pray for a discovery of their names; and after he has obtained such discovery may amend his bill and make them parties, for the purpose of charging them personally for the deficiency, to the extent of their liability. Or he may wait until a final decree against the corporation has been made, and its effects have been distributed among its creditors, and may then file a supplemental bill for the purpose of charging the stockholders personally for the deficiency to the extent of their statutory liability. *Morgan* v. *New York & A. R. Co.*, 10 *Paige* (*N. Y.*) 290.

Suit being instituted in a county against the stockholders living there and those living elsewhere, if the others not living in that county are necessary parties to the suit they are properly sued there. It is essential to the completeness of the remedy that the amount of the indebtedness of the corporation, the amount due by each stockholder, and the proportion thereof necessary to discharge the debts, should be ascertained. Therefore the other stockholders are necessary parties, and the venue is properly laid in that county. *Mathis* v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

62. Pleading.—The liability of stockholders of corporations (pursuant to part 2, title 2, chapter 3, of Ala. Rev. Code) for debts of the corporation becomes primary and absolute on the dissolution of the corporation; and a bill in equity will lie to enforce such liability, without averring the insolvency of the corporation, and without previous suit against it. *Spence* v. *Shapard*, 57 *Ala.* 598.

A complaint which alleges that plaintiffs are the holders of unsatisfied judgments against an insolvent railroad corporation, and which seeks the recovery of a personal judgment against defendants, who are alleged to have subscribed to the stock of the corporation, and to have been stockholders therein at the time the several debts due plaintiffs were incurred, fails to state a good cause of action, in the absence of any averment that defendants are indebted for unpaid balances, or that plaintiffs' claims were for labor done in the construction of the road. *Toner* v. *Fulkerson*, 125 *Ind.* 224, 25 *N. E. Rep.* 218.

Where a judgment creditor of an insolvent corporation commences an action to obtain satisfaction of his judgment by the enforcement of the statutory liability of the several stockholders, and, for aught that appears in the record, plaintiff is the only creditor, and defendants are the only stockholders, and the petition contains the neces-

* Necessary parties to bill to subject unpaid subscriptions to payment of corporation debts, see notes, 3 AM. ST. REP. 815, 857.

For whose benefit decree should be in suit to subject unpaid subscriptions to payment of corporation debts, see note, 3 AM. ST. REP. 816.

sary averments to charge defendants as stockholders, sustaining a demurrer to, and dismissing the petition, on the sole ground that it does not show a cause of action, is erroneous. *Umsted* v. *Buskirk*, 17 *Ohio St.* 113.

In an action by a judgment creditor of a company against defendant, to recover the amount of the shares which, it is alleged, "he had duly subscribed for, and become a member of the company to the extent of the said shares," plaintiff produced at *enquete* the stock book of the company, in which defendant's name appeared as a subscriber, but failed to prove the signature. Defendant established that the signature was not his, nor authorized by him, and objection was made at the argument that defendant was bound under L. C. Con. St. c. 83, § 86, to file with his plea an affidavit that the signature was forged. *Held*, that such objection would not be maintained and the case would not be treated as coming under the section referred to. *Rogers* v. *Hersey*, 15 *Low. Can.* 141.

63. Defenses, generally. — A provision in a company's act that it shall not issue any shares nor shall any share vest in the person accepting it until one-fifth of the amount of the share is paid up does not make the payment of one-fifth a condition precedent to the liability as a shareholder of the person accepting the share. *East Gloucestershire R. Co.* v. *Bartholomew*, *L. R.* 3 *Ex.* 15, 17 *L. T.* 256, 37 *L. J. Ex.* 17.—FOLLOWED IN McEuen *v.* West London W. & W. Co., L. R. 6 Ch. 655, 40 L. J. Ch. 471, 25 L. T. 143, 19 W. R. 837.

Where a corporation which has at least a *de facto* existence sues a stockholder to enforce an individual liability, he cannot set up a defect in the organization of the corporation, for the reason that its corporate existence cannot be inquired into collaterally. *Eaton* v. *Aspinwall*, 19 *N. Y.* 119; *affirming* 6 *Duer* 176.

A subscriber for shares of stock in a railroad company which is not authorized by law to receive land in payment for its stock, cannot, in an action by its creditors against the stockholders of the company, set up or avail himself of the benefit of a collateral agreement between himself and the company to the effect that the amount of his subscription was to be paid in land. *Noble* v. *Callender*, 20 *Ohio St.* 199.—FOLLOWING Henry *v.* Vermillion & A. R. Co., 17 Ohio 187.

The cessation of a railway company by non-performance of the conditions of its charter within three years does not extinguish its liability or that of its stockholders to pay the debts contracted during its existence. *Ray* v. *Blair*, 12 *U. C. C. P.* 257.

In an action by a creditor of the corporation against a shareholder, defendant pleaded, among other pleas, *nul tiel record* as to the judgment obtained against the company, and issue was joined thereon. It did not appear at the trial that this issue had been disposed of. *Held*, that plaintiff, not being shown to be a creditor of the company, could not recover. In such actions it is not necessary to aver that calls have been made upon defendant's stock. *Tyre* v. *Wilkes*, 18 *U. C. Q. B.* 46.

A shareholder is liable as such, notwithstanding the fact that the full amount of stock has never been subscribed nor the first instalment been paid, that the original design of the company has been changed by statute since he subscribed, that his subscription has become forfeited for non-payment, and that the company has ceased to regard him as a shareholder, his stock never having been sold as forfeited, a new statute as to such sales having been passed under a resolution of the directors before the day named for the sale. *Smith* v. *Lynn*, 3 *Up. Can. E. & A.* 201.—QUOTING Wickham *v.* New Brunswick & C. R. Co., L. R. 1 P. C. 64.

Under a clause in an agreement between a contractor and a railroad company, where the contractor was authorized to collect, for his own benefit and profit, arrears due by certain stockholders for the price of their stock, to a certain specified amount, the stockholders cannot be sued in the name of the contractor, and the company is not liable to warrant or defend such contractor against a plea by a stockholder alleging facts to show that he was not indebted to the company. *White* v. *Daly*, 7 *Low. Can.* 360.

64. Payment for stock subscribed.* —When only a part of subscribed stock was paid for, the stockholders voted to issue no further calls, and certificates were issued for the amount of the stock already paid, as full-paid stock, and the balance of the sub-

* Payment of subscriptions to stock in property as affecting stockholders' liability where corporation becomes insolvent, see 57 AM. & ENG. R. CAS. 187, *abstr.*

scription was canceled. This was done when the company was solvent, and no one questioned it for seven years, and until after the company became insolvent. *Held*, that the subscribers had been released, and could not be held by creditors of the company for the unpaid balance of their subscriptions. *Steacy* v. *Little Rock & Ft. S. R. Co.*, 5 *Dill.* (*U. S.*) 348.

Where a company issues full-paid stock to contractors, which is sold in the public market to purchasers for value without notice of any equities between the company and the contractors, creditors of the company cannot hold the purchasers liable for an unpaid balance because the contractors had not done work enough fully to earn the stock. *Steacy* v. *Little Rock & Ft. S. R. Co.*, 5 *Dill.* (*U. S.*) 348.

Where property is conveyed to a corporation in payment for certain shares of stock, and the transaction is made a matter of record and subsequently approved by all the officers and stockholders, such shares will, in the absence of fraud, be treated as fully paid, and especially so in a case where a party afterwards purchases the same shares of stock, and subsequently becomes a creditor of the corporation by purchasing its mortgage bonds with full knowledge of the nature and terms of the original transaction, and such party or his assignee thereafter seeks to enforce a liability against holders of such stock on the ground that it was not fully paid. *Walburn* v. *Chenault.* 43 *Kan.* 352, 23 *Pac. Rep.* 657.

A special tax was imposed in aid of the corporation, the holders of the tax receipts to become stockholders in the company for the amount thereof. *Held*, that the payment of the tax does not release the stockholders from the obligations contracted by them under the charter. *New Orleans, J. & G. N. R. Co.* v. *Lea*, 12 *La. Ann.* 388.

Defendant, a stockholder in a company against which he had a claim for goods sold, obtained a note from the company, and transferred it to one F. as trustee, who, after suing the company and obtaining judgment and a return of *nulla bona*, sued defendant, who paid him the amount of his unpaid stock, which amount F. then held as defendant's trustee. *Held*, that the payment to F. was not a payment of defendant's stock, and was no answer therefore to an action brought against defendant by a creditor of the company, who had also obtained judgment and a return of *nulla bona*. *McGregor* v. *Currie*, 26 *U. C. C. P.* 55.

65. Payment of judgment against corporation.—N., one of the defendants, having a claim against a railway company for $1800, assigned it to one H. by an instrument absolute in form, but really in trust, to enable H. to sue first the railway company and then the defendants, as shareholders of unpaid stock of the company. H. accordingly recovered judgments against both the company and the defendants, but made no effort to realize on that against the latter. After the commencement of this action, however, which was by a judgment creditor of the railway company against the defendants, as shareholders of the company, for their unpaid stock, defendants' solicitors gave a check for the $1800 to H., who, after retaining $127, the amount of a claim he had against N., handed over the balance to him, and defendants then set up as a defense this payment under the judgment recovered by H. against them. *Held*, that the judgment against defendants and the alleged payment thereunder constituted no defense to the claim of an ordinary judgment creditor, and that the stock of the present defendants had not been paid up to the extent of $1800, which was therefore liable to plaintiff's claim. *Nasmith* v. *Dickey*, 44 *U. C. Q. B.* 414.

66. Breach by corporation of condition in subscription. — Where residents of a city subscribe to stock upon the condition that the company shall erect and operate, as soon as possible, in or near the city, a slaughter-house of certain stated capacity, and the slaughter-house is erected, equipped and operated, the fact that the company is compelled by financial embarrasments to suspend business will not release stockholders from their obligation to creditors. *Mathis* v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

Plaintiff, a creditor of a railway company, sued defendant, a shareholder, for the amount remaining due on his shares. Defendant pleaded that it was agreed between him and the company that if he would sign an agreement to take the shares it would give him a contract for the construction of the railway, and that unless and until the contract should be so given he should not be bound by the agreement or become thereby a shareholder; and in pursuance of

said contract, and not otherwise, he signed the agreement; and that, without any default on his part, the company refused to give him the contract, and gave it to another; and that, except as aforesaid, he never subscribed for or became the owner of the shares. In another plea, defendant alleged that he did subscribe for the shares on the same agreement; and that until the contract should be given to him, he was not bound by such subscription; that the contract was given to another, and that he had never paid, nor been asked to pay, anything on the shares, nor had he been recognized, or treated, or done any act as a shareholder in respect of said shares; and that, other than as aforesaid, he never subscribed for or became the owner of said shares. *Held*, on demurrer, that both pleas were good, as showing that defendant never became a shareholder, so as to be liable to creditors, there being here no such provision as in the English Companies Act of 1867, requiring such agreements to be registered in order to bind creditors. *Bullivant* v. *Manning*, 41 *U. C. Q. B.* 517.

67. Subscription at less than par value.—A railroad company, being financially embarrassed, paid a contractor with stock at twenty per cent. of its face value, but which had no market value. *Held*, that the holder of such stock was not liable to creditors of the railroad for the full face value of the stock, under the Iowa Code of 1873, § 1082, making stockholders individually liable "to the amount of the unpaid instalments of the stock owned by them, or transferred by them for the purpose of defrauding creditors." *Clark* v. *Bever*, 139 *U. S.* 96, 11 *Sup. Ct. Rep.* 468; *affirming* 31 *Fed. Rep.* 670.—DISAPPROVING Jackson *v.* Traer, 64 Iowa 469.

When creditors have notice when their debts are created of an arrangement between the corporation and the subscribers to its stock, by which the latter received it for less than par, the creditors cannot hold the subscribers for a greater sum than they agreed to pay. *Mathis* v. *Pridham*, 1 *Tex. Civ. App.* 58, 20 *S. W. Rep.* 1015.

68. Statute of limitations.* — The claim of a creditor of a corporation against a stockholder for unpaid stock matures on dissolution of the corporation, and must be exhibited within two years. *Gareschè* v. *Lewis*, 15 *Mo. App.* 565; *affirmed in* 93 *Mo.* 197.

69. Waiver of lien by creditor.—The taking from the railroad company of notes indorsed by a stockholder for claims is not a waiver of any lien which such claims may have, in the absence of any intention to waive it. *McIlhenny* v. *Binz*, 80 *Tex.* 1, 13 *S. W. Rep.* 655.

70. Illegality of, or fraud in, claim of plaintiff against corporation.—In a suit to subject unpaid subscriptions to the stock of a railroad to payment of the debts of the company, the defense was set up that the origin of the debts sought to be enforced was an illegal gambling transaction. On motion the court struck out this part of the answer. *Held*, no ground for reversal where the proofs did not sustain the charge. *Lloyd* v. *Preston*, 146 *U. S.* 630, 13 *Sup. Ct. Rep.* 131.

It is the duty of a corporation towards its stockholders and the right of creditors of the corporation, for their own protection, to resist the appropriation of the property of the company to the payment of creditors whose claims originated in fraud. *Central Trust Co.* v. *New York City & N. R. Co.*, 18 *Abb. N. Cas.* (*N. Y.*) 381.

71. Usurious character of judgment against company.—A judgment was obtained against a railroad company, and execution returned *nulla bona*. An action was then begun against a stockholder, under the statute, to subject his unpaid subscription to satisfaction of the judgment. *Held*, that the stockholder could not show that the judgment against the company was based on a usurious transaction without setting it up by special plea. *Fraser* v. *Hickman*, 12 *U. C. C. P.* 584.

72. What sets-off are allowable.*—In a proceeding under the statute by motion for execution against a stockholder in a railroad, the stockholder is entitled to set off against his liability any demand he may have against the company. *Jerman* v. *Benton*, 79 *Mo.* 148.

73. What sets-off will not be allowed.—The act respecting railways declared a shareholder liable to judgment

* When statute of limitations begins to run against creditors' claim on unpaid subscriptions to capital stock, see notes, 3 AM. ST. REP. 827, 872.

* Stockholders' right to set off debt due them by corporation in actions to enforce statutory liability to corporation creditors, see note, 3 AM. ST. REP. 871.

creditors of the company for "an amount equal to the amount unpaid on the stock held by him." *Held*, that a shareholder, in an action against him by a judgment creditor of the company, could not set off, in equity, a debt due him by the company before the judgment was recovered. *Macbeth* v. *Smart*, 14 *Grant's Ch.* (*U. C.*) 298.

Defendant, a stockholder, when sued for a debt of the corporation, pleaded upon equitable grounds a set-off against the company upon the common money counts, claiming that the amount so due as a set-off paid the amount due by him upon the stock, and therefore there was nothing due by him. *Held*, bad on demurrer, (1) as not disclosing a good defense at law, plaintiff being an entire stranger to the claim; (2) because the plea did not offer to set off the claim of defendant against the railway company in payment of plaintiff's debt; (3) because the plea did not aver that the amount so unpaid upon the stock was the only debt due by defendant to the railway company. *Smart* v. *McBeth*, 13 *U. C. C. P.* 27.

Where an action is brought against a stockholder in a railroad to subject his unpaid stock to payment of a judgment against the company, he cannot set off the amount of a decree against the company for the price of land contracted to be sold to the company, the decree having directed payment of the price when a conveyance should be made, which had not been done. *Fraser* v. *Robertson*, 13 *U. C. C. P.* 184.

74. Evidence. — In an action to enforce, against a stockholder, a liability for a debt of the corporation, the record of a judgment recovered against the corporation is competent evidence of plaintiff's status as a creditor of the company, and of the amount due him. *Stephens* v. *Fox*, 83 *N. Y.* 313; *affirming* 17 *Hun* 435.—DISTINGUISHING Miller *v.* White, 50 N. Y. 137; McMahon *v.* Macy, 51 N. Y. 155.

Where a creditor of a company is proceeding by *scire facias* against a shareholder, he must bring the defendant within the precise terms of the statute by showing that he is in the strictest sense a shareholder. *Denison* v. *Lesslie*, 3 *Ont. App.* 536; *affirming* 43 *U. C. Q. B.* 22.

The evidence was sufficient to prove that knowledge of the acceptance of his offer by the company had reached the defendant and that he was therefore liable as a shareholder. *Denison* v. *Lesslie*, 3 *Ont. App.* 536; *affirming* 43 *U. C. Q. B.* 22.

75. Showing value of stock held by defendant. — A railroad contractor was paid $12,000 per mile in first mortgage bonds of the company, and in addition took a large amount of stock. A creditor of the railroad afterward sought to charge the contractor as a subscriber to unpaid stock, alleging that the $12,000 per mile was full pay for the work. *Held*, on demurrer, that to do so he must show the value of the stock when issued. *Fogg* v. *Blair*, 139 *U. S.* 118, 11 *Sup. Ct. Rep.* 476.

76. Contribution among defendants.*—The liability of stockholders for the debts of a railroad is several in its nature, but the right arising out of this liability is extended for the common and equal benefit of all the creditors, and the suit of a creditor to enforce such liability should, under the statute, be for the benefit of all of the creditors; and the stockholders whose liability is sought to be enforced have the right to insist on their co-stockholders being made parties for the purposes of a general account, and to enforce from them contribution in proportion to the shares of stock held by them. *Umsted* v. *Buskirk*, 17 *Ohio St.* 113.

The right of contribution grows out of the organic relation existing among the stockholders. As between them and the creditors, each stockholder is severally liable to all the creditors; as between themselves, each stockholder is bound to pay in proportion to his stock. *Umsted* v. *Buskirk*, 17 *Ohio St.* 113.

III. STOCKHOLDERS' RIGHTS OF ACTION.

1. *In General.*

77. Right to sue in behalf of the corporation, generally. — A stockholder, in a suit which he is permitted to prosecute in behalf of the corporation, cannot question its right to exercise the powers declared in its certificate of incorporation, especially its power to own the stock of another corporation. Such question can only be raised in proceedings by the attorney-general in behalf of the state. *Willoughby* v. *Chicago J. R. & U. S. Co.*, 50 *N. J. Eq.* 656, 25 *Atl. Rep.* 277.

* Actions between stockholders for contribution, see note, 3 AM. ST. REP. 870.

Defendant company leased another road, and in addition to a certain rent, agreed to pay a ten per cent. dividend on the capital stock of the leased road, payable quarterly, which it agreed to guarantee to the stockholders, and had the terms of this agreement printed on the certificates of stock. *Held*, that this was a payment to be made to the lessor company, and that it did not give stockholders a right of action against defendant. *Hawkness* v. *Manhattan R. Co.*, 11 *N. Y. S. R.* 732; *affirming* 22 *J. & S.* 174; *affirmed in* 113 *N. Y.* 627, *mem.*

78. Necessity of request of, and refusal by directors to sue.*— A stockholder in a railroad may bring a chancery suit where the corporation or its directors refuse, but the suit can only be maintained on the ground that the rights of the corporation are involved, and the corporation is a necessary party defendant. *Davenport* v. *Dows*, 18 *Wall.* (*U. S.*) 626.

A stockholder cannot bring a suit in his own name to set aside an illegal tax on the railroad of which he is a stockholder, unless he has first made an ineffective effort to induce the corporation to obtain the relief. *Huntington* v. *Palmer*, 104 *U. S.* 482.—DISTINGUISHING Dodge *v.* Woolsey, 18 How. (U. S.) 331. FOLLOWING Hawes *v.* Oakland, 104 U. S. 450.—*Morgan* v. *New Orleans, M. & C. R. Co.*, 1 *Woods* (*U. S.*) 15. *Atchison, T. & S. F. R. Co.* v. *Sumner County Com'rs*, 51 *Kan.* 617, 33 *Pac. Rep.* 312. *Shawhan* v. *Zinn*, 79 *Ky.* 300. *Wilkie* v. *Rochester & S. L. R. Co.*, 12 *Hun* (*N. Y.*) 242.

And the above rule applies where the citizenship of a stockholder enables him to sue in a federal court, but where the corporation itself could not sue in the same court. *Morgan* v. *New Orleans, M. & C. R. Co.*, 1 *Woods* (*U. S.*) 15.

Where the legislature of a state has repealed the charter of a street-railroad company, and transferred its franchises and track to another, and the corporation refuses to seek a remedy in the courts, a stockholder of the company who asks an injunction on the ground that the repealing statute impairs the obligation of a contract will have a standing in a court of equity. *Greenwood* v. *Union Freight R. Co.*, 9 *Am. & Eng. R. Cas.* 526, 105 *U. S.* 13.

Such a statute impairs the obligation of the contract of the charter, unless there is reserved to the legislature the right to repeal the statute under which the company was organized. *Greenwood* v. *Union Freight R. Co.*, 9 *Am. & Eng. R. Cas.* 526, 105 *U. S.* 13.

79. When such request and refusal need not appear.—A stockholder of a railroad company which has located, and partially constructed, its lines, may maintain a bill to enjoin a rival company from appropriating its work to its own use, when he shows that the directors of his own company are acting in sympathy with the rival company. *Weidenfeld* v. *Sugar Run R. Co.*, 51 *Am. & Eng. R. Cas.* 505, 48 *Fed. Rep.* 615.

In an action by a stockholder against the officers of the corporation to charge them with a misappropriation of property or funds, it is not necessary to show an active effort on the part of plaintiff to induce the corporation to sue, where it is apparent that such effort would have been fruitless, as where the directors of the corporation participated in the acts complained of. *Frothingham* v. *Broadway & S. A. R. Co.*, 9 *Civ. Pro.* (*N. Y.*) 304.—FOLLOWING Barr *v.* New York, L. E. & W. R. Co., 96 N. Y. 444.

Or where the directors are under the control of the persons whose wrongful acts are complained of. (Dykman, J., dissenting.) *Currier* v. *New York, W. S. & B. R. Co.*, 35 *Hun* (*N. Y.*) 355.

If it can be made to appear in any manner that the corporation cannot safely be left to obtain relief through the action of its officers, equity will interfere at the suit of a stockholder, without proof of a demand upon the managing agents and their wrongful refusal or neglect to proceed on its behalf. *Crumlish* v. *Shenandoah Valley R. Co.*, 28 *W. Va.* 623.

80. Right to be made parties to suits against corporation—Intervention.—In the absence of fraud, a decree, canceling bonds of one railroad, and a mortgage of another road securing the bonds, on a bill filed by one company against the other, binds all the stockholders though they be not parties. *Beals* v. *Illinois, M. & T. R. Co.*, 133 *U. S.* 290, 10 *Sup. Ct. Rep.* 314.

Where a stockholder has filed a bill against his corporation asking for a re-

* When stockholders may sue. Corporation refusing to sue upon request, see note, 9 L. R. A. 654.

ceiver, he cannot, except in extraordinary cases, intervene in a subsequent suit commenced by bondholders asking for a receiver and a foreclosure, and have that suit stayed until his suit is determined. *Pennsylvania Co.* v. *Jacksonville, T. & K. W. R. Co.*, 55 *Fed. Rep.* 131.

81. Right to defend suits against corporation.—Stockholders, except when expressly authorized by statute, are not allowed to plead and defend for the corporation, when the suit is against it, and they are not parties on the record. *Blackman* v *Central R. & B. Co.*, 58 *Ga.* 189.—QUOTED IN Central Trust Co. *v.* Marietta & N. G. R. Co., 48 Fed. Rep. 14.

82. Impeachment of judgment against corporation.—Where a stockholder files a creditor's bill to impeach a judgment against the corporation, but no other stockholder joins him, and it has been determined that he is not liable as a stockholder to the creditors of the company, his bill will be dismissed, but without prejudice. *Atkins* v. *Steacy*, 5 *Dill.* (*U. S.*) 381, *n.*

83. Right to attack legality of consolidation, and set aside mortgage given thereon.—The stockholders of several railroads which have been consolidated cannot maintain a bill to set aside a mortgage made by the consolidated company upon its aggregate property, on the ground that one of the companies consolidated had no legal existence. Such a bill lies only at the instance of the state, through the attorney-general. *Bell* v. *Pennsylvania, S. & N. E. R. Co.*, (*N. J. Eq.*) 10 *Atl. Rep.* 741.

84. Right to pursue corporate property fraudulently disposed of by directors. — As a general rule, the property of a corporation is a trust fund, for the benefit of its creditors and stockholders, and they may, in all cases where it has been fraudulently and wrongfully disposed of by the directors, pursue it into the hands of purchasers with notice, and assert their lien upon it, or their claims for its value. *Goodin* v. *Cincinnati & W. Canal Co.*, 18 *Ohio St.* 169.

85. Contribution. — After a railroad company had issued bonds it consolidated with another company which guaranteed the bonds. Plaintiff, who was a holder of some of the bonds, sued both companies to recover thereon. It appeared that if the guarantor was liable for the bonds, it would have a right to recover from the stockholders of the company issuing the bonds, including plaintiff, to the extent of their unpaid subscriptions. *Held*, nevertheless, that a decree could only be for the payment of the amount of plaintiff's bonds, and, because of a lack of parties, there could be no decree for contribution. *Harrison* v. *Arkansas Valley R. Co.*, 4 *McCrary* (*U. S.*) 264, 13 *Fed. Rep.* 522.

2. Remedy against the Corporation.

86. In general.—All remedies for injuries to the property or rights of a corporation must be prosecuted in its name, and all demands against the corporation must be prosecuted against it by name, unless its officers or agents by fraud or misrepresentation have rendered themselves personally liable. There is but one case in which a stockholder can interpose, and that is where the officers and managers of the corporation, by fraud and collusion with third persons, are sacrificing, or are about to sacrifice and betray, the interests of the corporation. *Forbes* v. *Memphis, E. P. & P. R. Co.*, 2 *Woods* (*U. S.*) 323.

The rights of a stockholder are to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose; and if the corporation becomes insolvent, to have the property applied to the payment of debts; with the incidental right to have a certificate of his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company, he may sue at law or in equity, according to the nature of the case. *Forbes* v. *Memphis, E. P. & P. R. Co.*, 2 *Woods* (*U. S.*) 323.—QUOTED IN Central Trust Co. *v.* Marietta & N. G. R. Co., 48 Fed. Rep. 14; Farmers' L. & T. Co. *v.* Kansas City, W. & N. W. R. Co., 53 Fed. Rep. 182.

If a railroad company has power to mortgage its property and franchises and issue bonds thereon, no suit to restrain such action will lie by a common stockholder, nor by preferred stockholders who stand in no better condition; especially where no injury to complainant is shown. *Thompson* v. *Erie R. Co.*, 42 *How. Pr.* (*N. Y.*) 68.

A member of a joint-stock express company may maintain an action against it in

the manner prescribed by statute (i. e., against its president or treasurer) to recover for goods lost which were delivered to it for transportation, the same as if he was not connected with the company. *Westcott* v. *Fargo*, 61 *N. Y.* 542; *affirming* 63 *Barb.* 349, 6 *Lans.* 319.

A railway company, in an action against it by a stockholder for wrongful conversion of his interests, is not precluded by the erroneous estimates of its officials, embodied in a published report, from showing the true value of its assets. *International & G. N. R. Co.* v. *Bremond*, 4 *Am. & Eng. R. Cas.* 308, 53 *Tex.* 96.

When it is shown that the corporation has ceased to exist either in law or in fact, or that it has abandoned its corporate business and neglected to maintain its corporate existence by the election of directors and the appointment of officers to manage its affairs, a stockholder may, without showing more, bring suit on behalf of himself and the other stockholders against the corporation, or others having assets belonging to it, for the protection of his rights. *Crumlish* v. *Shenandoah Valley R. Co.*, 28 *W. Va.* 623.

87. Who may sue as a stockholder. —Stockholders of a railroad may file a bill to restrain the company from paying interest on the bonds of another company, which the defendant company had guaranteed, on the ground that the guaranty is *ultra vires*, and not binding on dissenting stockholders. *Zabriskie* v. *Cleveland, C. & C. R. Co.*, 23 *How.* (*U. S.*) 381.

Injunction will lie at the instance of holders of common stock of railroad companies who are entitled to, but are deprived of, the right of representation, pending suit for the enforcement of such right, to restrain an illegal, disadvantageous, and *ultra vires* purchase by the company of another road. *Mackintosh* v. *Flint & P. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 340, 34 *Fed. Rep.* 582.

Under the provisions of the charter of the Jersey City & Bergen Point Plank Road Co., and the charter of the Jersey City & Bergen Railroad Co., the occupation of a part of the ancient highway on which the plank road is constructed, by the railway, with the consent of the plank-road company, without the personal consent of a stockholder of the road company, that company having been authorized to lay rails upon the road, is no violation of his rights as a stockholder. *Story* v. *Jersey City & B. P. Plank Road Co.*, 16 *N. J. Eq.* 13.

And the sale by the plank-road company of the whole or a part of its road to the railroad company, without the personal consent of a stockholder in the plank-road company, is not such an infringement of his rights as a stockholder that a court of equity will interfere to restrain it by injunction. *Story* v. *Jersey City & B. P. Plank Road Co.*, 16 *N. J. Eq.* 13.

A dissenting stockholder of a railroad company cannot have a preliminary injunction to prevent his company from becoming the purchaser, under authority of a statute to sell public improvements belonging to the state. His rights can only be determined on the final hearing. *Mott* v. *Pennsylvania R. Co.*, 30 *Pa. St.* 9.

A stockholder in one of four companies consolidated under Pa. Act of March 24, 1865, who has not converted his stock into the stock of the consolidated company, has no footing for a stockholder's bill against that company. *Philadelphia & E. R. Co.* v. *Catawissa R. Co.*, 53 *Pa. St.* 20.

Where a railroad is chartered between certain *termini*, and built, and afterwards the legislature grants permission to extend the road, and a majority of the stockholders accept this amendment to the charter, but against the wish of plaintiff, a stockholder, he is entitled to an injunction to prevent the company from using its funds or credit to extend the road, on the ground that the extension is a fundamental change in the original purpose of the corporation and not binding on the individual stockholders. *Stevens* v. *Rutland & B. R. Co.*, 29 *Vt.* 545. —APPROVING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 385. DISTINGUISHING Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351. QUOTING Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384. REVIEWING Union L. & C. Co. *v.* Towne, 1 N. H. 44; Middlesex Turnpike Corp. *v.* Locke, 8 Mass. 268.—APPROVED IN Mowrey *v.* Indianapolis & C. R. Co., 4 Biss. (U. S.) 78; Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178. FOLLOWED IN Leo *v.* Union Pac. R. Co., 16 Am. & Eng. R. Cas. 452, 19 Fed. Rep. 283.

88. Necessity of previous application for redress of wrongs complained of.—A bill filed by a minority in

number and value of the shareholders of a corporation against the corporation itself and its officers will not be entertained unless it shows that application was first made by the complainants to the board of directors, or to the stockholders, to redress the wrongs complained of, or for authority to prosecute the suit in the name of the company, or sets out facts showing that it could not be done, or that it was not reasonable to require it. *Roman* v. *Woolfolk*, 98 *Ala.* 219, 13 *So. Rep.* 212.

When a bill is filed by individual shareholders without previous application to the directors or shareholders for redress of wrongs complained of, or good cause shown for not doing so, and application is made for an injunction and the appointment of a receiver, the court will not consider whether the averments of the bill alone excuse this omission, but will consider also the sworn answers and affidavits introduced on the hearing. *Roman* v. *Woolfolk*, 98 *Ala.* 219, 13 *So. Rep.* 212.

It is the right of any stockholder in the Macon & Brunswick railroad to require the company to set aside the two per cent. sinking fund required by the legislatures of 1865–66, on its indorsement of the bonds of the company; but it must appear, before a court of equity is resorted to, that a fair effort has been made by the complainant to procure this to be done by the company. *Hazlehurst* v. *Savannah, G. & N. A. R. Co.*, 43 *Ga.* 13.

A stockholder may file a bill to restrain or redress a wrong, where the board of directors are themselves the wrong-doers, or refuse to sue; and the same rule applies where there are two boards, both claiming to have a right to act, but where the ones claiming to be the legal directors refuse to sue the other board which is charged as the wrong-doer. *Pond* v. *Vermont Valley R. Co.*, 12 *Blatchf.* (*U. S.*) 280.

Plaintiffs cannot be defeated of their right to sue in a federal court by the fact that the members of such legal board of directors have, as stockholders, the same interests as plaintiffs, or that they desire the success of plaintiffs, nor by the fact that the refusal of such legal board of directors was in order to drive plaintiffs to bring the suit themselves, or even to enable plaintiffs to bring their suit in the federal court. *Pond* v. *Vermont Valley R. Co.*, 12 *Blatchf.* (*U. S.*) 280.

89. Action to restrain exercise of corporate franchise.* — A stockholder in a corporation, the charter of which, by Mass. statute of 1830, ch. 81, is subject to alteration, amendment or repeal, at the pleasure of the legislature, cannot maintain a bill in equity to restrain the corporation from engaging in a new enterprise, in addition to that contemplated by the charter, but of the same kind, if it is sanctioned by an express legislative grant, and by a vote of the majority of the stockholders. *Durfee* v. *Old Colony & F. R. R. Co.*, 5 *Allen* (*Mass.*) 230.—NOT FOLLOWED IN Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178.

A court of equity will interfere on behalf of a single stockholder, if he can show that the corporation is employing its statutory powers, funds, etc., for the accomplishment of purposes not within the scope of its institution, and an injunction in such case will be granted. But it is well settled that, acting within the scope and in obedience to the constitution of the corporation, the will of the majority, duly expressed at a legally constituted assembly, must govern. *Gifford* v. *New Jersey R. & T. Co.*, 10 *N. J. Eq.* 171.

Where a stockholder sues on behalf of himself and all others having a common interest, and alleges that the officers of the corporation control it, he may maintain the action, although he is not a creditor of the company, and obtain such relief as does not depend upon N. Y. Rev. St. §§ 33–35, relating to "proceedings against corporations in equity." *Ramsey* v. *Gould*, 57 *Barb.* (*N. Y.*) 398, 8 *Abb. Pr. N. S.* 174, 39 *How. Pr.* 62; *affirmed in* 3 *Lans.* 181.

90. Action to restrain illegal assessments or calls.—A company being authorized to construct a certain railway or part of it, built and put in operation part in due time, and after the expiration of ten years limited by the Consolidated Railway Act (22 Vict. c. 66, § 117) made calls with a view of constructing the remainder. *Held*, illegal; and that consequently any shareholder was entitled to restrain proceedings, even though no other shareholder objected thereto. *Dumble* v. *Peterborough & L. C. R. Co.*, 12 *Grant's Ch.* (*U. C.*) 74.—APPROV-

* Restraining exercise of corporate franchise. Action by one in behalf of others, see note, 9 L. R. A. 273.

ING Forrest *v.* Manchester, S. & L. R. Co., 7 Jur. N. S. 887; White *v.* Carmarthen, etc., R. Co., 1 H. & M. 786.

91. Action to recover assessments paid on stock.—A., B. and C. owned all the stock of a street-railway company which was fully paid up. To raise money for the uses of the company under a voluntary assessment of the stock, each paid the company a proportionate amount. A. sold his shares to B. and C. and then brought suit against the company in which he recovered the amount paid upon the voluntary assessment. B. became bankrupt and his stock was purchased by D. B. then brought suit against the company to recover the amount paid by him upon the assessment. The cause was tried before a referee under Pa. Act of 1874, who reported as a fact that the payment of assessments was made as voluntary contributions and not as loans to the company. *Held*, (1) that the findings of fact by a referee are as binding as the special verdict of a jury; (2) that the recovery of A. against the company did not operate as a withdrawal of his proportion of the voluntary contributions and thus leave the contribution of B. without consideration; (3) that a shareholder in a corporation has no distinct and individual title to the moneys or property of the corporation; (4) that under the findings of the referee B. could not recover. *Bidwell* v. *Pittsburgh, O. & E. L. Pass. R. Co.*, 114 *Pa. St.* 535, 6 *Atl. Rep.* 729.

92. Action to restrain misuse of corporate funds.—Certain stockholders may restrain the directors of a company from laying down rails under a contract which they have entered into, until the validity of the contract has been determined by the courts. *Beman* v. *Rufford*, 6 *Eng. L. & Eq.* 106, 15 *Jur.* 914.

Though a stockholder may have an injunction to restrain the directors from applying the funds of the corporation in the completion of a part only of a railroad, to the exclusion of the remainder, yet where such stockholder remains silent for eighteen months, with knowledge that it is the intention to abandon a part of the road, while the directors are expending large sums of money in the completion of the other portion, an injunction will be refused. *Graham* v. *Birkenhead, L. & C. J. R. Co.*, 6 *Eng. L. & Eq.* 132.

A stockholder in one company may file a bill on behalf of himself and other stockholders to restrain the execution of an *ultra vires* agreement entered into between his company and another, against the policy of the acts creating them. *Winch* v. *Birkenhead, L. & C. J. R. Co.*, 5 *De G. & S.* 562, 16 *Jur.* 1035.

A stockholder may enjoin his corporation from employing its property or powers for a purpose wholly different from that for which it was created, yet he has no right to enjoin it from doing what is in the direct furtherance of the object of its creation, and is for the benefit of the stockholders as such, though it may be for their injury in another character; or the interest of some other person, or the public, may be injuriously affected by the act. *Baltimore & O. R. Co.* v. *Wheeling*, 13 *Gratt.* (*Va.*) 40.

93. Action to restrain payment of dividends.—After a company had issued preferred stock it consolidated with defendant company, which assumed the former's obligations. No dividends were paid on the preferred stock from 1857 to 1863, although dividends were paid on the common stock. In 1875 plaintiff, a holder of preferred stock, filed a bill to restrain a further payment on the common stock until the dividends from 1857 to 1863 were paid. *Held:* (1) that he had a right to maintain the bill, and to the relief sought, where there was nothing to show that the delay had so injured defendant as to work an estoppel; (2) that the statute of limitations did not constitute a bar, where the original demand was against a foreign corporation, and the consolidation was effected within six years; (3) that plaintiff was entitled to dividends accrued before the assignment of the stock to him, with interest. *Boardman* v. *Lake Shore & M. S. R. Co.*, 4 *Am. & Eng. R. Cas.* 265, 84 *N. Y.* 157. — DISTINGUISHING Kent *v.* Quicksilver Min. Co., 78 N. Y. 184; Coles *v.* Bank of England, 10 Ad. & El. 437; Pickard *v.* Sears, 6 Ad. & El. 474; Prendergast *v.* Turton, 1 Y. & C. 98; Stafford *v.* Stafford, 1 De G. & J. 193; Nicholls *v.* Leeson, 3 Atk. 573; Currie *v.* Goold, 2 Mad. Ch. 426; Matthews *v.* Great Northern R. Co., 5 Jur. N. S. 284.

An action cannot be maintained to restrain the bringing of numerous and vexatious suits against plaintiff by any or all of its stockholders, on account of an agreement concerning the payment and prefer-

ment of stock, which agreement was not approved by the majority of the stockholders. *Manhattan R. Co.* v. *New York El. R. Co.*, 29 *Hun* (*N. Y.*) 309.

Where an officer of a corporation issues spurious stock, a holder of genuine stock may enjoin the corporation from declaring dividends except to such stockholders as are ascertained to be genuine. *Underwood* v. *New York & N. H. R. Co.*, 17 *How. Pr.* (*N. Y.*) 537.

A stockholder may maintain an action to enjoin the payment by his company of a dividend, where the directors are about to misapply the funds of the corporation in paying such dividend, there being in fact no money earned for such a purpose. *Carpenter* v. *New York & N. H. R. Co.*, 5 *Abb. Pr.* (*N. Y.*) 277.

94. Action to restrain granting of free passes.—A court of equity will not grant an injunction merely because of the fears or apprehensions of the party applying for it. So it will not grant an injunction at the suit of a stockholder to restrain his company from granting free passes to certain state officers, merely because it has done so in the past, and he is apprehensive that it will do so again. *Goodwin* v. *New York, N. H. & H. R. Co.*, 43 *Conn.* 494, 11 *Am. Ry. Rep.* 9.

3. *Remedy against Directors.*

95. In general.—The relation of stockholders to the corporation being that of *cestuis que trustent*, the action of common directors of two railroad corporations, in matters where the interests of the roads conflict, may be enjoined upon a stockholder's bill filed for that purpose. *Pearson* v. *Concord R. Corp.*, 13 *Am. & Eng. R. Cas.* 102, 62 *N. H.* 537, 13 *Am. St. Rep.* 590.

In actions by stockholders of corporations which assail the acts of their directors or trustees, courts will not interfere unless the corporate powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts complained of were fraudulent, or collusive and destructive of the rights of the stockholders; mere errors of judgment are not sufficient as grounds for equity interference. *Leslie* v. *Lorillard*, 110 *N. Y.* 519, 18 *N. E. Rep.* 363. *Deaderick* v. *Wilson*, 8 *Baxt.* (*Tenn.*) 108.

Or in cases where the corporate property is threatened with waste or misapplication. *Carpenter* v. *New York & N. H. R. Co.*, 5 *Abb. Pr.* (*N. Y.*) 277.

In a general sense a corporation may be regarded as the trustee of its creditors, but not of its stockholders. The directors stand in the relation of trustees to the stockholders, and between them exists the relation of trustee and *cestui que trust*. So where it is sought to have a dividend declared the directors should be made parties, as the corporation can act only through them. *Karnes* v. *Rochester & G. V. R. Co.*, 4 *Abb. Pr. N. S.* (*N. Y.*) 107.

While it may be conceded that the holder of a single share of stock may call upon the directors of the corporation for an account, and perhaps may, when it is apparent that some act is threatened subversive of his interest, invoke the aid of a court of equity to restrain the act, although the other stockholders, representing a majority of the stock, are opposed to his view, and approve the action of the directors, still the court should interpose by injunction only where the threatened act is unquestionably wrong, and the case made is free from reasonable doubt. *Gere* v. *New York C. & H. R. R. Co.*, 19 *Abb. N. Cas.* (*N. Y.*) 193.

To enable a stockholder to maintain an action to restrain the directors from the exercise of their corporate powers, and for the appointment of a receiver, the risk and responsibility must be upon him. If it appears that other persons, whose interests are hostile to the company, have agreed with plaintiff to bear the expenses of the litigation, any relief, especially upon an interlocutory motion, will be refused. He must show that he is acting *bona fide*. *Belmont* v. *Erie R. Co.*, 52 *Barb.* (*N. Y.*) 637.—APPROVING Forrest *v.* Manchester, S. & L. R. Co., 7 Jur. N. S. 887; Rogers *v.* Oxford, W. & W. R. Co., 2 De G. & J. 674. QUOTING Filder *v.* London, B. & S. C. R. Co., 1 H. & M. 489; Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157.

Wrongs sustained by stockholders by the mismanagement of the corporate property by their officers are private wrongs; and where they sue as individuals, they must show that their private rights are affected. *Wetmore* v. *Story*, 3 *Abb. Pr.* (*N. Y.*) 262.

Where it appears that the directors have fraudulently managed the business so as to wreck the corporation, a stockholder ought to have the fullest opportunity to unearth

the frauds by an examination of the defendants; but the application must state the substance of the cause of action. It is due to the administration of justice that the court whose aid is invoked should know that those asking for its process have been injured pecuniarily by the wrongful doings of the directors. *Boorman* v. *Pierce*, 56 *How. Pr.* (*N. Y.*) 251.

96. Who may sue.—To enable a stockholder who holds a small amount of stock to contest certain acts of the directors on the ground that they are *ultra vires*, when the majority of stockholders make no objection, it must appear that he was a stockholder at the time of the occurring of the acts complained of, or that the stock has since devolved upon him by operation of law, and that he has exhausted all means in his power to obtain redress through the corporation itself. *Dimpfelf* v. *Ohio & M. R. Co.*, 16 *Am. & Eng. R. Cas.* 461, 110 *U. S.* 209, 3 *Sup. Ct. Rep.* 573.—FOLLOWED IN Weidenfeld *v.* Allegheny & K. R. Co., 47 Fed. Rep. 11.—*Frothingham* v. *Broadway & S. A. R. Co.*, 9 *Civ. Pro.* (*N. Y.*) 304.

A person who has no shares standing in his name on the books of a corporation is not a stockholder within the rules of equity allowing a stockholder to maintain an action against defaulting officers, where the corporation omits to prosecute; although he holds certificates of stock issued by the corporation to other persons, with powers of attorney authorizing the transfer of such shares to him, executed by the persons in whose names the shares stand registered on the books of the corporation; and although the corporation has, on demand, wrongfully refused to allow such transfer to be made to him. *Heath* v. *Erie R. Co.*, 8 *Blatchf.* (*U. S.*) 347.—DISTINGUISHING Foss *v.* Harbottle, 2 Hare 461; Mozley *v.* Alston, 1 Phillips 790; Gray *v.* Lewis, L. R. 8 Eq. 526; Allen *v.* Curtis, 26 Conn. 456; Samuels *v.* Holliday, McCahon (Kan.) 214; Memphis City *v.* Dean, 8 Wall. (U. S.) 64. EXPLAINING Dodge *v.* Woolsey, 18 How. (U. S.) 341; Bronson *v.* La Crosse & M. R. Co., 2 Wall. 283. QUOTING March *v.* Eastern R. Co., 40 N. H. 548; Peabody *v.* Flint, 6 Allen (Mass.) 52; Hoole *v.* Great Western R. Co., L. R. 3 Ch. 262; Hersey *v.* Veazie, 24 Me. 12.

A transferee of stock under an unrecorded transfer, who is not recognized by the corporation as a member, cannot sue to enforce corporate rights, or to restrain threatened wrongs on the corporate interest. *Brown* v. *Duluth, M. & N. R. Co.*, 54 *Am. & Eng. R. Cas.* 219, 53 *Fed. Rep.* 889.

Plaintiff sued as a creditor and stockholder of a railway company, for the purpose, among other things, of compelling the officers of the company, who were made defendants, and who were charged as having the control of the affairs of the corporation, to account for their official conduct in the disposition of funds and property, and to obtain their suspension or removal. It was objected that he had purchased his bonds and stock with the intent to commence an action thereon, and that such purpose was a violation of N. Y. Rev. St. 288, § 71. *Held*, that the court must look to the cause of action shown, and the judgment demanded, and not to the motives or purposes elsewhere avowed; and that he had a right to sue, if he was in fact the owner of bonds and stock in the company. *Ramsey* v. *Gould*, 57 *Barb.* (*N. Y.*) 398, 8 *Abb. Pr. N. S.* 174, 39 *How Pr.* 62; *affirmed in* 3 *Lans.* 181.

His bringing the suit after having become invested with the bonds and stock is not bad faith, such as the courts will relieve against. *Ramsey* v. *Gould*, 57 *Barb.* (*N. Y.*) 398, 8 *Abb. Pr. N. S.* 174, 39 *How. Pr.* 62; *affirmed in* 3 *Lans.* 181.

In such an action the plaintiff has no inequitable advantage which he is seeking to enforce against the defendants. His buying the stock and bonds of the company was no wrong done them, with whatever intent it was done. The relative rights of the parties are the same as if the suit were brought by the plaintiff's vendor. The intent with which he purchased does not change or affect those rights or raise any equities respecting them, in favor of the defendants. In regard to them his hands are "clean," and the rule of equity requires no more. *Ramsey* v. *Gould*, 57 *Barb.* (*N. Y.*) 398, 8 *Abb. Pr. N. S.* 174, 39 *How. Pr.* 62; *affirmed in* 3 *Lans.* 181.

One who only claims to be entitled to stock in a corporation, under an agreement with another corporation, specific performance of which he seeks, has no legal status whatever to enforce any claim which the corporation may have against its officers for malfeasance in office, until he has recovered the shares of stock to which he alleges himself to be entitled. *Stanton* v. *Missouri Pac. R. Co.*, 15 *Civ. Pro.* 296, 2 *N. Y. Supp.* 298.

97. Necessity of showing refusal of corporation to sue. — An action against an officer of a corporation, for misappropriation of corporate funds, or for damages, for waste or destruction of corporate capital through misfeasance in office, or violation of duty, cannot be brought by a stockholder unless the corporation refuses to sue, and in case of such refusal the corporation must be made a defendant; and this rule is not affected by New York Code Civ. Pro. § 1782, authorizing actions for such purposes "by a creditor of the corporation or by a trustee, director, manager or other officer of the corporation, having a general superintendence of its concerns." Neither does section 452, providing that "the court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights," apply to an action by a stockholder where the corporation is not made a party. *Stromeyer* v. *Combes*, 15 *Daly* 29, 2 *N. Y. Supp.* 232, 18 *N. Y. S. R.* 154. *Stanton* v. *Missouri Pac. R. Co.*, 15 *Civ. Pro.* 296, 2 *N. Y. Supp.* 298.

Unless the corporation or its officers, upon being requested, refuse to prosecute the action, or unless it appears that such a request would be useless. *Doud* v. *Wisconsin, P. & S. R. Co.*, 65 *Wis.* 108, 25 *N. W. Rep.* 533. — DISTINGUISHING Dousman *v.* Wisconsin & L. S. M. & S. Co., 40 Wis. 418; Wood *v.* Union Gospel Church Bldg. Assoc., 63 Wis. 9.

If such an action is brought by a stockholder, an averment of the refusal of the corporation to sue is essential to the sufficiency of the complaint, and the omission of such averment may be taken advantage of by demurrer or by an objection to any evidence. *Doud* v. *Wisconsin, P. & S. R. Co.*, 65 *Wis.* 108, 25 *N. W. Rep.* 533.

Neither can a stockholder maintain an action against the president of the corporation for damages for a fraudulent disposition of property by a writing signed by the president individually. If he was not acting in an official capacity, his act was nugatory. *Stromeyer* v. *Combes*, 15 *Daly* 29, 2 *N. Y. Supp.* 232, 18 *N. Y. S. R.* 154.

98. Action for neglect of duty and of purposes of the organization. — A bill by a stockholder to compel officers of a corporation to account for a misapplication of corporate funds need not aver that the complainant has applied to the corporation or its board of directors to bring the suit, and that they have refused, where the acts complained of are *ultra vires*, or beyond the power of the corporation to affirm or sanction. *Heath* v. *Erie R. Co.*, 8 *Blatchf.* (*U. S.*) 347.

If the corporation refuses to call to account, by proper legal proceedings, its directors and officers who are abusing their trust, misapplying the funds of the corporation, and receiving profits from contracts made by other parties with the corporation through their aid, or if such corporation is still under the control of those who necessarily must be made defendants in such proceedings, so that it would be a mockery to require or permit a suit against them to be brought and prosecuted under their management, the stockholders who are the real parties in interest, or a part of them, may maintain an action to make such officers, and all parties who have participated with said officers in their unlawful transactions, account for their wrongs and frauds; and the corporation is a proper party defendant with them. *Ryan* v. *Leavenworth, A. & N. W. R. Co.*, 21 *Kan.* 365.

Where the managers of a railroad corporation, acting in its interests, buy a controlling interest in the stock of a connecting road for the purpose of making, with themselves as controlling managers of the latter road, contracts more favorable to the former, and accomplish their purpose, the question whether the contracts are fair and just is immaterial in a stockholder's injunction suit to restrain the execution of the contracts. *Pearson* v. *Concord R. Corp.*, 13 *Am. & Eng. R. Cas.* 102, 62 *N. H.* 537, 13 *Am. St. Rep.* 590.—REVIEWING United States Rolling Stock Co. *v.* Atlantic & G. W. R. Co., 34 Ohio St. 465; Flagg *v.* Manhattan R. Co., 20 Blatchf. (U. S.) 142.

One or more stockholders can maintain, for the benefit of a corporation, a suit against its directors for not carrying out the purposes of the organization and for abandoning the duties of their offices. It seems that relief would be as well secured by such suit if the prayer in their petition was for individual relief as if for relief in name of the corporation. *Becker* v. *Gulf City St. R. & R. E. Co.*, 80 *Tex.* 475, 15 *S. W. Rep.* 1094.

A shareholder of a railway company cannot maintain a bill against the company and its managing director, based on the mis-

conduct of the latter, without showing that the directors refused to consent to a suit in the name of the company; and it is not enough that the bill alleges that on account of the attitude of the directors such an application, if made, would be unavailing. *McMurray* v. *Northern R. Co.*, 23 *Grant's Ch.* (*U. C.*) 134.

A shareholder in a railroad company cannot file a bill to compel the managing director to account for moneys and to answer for other misconduct in office, without showing that the directors or shareholders had refused to consent to a suit in the name of the company. *McMurray* v. *Northern R. Co.*, 22 *Grant's Ch.* (*U. C.*) 476.

99. Actions to restrain fraudulent acts of directors.—Where any fraud has been perpetrated by directors by which the property or interest of stockholders is affected, they may come in as parties to a suit against the company, and ask that their property shall be relieved from the effect of such fraud. *Bayliss* v. *Lafayette, M. & B. R. Co.*, 8 *Biss.* (*U. S.*) 193.

An association of fifteen persons, including S., G. and C., was formed to obtain a contract for the construction of the railroad of a corporation whereof S. was president and G. treasurer, and to gain control of the corporation and its property by issuing to the association, as part payment of the work, a majority of the stock of the corporation. At a meeting of a bare quorum of the directors of the corporation, including S. and G., a proposal was received from C., on behalf of himself and his associates, whose names were concealed, to construct the road, and was referred to the president, S., who made the contract as previously arranged by the association, and for the joint interest of its members. Further to conceal the plot, C. transferred the contract to G. & Co., under whose name the work was done; but the association in fact performed the work, paid the expenses, and divided the profits. With a majority of the stock issued under the contract, a majority of the directors was thenceforth chosen from the association, S. continuing president. *Held:* (1) that the contract made by S. with C., in the name of the corporation, was fraudulent and void; (2) that the officers were accountable to the corporation for the abuse of their trust and the profits realized under the contract; (3) that all persons participating in the fraudulent transactions with knowledge of the facts were equally liable with the officers; (4) that the stockholders were the real parties in interest to maintain an action against the officers and fraudulent participators, and the corporation a proper party defendant with them. *Ryan* v. *Leavenworth, A. & N. W. R. Co.*, 21 *Kan.* 365.—QUOTING Wardell *v.* Union Pac. R. Co., 4 Dill. (U. S.) 330.—FOLLOWED IN Venner *v.* Atchison, T. & S. F. R. Co., 28 Fed. Rep. 581.

Complainants, having failed to comply with the conditions and terms of their subscription to the capital stock of a railway company, without any default on the part of the corporation or its officers, have not such rights or interests in the stock as to entitle them to an injunction to restrain the acts of the officers on the grounds of conspiracy and fraud. *Busey* v. *Hooper*, 35 *Md.* 15.

A minority of the stockholders may maintain a bill in equity on behalf of themselves and the other stockholders, for conspiracy and fraud whereby their interests have been sacrificed, against the corporation and its officers and others who participate therein. By unreasonable delay, however, in bringing their bill, they will forfeit their title to equitable relief. *Peabody* v. *Flint*, 6 *Allen* (*Mass.*) 52.—QUOTED IN Heath *v.* Erie R. Co., 8 Blatchf. (U. S.) 347.

Where directors of a corporation have so mismanaged its affairs as to be fraudulent, a bill may be maintained against them personally by a shareholder. *Watt's Appeal*, 78 *Pa. St.* 370.

100. Actions to restrain misappropriation of assets.*—Where one railroad corporation is the owner of a large amount of stock in a connecting railroad, and both corporations are under the control of the same officers, and the officers of the connecting line are guilty of a misapplication of the corporate funds for their personal benefit, the stockholders of the former corporation, or a part of them, may institute a suit to compel the officers to account for such misapplication. *Ryan* v. *Leavenworth, A. & N. W. R. Co.*, 21 *Kan.* 365.

And where the stock of the first corporation in the connecting road has been fraudulently canceled by the officers of the two corporations, and a like amount of stock in the connecting road issued without consideration to trustees for the former corpora-

* Misappropriation by directors; intervention of equity, see note, 3 AM. & ENG. R. CAS. 176.

tion, and such corporation is the equitable owner of the same, the stockholders of said first corporation, or a part of them, may maintain a suit to compel the officers of such connecting corporation to restore to said corporation the funds and property wrongfully taken by them, without first bringing an action to compel a transfer of the stock from the trustees to the corporation equitably owning the same, if both of said corporations and the trustees are joined as defendants, and the latter refuse to institute a suit to protect the property and interests of the corporation. *Ryan* v. *Leavenworth, A. & N. W. R. Co.*, 21 *Kan.* 365.

Where it appears that the president of one street-car company held stock in another, in which plaintiffs were stockholders, in trust for the benefit of the company, and that the bonds had been sold, but their proceeds not accounted for, and that such president would not bring an action, plaintiffs, as such stockholders, have a right to sue. *Frothingham* v. *Broadway & S. A. R. Co.*, 9 *Civ. Pro.* (*N. Y.*) 304.

In such case it was objected that the company in which plaintiffs held stock could not lawfully hold stock in the other company, but it appeared that the transfer of stock was a gift. *Held*, that the objection was not well taken. The prohibition of the General Railroad Act of 1850, ch. 140, § 8, is against a railroad company using any of its funds in the purchase of any stock in its own, or any other corporation; but even if the transfer was made in pursuance of a contract which had been performed by plaintiffs' company, the defendant company could not plead *ultra vires*. *Frothingham* v. *Broadway & S. A. R. Co.*, 9 *Civ. Pro.* (*N. Y.*) 304.

A complaint by a minority stockholder showing a general misappropriation of the funds of the corporation by those who have obtained control of its management, and that such managers have taken money from the treasury for themselves, for money claimed to have been loaned for improvements which were not made for several years thereafter, and that plaintiff was refused access to the books, or any information regarding the affairs of the company, shows such a misapplication of the corporate funds as to state a good cause of action. *Sage* v. *Culver*, 24 *N. Y. Supp.* 514, 71 *Hun* 42, 54 *N. Y. S. R.* 297, *affirmed in* 147 *N. Y.* 241, 41 *N. E. Rep.* 513.

101. Action to enjoin waste of corporate property. — Where persons who have wasted and misappropriated its funds are in the control of a corporation, a stockholder may sue without first demanding that the corporation sue. *Sage* v. *Culver*, 24 *N. Y. Supp.* 514, 71 *Hun* 42, 54 *N. Y. S. R.* 297; *affirmed in* 147 *N. Y.* 241, 41 *N. E. Rep.* 513.

102. Action to restrain acts ultra vires.—A single stockholder may maintain an action against the corporation and the directors to restrain a contemplated transaction which is *ultra vires*, although all of the other stockholders favor it; but where the transaction is one involving discretion, an injunction will not be granted unless a clear case is made. *Du Pont* v. *Northern Pac. R. Co.*, 16 *Am. & Eng. R. Cas.* 456, 18 *Fed. Rep.* 467, 21 *Blatchf.* (*U. S.*) 534.

Where the directors of a railroad company, without any authority, pass a resolution to assume certain debts and to buy a majority of the stock and bonds of a rival road, subject to the approval of the stockholders, the proposed purchase, being *ultra vires*, cannot be ratified by the stockholders, and may be enjoined by a single stockholder. *Elkins* v. *Camden & A. R. Co.*, 9 *Am. & Eng. R. Cas.* 590, 36 *N. J. Eq.* 5.—QUOTED IN Ellerman *v.* Chicago J. R. & U. S. Co., 49 N. J. Eq. 217.

103. Action for unauthorized consolidation.—A stockholder in a railway company which, against his protest, has been consolidated without authority of law with another company, by the action of other stockholders, and whose equitable interest has been wrongfully appropriated by the consolidated company, cannot maintain an action for the injury against the directors of the company, as such; nor are the directors responsible to the corporation for a consolidation effected by act of the stockholders. *International & G. N. R. Co.* v. *Bremond*, 4 *Am. & Eng. R. Cas.* 308, 53 *Tex.* 96.

4. *Remedy by Stockholder Who has been Deprived of His Stock.*

104. In general. — Where stock in a corporation is sold under a void execution the owner is entitled to relief in equity against the corporation to restrain a transfer on its books to the purchasers. *Seligman* v. *St. Louis & S. F. R. Co.*, 22 *Fed. Rep.* 37.

A railroad corporation may abandon its charter and dissolve itself except so far as its public duties as conservators of a highway may limit this power; and the legislature may release it from this limitation, and allow a transfer of its duties to other hands. A single stockholder has no right to object to a transfer of all the property of the corporation to another company, under the authority of an act of assembly. But he cannot be compelled by law to accept the stock of the other company in payment for the shares held by him, and a court of equity will restrain the corporation and its officers from entering into a contract to that effect. *Lauman* v. *Lebanon Valley R. Co.*, 30 *Pa. St.* 42.—APPROVED IN Black *v.* Delaware & R. Canal Co., 24 N. J. Eq. 455.

Where all the stock of a corporation is void, under Wis. Rev. St. § 1753, because not fully paid for, none of the stockholders can make any claim by means of or through it to the aid or protection of a court of equity as against the others, based upon the rights of a stockholder. *Hinckley* v. *Pfister*, 83 *Wis.* 64, 53 *N. W. Rep.* 21.

But a holder of such void stock who has pledged it as security for a debt of the corporation, under an agreement that bonds pledged by the corporation for the same debt shall be first resorted to, may sue for a conversion of his stock by a sale in violation of such agreement. But where, by the terms of the pledge, the right to vote on the stock was transferred to the pledgee, the pledgor cannot ask a court of equity to restore to him the stock or the right to vote on it, until the purpose for which it was pledged has been satisfied. *Hinckley* v. *Pfister*, 83 *Wis.* 64, 53 *N. W. Rep.* 21.

105. Suit to compel issue to plaintiff of due proportion of new stock.—Where the board of directors of a corporation, in issuing new stock to the shareholders generally, refused to issue to a particular shareholder his due proportion thereof, he may compel its issue to him by suit in equity against the corporation (at least as long as there is sufficient stock remaining undisposed of), though he might probably have maintained an action at law against it for damages. If there are other shareholders in like condition with the plaintiff in such a case, their rights and his are several, and he has no right to represent them. *Dousman* v. *Wisconsin & L. S. M. & S. Co.*, 40 *Wis.* 418.—DISTINGUISHED IN Doud *v.* Wisconsin, P. & S. R. Co., 65 Wis. 108.

106. Compelling issue of stock to cover amount paid in.—The purchasers of a railroad at an execution sale issued a circular letter offering the old stockholders the privilege of participating in the purchase, upon payment of ten per cent. of their paid-up stock within a specified time. Subsequently the legislature passed a statute releasing the road from a certain forfeiture, on condition that the original stockholders were restored to their rights as existing before the sale, provided they pay the ten per cent. within a certain time, otherwise to forfeit all rights under it. A stockholder paid in the ten per cent. on the stock held by him, but after the time fixed by the circular and by the statute; and he sued to compel the issuance of stock to cover the ten per cent. paid in. *Held*, that he was not entitled to recover, not having made the payment within the time prescribed. *Van Alstyne* v. *Houston & T. C. R. Co.*, 9 *Am. & Eng. R. Cas.* 447, 56 *Tex.* 373.

107. Suit to reach stock improperly apportioned to another.—A subscriber to a joint-stock corporation who complains of an inequitable distribution of the stock, and who is seeking to reach stock which has been improperly assigned or apportioned to others, should file his bill in behalf of himself and of all other subscribers standing in the same situation. *Walker* v. *Devereaux*, 4 *Paige* (*N. Y.*) 229.

The remedy of a stockholder whose stock has been illegally and wrongfully canceled, new stock in lieu thereof having been issued to an unauthorized person, is against the company, whether the wrongful issuance of the new stock was the result of negligence or fraud. *Baker* v. *Wasson*, 53 *Tex.* 150.

If the new stock thus wrongfully issued was procured by a fraudulent combination between the company and the party who received it, both would be liable in damages to the rightful owner. The party receiving the new stock would, however, not be liable if he had neither actual nor constructive notice of the invalidity of his own title. *Baker* v. *Wasson*, 53 *Tex.* 150.

108. Suit to recover proceeds of stock deposited in view of consolidation.—A complaint set up the deposit of certain stock and bonds with defendant, a trust company, in pursuance of a reorganization plan which had failed; that an action

had been brought in which the trust company had been decreed to sell certain of the stock and bonds to create a fund for the costs of the action, and to distribute the surplus, after paying such costs, to the actual holders of the stock and bonds; and demanded judgment for the value of the stock at the time of the sale. *Held*, that the complaint was demurrable (1) because the holders of the bonds were not joined as parties, and (2) because it contained no allegation showing the amount of costs payable in the suit, or what was chargeable against the stock or bonds sought to be recovered. *Carman* v. *Farmers' L. & T. Co.*, 70 *Hun* 283, 53 *N. Y. S. R.* 824, 24 *N. Y. Supp.* 39.

109. Suit for wrongful transfer of plaintiff's shares. — In an action by a stockholder against a corporation to recover damages for the wrongful transfer of plaintiff's shares upon a power of attorney which is alleged to have been forged, evidence is admissible to show that the desk of the alleged forger contained a genuine signature of the stockholder, torn from his ledger, and that in the same desk were other complete and partly completed signatures, imitating the genuine signature; and such signatures are admissible. *Pennsylvania Co.* v. *Philadelphia, G. & N. R. Co.*, 153 *Pa. St.* 160, 25 *Atl. Rep.* 1043; *affirming* 1 *Pa. Dist.* 301.

5. *Remedy of Minority against Majority of Stockholders.*

110. How far the doctrine of majority rule will be carried.—It is a general rule that the acts of a majority of a body politic bind the whole corporation, when confined to its ordinary transactions and consistent with the original objects of its formation. *Mowrey* v. *Indianapolis & C. R. Co.*, 4 *Biss.* (*U. S.*) 78.

In corporations, within the scope of the corporate authority the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits. *Leo* v. *Union Pac. R. Co.*, 16 *Am. & Eng. R. Cas.* 452, 19 *Fed. Rep.* 283.

Those who become members of a corporation consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond such powers depends upon the want of consent, if the consent is given the right ceases. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown as a part of the title to relief. *Leo* v. *Union Pac. R. Co.*, 16 *Am. & Eng. R. Cas.* 452, 19 *Fed. Rep.* 283.

A person purchasing the stock of a corporation thereby assents that a majority of the stockholders shall control the policy of the corporation, and so long as the acts of the majority are in good faith, and within the powers of the corporation, and are not prohibited by law, they are valid. *Harkness* v. *Manhattan R. Co.*, 11 *N. Y. S. R.* 732; *affirming* 22 *J. & S.* 174; *affirmed in* 113 *N. Y.* 627, *mem.*, 20 *N. E. Rep.* 877.

Minority stockholders of a corporation cannot complain of an issue of mortgage bonds to a holder of the majority of the stock, when such issue was made by the corporation without fraud, for an adequate consideration, and with great benefit to the corporation, though the issuance was procured by the majority stockholder for use to raise money for himself, and was actually so used. *Gloninger* v. *Pittsburgh & C. R. Co.*, 46 *Am. & Eng. R. Cas.* 276, 139 *Pa. St.* 13, 21 *Atl. Rep.* 211.

111. Rights of minority stockholders, generally.* — The corporator has a perfect right to stand upon his contract with the corporation in opposition to the action of the majority, and he has an equal right to insist upon his rights under it against the action of the legislature. The acceptance of an amendatory act in an irregular manner will not bind the stockholders who did not assent to it. *New Orleans, J. & G. N. R. Co.* v. *Harris*, 27 *Miss.* 517.

When a person becomes a member of an incorporated company by his subscription to the stock, he agrees to be bound by the terms of the contract as defined in the charter of incorporation; he agrees to be bound by the acts of the corporation and its officers, performed within the scope of the charter powers; but upon no principle can it be held that he impliedly consents to any alteration which would work a radical change in the structure of the association, which might be voted or accepted by even a majority of the whole of the corporators. *New Orleans, J. & G. N. R. Co.* v. *Harris*, 27 *Miss.* 517.—DISTINGUISHED

* Monographic note on the rights of minority stockholders, see 25 AM. & ENG. R. CAS. 13.

IN Hawkins *v.* Mississippi & T. R. Co., 35 Miss. 688.

A majority of stockholders will not be permitted to sanction a transaction which is the outcome of a scheme dishonest or fraudulent in its inception and development. The minority stockholders have rights which, under such circumstances, must be recognized. The majority may legally control the company's business, but in thus assuming control they take upon themselves the correlative duty of diligence and good faith. They cannot manipulate the company's business in their own interests to the injury of the corporation. *Meyer* v. *Staten Island R. Co.*, 7 *N. Y. S. R.* 245, 43 *Hun* 641.—QUOTING Central Trust Co. *v.* New York City & N. R. Co., 4 N. Y. S. R. 639.

112. When one stockholder may sue the others in equity, generally.—Where an incorporated railroad company would be the proper complainant in a chancery suit, but refuses or elects not to bring the suit when required by a stockholder to do so, and the controversy is between different classes of its stockholders, a court will entertain a bill brought by a stockholder to settle such controversy. *Wheeling* v. *Mayor, etc., of Baltimore*, 1 *Hughes* (*U. S.*) 90.

Where the majority of the stockholders of a corporation are illegally pursuing, in the name of the corporation, a course which is in violation of the rights of the other stockholders, and which can only be restrained by a court of equity, an action to obtain equitable relief may be maintained by an aggrieved stockholder, or those whose rights are thus affected may join as plaintiffs in the action. *Barr* v. *New York, L. E. & W. R. Co.*, 23 *Am. & Eng. R. Cas.* 745, 96 *N. Y.* 444.—QUOTING New York & N. H. R. Co. *v.* Schuyler, 17 N. Y. 592.—DISTINGUISHED IN Beveridge *v.* New York El. R. Co., 112 N.Y. 1, 19 N. E. Rep. 489, 20 N. Y. S. R. 962. FOLLOWED IN Frothingham *v.* Broadway & S. A. R. Co., 9 Civ. Pro. 304.

113. —— to prevent illegal action of majority where directors refuse to interfere.—A minority of the stockholders of a corporation may maintain a bill in equity to prevent illegal action on the part of the majority, after they have requested the proper officers to interfere; and where the illegal action complained of or threatened is on the part of a majority of the directors acting in the interest of another corporation of which they are also directors, such previous request by the minority is unnecessary, since it would be unavailing. *Memphis & C. R. Co.* v. *Woods*, 44 *Am. & Eng. R. Cas.* 257, 88 *Ala.* 630, 7 *So. Rep.* 108.

114. —— to prevent misapplication of capital and profits to the lessening of dividends.—A minority of stockholders have a remedy in chancery against the directors, the corporation, and all others, whether individuals or corporations, assisting or confederating with them, to prevent such corporation and the directors thereof from making any misapplication of their capital or profits which might result in lessening the dividends of stockholders, or the value of their shares, if the acts intended to be done create what in law is denominated a breach of trust or duty. *March* v. *Eastern R. Co.*, 40 *N. H.* 548.

Such stockholders have a remedy against individuals, in whatever capacity they may profess to act, and against the corporation in which they are members and all others acting in concert with it to effect and accomplish a common purpose and object, when the object thus to be accomplished is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. *March* v. *Eastern R. Co.*, 40 *N. H.* 548.—QUOTED IN Heath *v.* Erie R. Co., 8 Blatchf. (U. S.) 347.

115. —— to prevent sale and investment of proceeds in another enterprise.—A majority of the stockholders cannot sell the property of the company against the wishes of the minority, and thus defeat the objects for which the company was formed. *Searcy* v. *Yarnell*, 47 *Ark.* 269, 1 *S. W. Rep.* 319.

A majority of stockholders in a prosperous corporation cannot, at their own mere caprice, sell out the whole source of their emoluments and invest their capital in other enterprises, where the minority desire the prosecution of the business in which they had engaged. The contract is that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes. *Kean* v. *Johnson*, 9 *N. J. Eq.* 401.—DISTINGUISHING Ware *v.* Grand Junction Water Co., 13 Cond. Ch. 126; Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351.

Under the Constitution, a majority of the members of a corporation cannot be authorized to divest the interest of a dissenting stockholder by a transfer of the whole of its property to another company, to be paid for in the shares of such other company, without first giving security for the interest of such dissenting stockholder. *Lauman* v. *Lebanon Valley R. Co.*, 30 *Pa. St.* 42.—CRITICISED IN Mowrey *v.* Indianapolis & C. R. Co., 4 Biss. (U. S.) 78. REVIEWED IN Meyer *v.* Johnston, 64 Ala. 603; State *v.* Bailey, 16 Ind. 46.

116. —— for fraudulent acquisition by one corporation of the property of another.—One corporation purchased a controlling interest in another, and thereby secured the election of a board of directors from its own employés and officers, who owned no stock in their individual right, which board executed a pretended traffic agreement to surrender to the former complete control of the property and franchises of the latter. *Held*, that the minority stockholders could not maintain a bill to annul such agreement without first applying to the board of directors. *Earle* v. *Seattle, L. S. & E. R. Co.*, 56 *Fed. Rep.* 909.

Where one company elects and controls a board of directors of another company, and acquires a majority of its stock through such directors, without adequate consideration, it is a fraud upon the vendor company and its stockholders for which the courts will grant relief at the suit of a stockholder. *Pondir* v. *New York, L. E. & W. R. Co.*, 55 *N. Y. S. R.* 63, 72 *Hun* 384.

In such case, after the corporation refuses to bring an action minority stockholders may sue either to set aside the deed transferring the property or to compel an accounting. *Pondir* v. *New York, L. E. & W. R. Co.*, 55 *N. Y. S. R.* 63, 72 *Hun* 384. —FOLLOWING Barr *v.* New York, L. E. & W. R. Co., 125 N. Y. 263, 34 N. Y. S. R. 743.

117. —— for fraudulent dissolution and repurchase by majority.—Where the law permits it, a majority of stockholders have a right to dissolve the corporation and to dispose of its property and distribute the proceeds; but the majority have not the right to sell the property to themselves at their own valuation, and at less than its real value; and where this is done the minority stockholders may maintain a suit against the majority to compel an accounting, without making the corporation a party. *Ervin* v. *Oregon R. & N. Co.*, 20 *Fed. Rep.* 577, 22 *Blatchf.* (*U. S.*) 187.

And one or more of the minority stockholders may maintain such an action without making the other minority stockholders parties. *Ervin* v. *Oregon R. & N. Co.*, 20 *Fed. Rep.* 577, 22 *Blatchf.* (*U. S.*) 187.

In such case the minority stockholders have an equitable lien, to the extent of the money of which they have been deprived by the sale, on the corporate property in the hands of the purchasers, or of a new company which they have organized. *Ervin* v. *Oregon R. & N. Co.*, 23 *Blatchf.* (*U. S.*) 517, 27 *Fed. Rep.* 625.—QUOTING Taylor *v.* Chichester & M. R. Co., L. R. 2 Ex. 356.

6. *Ratification, Acquiescence or Laches as a Bar.*

118. Effect of laches.—A person who continues to act as stockholder for some months after he becomes aware of the circumstance on which he founds a bill to have his contract to take shares declared void on the ground of deception and misrepresentation will have his bill dismissed. *Sharpley* v. *Louth & E. C. R. Co., L. R.* 2 *Ch. D.* 663, 46 *L. J. Ch. D.* 259, 35 *L. T.* 71.

A stockholder's bill praying that a mortgage be annulled on account of a fraudulent consolidation will be dismissed, where complainants have been guilty of laches. *Bell* v. *Pennsylvania, S. & N. E. R. Co.*, (*N. J. Eq.*) 10 *Atl. Rep.* 741.

Admitting that the legislature is constitutionally incompetent to authorize a railroad company to embark in new enterprises, entirely beyond the scope and outside of the objects contemplated by its charter at the time the stock was subscribed for, and thus to effect a fundamental change in its charter, without the consent of all its stockholders, it is quite clear that before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights; it will not do for him to wait until the mischief of which he complains is accomplished. *Chapman* v. *Mad River & L. E. R. Co.*, 6 *Ohio St.* 119.—QUOTED IN Goodin *v.* Cincinnati & W. Canal Co., 18 Ohio St. 169.

119. What delay amounts to laches.*—Where officers of a company

* Action by minority stockholders to set aside a sale under deed of trust. What delay will

report at a stockholders' meeting a contract for completing the road, and state generally its terms, it is too late for any of the old stockholders, after the contract has been executed, to complain that there were terms in it not disclosed to them, which, if they had known, they would not have consented to; there being no charge of concealment or deception, and the ignorance on their part being only the result of their own failure to examine the contract, which was open to their inspection. *Haslehurst* v. *Savannah, G. & N. A. R. Co.*, 43 *Ga.* 13.

A stockholder assailed a certain contract made by his company for the purpose of raising money to complete the road, and for the issuance of second mortgage bonds. The contract and the mortgage were reported at a meeting of stockholders shortly after made, but they offered no objection, or aid to the company, but permitted the association to proceed and expend money in building the road. *Held*, that stockholders could not impeach the transaction after the lapse of five years. *Kitchen* v. *St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 224.

In such case a second mortgage was executed in 1868 and reported at the next meeting of stockholders, and a foreclosure sale was made in 1871, and suit was brought in 1873 attacking the transaction. All the time plaintiff was a stockholder, was present at the sale, but made no effort to stop it, although he believed the mortgage to be illegal. Subsequently he agreed to convert his stock into stock of a reorganized company, and did convert a part of it into cash. The proceeds of the second mortgage bonds were used in completing the road, and other large sums of money expended in improving it, and plaintiff bought the greater part of his stock in the old company after the road was advertised for sale, at a small per cent. of its par value. *Held*, that this showed such delay, acquiescence and ratification as to cut off his right to redeem. *Kitchen* v. *St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 224. —DISTINGUISHED IN Jackson *v.* Ludeling, 21 Wall. (U. S.) 616; Covington & L. R. Co. *v.* Bowler, 9 Bush (Ky.) 468. REVIEWED IN Foster *v.* Mullanphy Planing Mill Co., 92 Mo. 79.

By an unexplained delay of nearly three years in bringing suit, the objection of the dissenting stockholders is waived. *Boston, C. & M. R. Co.* v. *Boston & L. R. Co.*, 51 *Am. & Eng. R. Cas.* 106, 65 *N. H.* 393, 23 *Atl. Rep.* 529.

120. What delay does not amount to laches.—Where one stockholder institutes prompt proceedings to set aside an alleged illegal agreement entered into by the directors of a corporation on its behalf, this will enure to the benefit of all the stockholders. Other stockholders will not therefore be guilty of laches because they fail likewise to institute such proceedings, or to join therein. *Metropolitan El. R. Co.* v. *Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly* (*N. Y.*) 373, 14 *Abb. N. Cas.* 103. — QUOTING Boardman *v.* Lake Shore & M. S. R. Co., 84 N. Y. 157.

Stockholders are not guilty of laches in not acting together at once to set aside an alleged illegal agreement entered into by directors. They cannot be expected to take such action until the next meeting to which they are legally summoned to elect a new board of directors to assert their rights. In such case the new board of directors may institute proper proceedings to nullify and set aside the alleged illegal and wrongful agreement of the previous board. *Metropolitan El. R. Co.* v. *Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly* (*N. Y.*) 373, 14 *Abb. N. Cas.* 103.

Where a company has obtained an injunction to restrain the stockholders of a corporation from bringing suit to set aside an agreement entered into between itself and the corporation, it cannot in a subsequent suit by the corporation to set aside such agreement set up laches on the part of the stockholders in moving to set it aside. *Metropolitan El. R. Co.* v. *Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly* (*N. Y.*) 373, 14 *Abb. N. Cas.* 103.

A stockholder in a railway company, against whose protest a consolidation was illegally effected by the company with another railway company, delayed for more than two years the institution of proceedings against the consolidated company for the appropriation of his equitable interests. *Held*, that while the delay might preclude him from enjoying the further prosecution of the consolidated enterprise, it did not prevent him from following up his equitable interest in the hands of a corporation, which, by appropriating it without authority, became equitably bound to compensate

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constitute laches, see 44 AM. & ENG. R. CAS. 273, *abstr.*

him therefor. *International & G. N. R. Co.* v. *Bremond*, 4 *Am. & Eng. R. Cas.* 308, 53 *Tex.* 96.

121. Acquiescence. — There was a contract between a railroad company and its contractors that the chief engineer of the company should be the arbiter to settle, in the first instance, any disputes as to the work, and that the contractors should have the proceeds of running the road as it was completed, mile by mile, until the whole was completed and accepted by the company. The chief engineer and president of the company, eleven months before the time fixed for the completion, and when the road was in many respects not completed, accepted the road as finished, with a view of putting the whole road immediately at work for the company and completing it with the proceeds, and his acts were shortly after reported to a meeting of the stockholders, who acquiesced in the transaction and continued for nearly a year to acquiesce in the running of the road and receipt of its earnings. *Held*, that it was too late for a small portion of the stockholders to complain, and to ask that an account be taken of the actual value of the work done and that the builders be allowed only that value, especially if there was no offer to bring that value in money into court. *Hazlehurst* v. *Savannah, G. & N. A. R. Co.*, 43 *Ga.* 13.

A dissenting stockholder may have an injunction to restrain the corporation from using its powers or funds for an unauthorized purpose, or from creating a monopoly. But a consenting stockholder cannot have such injunction, nor can one who acquiesces in acts *ultra vires*, or permits them to go unquestioned, so that other parties who have acted on the faith of them would suffer great injury by their repudiation. *Stewart* v. *Erie & W. Transp. Co.*, 17 *Minn.* 372 (*Gil.* 348), 5 *Am. Ry. Rep.* 333, 8 *Am. Ry. Rep.* 149.

Where a stockholder in a railroad corporation has signed a contract disposing of its assets, knowing its contents, and voting at meetings of the company to carry it into effect, he cannot afterwards repudiate it, or question the *bona fides* of the transaction, no fraud being shown. *Clarke* v. *Omaha & S. W. R. Co.*, 4 *Neb.* 458, 19 *Am. Ry. Rep.* 423. —QUOTING Henry *v.* Vermillion & A. R. Co., 17 Ohio 191.

Any act of the corporation impairing the rights of a stockholder without his consent, either express or implied, will not be binding on him, except in a proceeding authorizing the taking of private property for public uses upon making compensation. But long acquiescence will be considered as equivalent to a consent, and whatever ground of equity an individual stockholder may have had, a counter equity may arise from the lapse of time. *Gifford* v. *New Jersey R. & T. Co.*, 10 *N. J. Eq.* 171.

122. Ratification.—Equity will refuse to enjoin a railroad, at the instance of its stockholders, from paying the interest upon bonds bearing its indorsement where there is evidence of many acts on their part tending to show complainants' knowledge of and consent to or ratification of such indorsement. *Cozart* v. *Georgia R. & B. Co.*, 54 *Ga.* 379.

Two competing roads entered into a contract by which certain tributory territory was preserved to each, within which the other would not extend branch lines. After the directors of one of the companies had passed a resolution to construct a certain branch line in violation of the contract, a resolution was passed at a stockholders' meeting ratifying all acts of the directors during a certain time, which included the time of the above resolution; but there was no evidence that the resolution was read, or the attention of the stockholders called thereto, though there was some evidence tending to show that the stockholders were misled. *Held*, that the resolution of the directors was not so ratified as to preclude stockholders from insisting on the performance of the contract. *Ives* v. *Smith*, 55 *Hun* 606, *mem.*, 28 *N. Y. S. R.* 917, 8 *N. Y. Supp.* 46, *affirming* 3 *N. Y. Supp.* 645.

7. *Procedure in Suits by Stockholders.*

123. Parties.*—In a stockholder's bill against his own company and another to compel an accounting, the stockholder's company is a necessary defendant; but the interests of the stockholder and the company are identical, they representing one side of the controversy while the company against whom the accounting and relief are sought represents the other. *Arapahoe County Com'rs* v. *Kansas Pac. R. Co.*, 4 *Dill.* (*U. S.*) 277.

* Joinder of stockholders, and causes of action in suits against directors and companies for conspiring to injure, see note, 23 AM. & ENG. R. CAS. 753.

Two stockholders, who held 831 shares out of a total of 10,900, filed a bill on behalf of themselves and all others similarly situated which remained on the calendar for six years without any other stockholders coming in and asserting their interests. *Held*, that after such lapse of time the suit would not be continued for the purpose of adding new parties. *Samuel* v. *Holladay, Woolw.* (*U. S.*) 400.

The state, being a stockholder in a railroad company, may be a party to a bill filed by other interested persons against a city and certain other railroads, to enjoin the consummation of a contract by which a controlling amount of the stock of the road in which the state is interested is about to pass into the control of other roads. A citizen of the state, as such, is not a proper party to a bill to enjoin a railroad company from illegally making a purchase of stock in another railroad company, but if there are other proper parties to the bill, this objection can not be considered a good ground of general demurrer. *Central R. Co.* v. *Collins*, 40 *Ga.* 582.

The failure to make the corporation a party is not a mere defect of parties, to be taken advantage of by special demurrer, but leaves the stockholder without a cause of action, the party entitled to the relief not being before the court. If the plaintiff fails to make the corporation a party, it is not proper for the court to require him to do so, and his action should be dismissed absolutely. *Shawhan* v. *Zinn*, 79 *Ky.* 300.

124. Intervention—New parties.—A company declared an extra dividend, payable in certificates of indebtedness, bearing interest and convertible, after a certain date, into stock. Upon a bill filed by a city, as a stockholder, against the company, an injunction was granted restraining the issuing of this dividend. To this bill the company filed an answer and moved for a dissolution of the injunction, but pending argument directed its solicitor to ask leave to withdraw the answer and to dismiss the motion, which was done. A petition was then filed by certain other stockholders, alleging that their rights and interests were injuriously affected by the continuance of the injunction, and asking leave to be made defendants and to move for its dissolution. This was refused and their petition dismissed, and on appeal the order so dismissing their petition was affirmed by a divided court. *Held*, that before final decree the petitioners ought to be heard as parties, and that if they are not, and on appeal, after final decree, are shown to be prejudiced because of the refusal so to hear them, the decree will be held to be of no avail as against them, and will be reversed or the cause remanded, under Md. Act of 1832, ch. 302, that the proper parties may be made. *Gregg* v. *Mayor, etc., of Baltimore*, 14 *Md.* 479.

125. Bill.—Trustees of a corporation held property for four months, during which time it was advertised for sale. A part of the time one of the plaintiffs was a director of the company, and both of them knew that the trustees had taken possession of the property under the mortgage, and that a sale was pending, but they made no effort to pay the debt for which the sale was made, or otherwise to prevent a sale. *Held*, that a bill filed by them, as stockholders, was not entitled to the favorable consideration of a court of equity. *Samuel* v. *Holladay, Woolw.* (*U. S.*) 400.—REVIEWING Dodge *v.* Woolsey, 18 How. (U. S.) 331.

The bill of a stockholder to restrain the corporation from employing its assets in excess of its corporate powers is bad on demurrer, unless it is specific in alleging grounds which show good cause for the relief sought. *Leo* v. *Union Pac. R. Co.*, 16 *Am. & Eng. R. Cas.* 452, 19 *Fed. Rep.* 283.—FOLLOWING Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Solomons *v.* Laing, 12 Beav. 339; Beman *v.* Rufford, 6 Eng. L. & Eq. 106; Stevens *v.* Rutland & B. R. Co., 29 Vt. 545.

A bill originally filed in a state court by minority stockholders, but removed to a federal court, will not be held insufficient because it does not allege that plaintiffs sought in vain for relief through the trustees and officers, as required by a rule of the federal courts, as such rule applies only to suits originally brought in the federal courts. *Earle* v. *Seattle, L. S. & E. R. Co.*, 56 *Fed. Rep.* 909.

A complainant cannot have any relief against a railway company, based on allegations of dereliction in duty to the stockholders. *Rogers L. & M. Works* v. *Erie R. Co.*, 20 *N. J. Eq.* 379.

A bill is not multifarious which is filed by a stockholder on behalf of himself and the other stockholders of a dissolved corpo-

ration for the purpose of compelling a defendant having in his possession property of said corporation or owing debts to it to account for and pay over the same, and which also asks that the creditors of such corporation may be convened and its assets distributed among its creditors and stockholders. *Crumlish* v. *Shenandoah Valley R. Co.*, 28 *W. Va.* 623.

Where a stockholder seeks to restrain a railway company from doing *ultra vires* acts, he must show the illegality of such acts by distinct and definite averments. *Mills* v. *Northern R. of Buenos Ayres Co., L. R.* 5 *Ch.* 621, 23 *L. T.* 719, 19 *W. R.* 171.

126. Complaint. — In an action by a stockholder to set aside a sale of the corporate property by the directors upon the ground of fraud, where the resolution authorizing the sale and the deed made in pursuance thereof recite that the sale was made because the corporation was greatly indebted, and had no means to pay its debts, it is proper that the complaint should negative such recitals and aver an ability upon the part of the corporation to meet the indebtedness, as specifications of constitutent parts of the fraud charged, and if these averments are denied in the answer, the issues thus raised are material, and evidence relevant thereto is properly admitted. *Smith* v. *Dorn*, 96 *Cal.* 73, 30 *Pac. Rep.* 1024.

Where it is alleged that a majority of the directors participated and assisted in the acts complained of and have ever since controlled the action of the board, and that it would therefore be useless to make a demand on the corporation or the directors to bring the action, which allegations are not denied, and the answer of the corporation shows that any demand upon it or upon its directors would have been useless, no demand is necessary to be alleged or shown. *Smith* v. *Dorn*, 96 *Cal.* 73, 30 *Pac. Rep.* 1024.

Plaintiff brought his action against his corporation and its president, alleging that he was a stockholder, and that the action was brought on behalf of himself and of such other stockholders as were willing to unite, etc.; that the company and its president had misapplied corporate moneys, refused to account for the same, withheld dividends due to plaintiff, and kept false books of account; and the relief demanded was that defendants be compelled to account. *Held*, on demurrer, that the complaint stated a cause of action as against the corporation, although it did not allege that it had refused to bring an action upon being requested so to do. *Brown* v. *Buffalo, N. Y. & E. R. Co.*, 27 *Hun* (*N. Y.*) 342.

Plaintiffs alleged in their complaint that they were stockholders in an improvement company, which contracted to construct a land-grant railroad, to be paid for in part by "land-grant bonds," which would enable the holders to share in the land; that the lands were to be taken at their appraised value, but that certain officers of the improvement company had appropriated valuable unappraised lands, leaving to complainants and other stockholders only inferior lands, not worth the amount of their bonds. *Held*, sufficient facts to entitle them to sue for redress. *Meyers* v. *Scott*, 2 *N. Y. Supp.* 753, 20 *N. Y. S. R.* 35, 50 *Hun* 603, *mem.*

In such case the complaint alleged that the president and secretary of the improvement company had confederated with two of the individual defendants named to secure to themselves the first of said bonds in fraud of plaintiffs' rights, and that certain bonds had been issued to said individual defendants and others, and used by them in obtaining an unfair preference in the distribution of lands; but there was nothing to show that such defendants had given a valuable consideration for the bonds. *Held*, that the complaint was sufficient to compel an accounting, under N. Y. Code Civ. Pro. § 447, providing that in equitable actions all persons may be brought in who have any claim or interest in the subject-matter of the action. *Meyers* v. *Scott*, 2 *N. Y. Supp.* 753, 20 *N. Y. S. R.* 35, 50 *Hun* 603, *mem.*

Where a stockholder brings an action for the redress or prevention of a wrong done or threatened to the corporate property, the complaint is insufficient if it contains no allegation imputing any fraud to the directors, nor that the directors have done or threatened to do anything *ultra vires*, nor that the directors are acting in their own interest in a manner injurious to or destructive of the rights of the other shareholders, and no allegation of an earnest effort on the part of the plaintiff to obtain redress within the corporation itself. Such a complaint does not bring the case within any recognized exception to the general rule that individual stockholders cannot maintain an action for the redress of wrongs to the corporation,

Latimer v. *Richmond & D. R. Co.*, 54 *Am. & Eng. R. Cas.* 189, 39 *So. Car.* 44, 17 *S. E. Rep.* 258.

The terms of an award between a railroad company and plaintiff were that the company should issue to plaintiff a certain amount of stock in case the legislature, at the session which was being held at that time, should make a grant of certain lands to the company. In an action for the value of the stock, the complaint averred that at the time of the award a bill was pending in the legislature creating a new corporation, and granting to it the lands named in the award; that the old company was then endeavoring to procure the passage of said bill, which was commonly known among the members as a bill granting said lands to said last-named company; that it was the passage of said bill to which the arbitrators had reference in their award and the parties in their settlement; that there was at the time no bill pending to grant the lands directly to the old company; that said company expected, in case the pending bill passed, to receive the benefit of the grant by consolidating with the new company; that said bill became a law, and the corporations afterwards consolidated, and thus obtained the benefit of the grant; and that said company neglected to issue stock to plaintiff as agreed. *Held*, on demurrer, that the complaint showed a good cause of action as against the old company. *Smith* v. *Chicago & N. W. R. Co.*, 18 *Wis.* 17.

127. Setting forth efforts to secure action by directors.*—Where a stockholder files a bill complaining of a transfer of stock from his corporation to another corporation, an allegation that the board of directors of his corporation was under the control of the other corporation, and that it would have been useless for him to make a demand on these directors to institute a suit to recover the stock, but that he would have made such application had he not known that they would refuse, is not a sufficient compliance with equity rule 94, providing, among other things, that a bill by a stockholder touching a matter wherein the corporation or its officers have the right to sue must "set forth with particularity the effort of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action." *Squair* v. *Lookout Mountain Co.*, 42 *Fed. Rep.* 729.

Where a stockholder files a bill for the redress of a grievance, or for the maintenance of a right which the corporation might properly assert, it must be set forth with particularity what effort the complainant has made to secure action on the part of the directors, and the cause of his failure. So a mere averment that protests were made against the acts complained of, but where there is nothing to show that they were by or on behalf of complainant, or any other stockholder, is not sufficient to authorize a preliminary injunction. *Weidenfeld* v. *Allegheny & K. R. Co.*, 47 *Fed. Rep.* 11.—FOLLOWING Hawes *v.* Oakland, 104 U. S. 450; Detroit *v.* Dean, 106 U. S. 537, 1 Sup. Ct. Rep. 560; Dimpfell *v.* Ohio & M. R. Co., 110 U. S. 209, 3 Sup. Ct. Rep. 573.

Neither will a preliminary injunction be granted where it appears that the corporation has brought suit in a state court against a third party whose acts are complained of, where the matters involved may properly be determined, and where the pleadings and proofs make the result of the issue doubtful. *Weidenfeld* v. *Allegheny & K. R. Co.*, 47 *Fed. Rep.* 11.

The rule that requires a stockholder to apply first to his corporation or its officers to bring a suit does not apply where the action is to protect the rights of stockholders themselves, and not the rights of the corporation, which have been violated by the officers. So an allegation in a complaint by a stockholder that the directors have confederated with certain other persons made defendants to defraud plaintiff and other stockholders is sufficient reason for not first applying to the corporation to bring the suit. *Meyers* v. *Scott*, 2 *N. Y. Supp.* 753, 20 *N. Y. S. R.* 35, 50 *Hun* 603, *mem.*

128. Plea or answer.—Stockholders filed a bill against the directors, alleging a refusal of the latter to take legal measures to protect their rights, and against a party in possession of the road of the company, and the lessee of it, and persons claiming liens on it, to recover possession of the road for said company. To this bill a plea was filed alleging that the company had brought a like suit in a court of the state and had discontinued it, through its directors, by

*Rule 94, relating to practice in equity in federal courts, see note, 22 AM. & ENG. R. CAS. 53.

preconcert with plaintiffs, that this suit might be brought to evade the proper jurisdiction of the state court, and denying any breach of trust by the directors. *Held*, that the plea was bad. *Dwight* v. *Central Vt. R. Co.*, 20 *Blatchf.* (*U. S.*) 200, 9 *Fed. Rep.* 785.

Another plea was filed to such bill, alleging that plaintiffs did not, before bringing the bill, in good faith request the directors to take legal measures to protect their rights, but by arrangement between plaintiffs and the directors a simulated request and refusal were made, and this suit was brought by the company in the name of plaintiffs, and denying that there had been any such refusal by the directors as amounted to a breach of trust. *Held*, that the plea was bad. *Dwight* v. *Central Vt. R. Co.*, 20 *Blatchf.* (*U. S.*) 200, 9 *Fed. Rep.* 785.

Still another plea was filed, alleging that security holders of the same class as those defendants had brought proceedings in behalf of themselves, and all other like security holders, against the company, in a state court, to enforce their security on the road, in which a decision favorable to the validity of their lien had been made, and which were pending, and setting forth the proceedings. *Held*, that the plea was bad. *Dwight* v. *Central Vt. R. Co.*, 20 *Blatchf.* (*U. S.*) 200, 9 *Fed. Rep.* 785.

In such case another plea was filed, by the party in possession of the road, alleging that it was in possession as a receiver of a state court and setting forth the proceedings on which its possession took place. *Held*, that the plea must be overruled, and the case proceed to proofs. *Dwight* v. *Central Vt. R. Co.*, 20 *Blatchf.* (*U. S.*) 200, 9 *Fed. Rep.* 785.

Before a stockholder or creditor of a corporation can maintain a bill for an injury to the corporate rights, he must show that the rights of the corporation have been prejudiced, and that the proper officers have refused to sue. So a plea to a bill by a stockholder denying that the corporation has refused to sue, and alleging that it has commenced suit, in good faith, touching the same matter, which is still pending, is a good defense. *Newby* v. *Oregon C. R. Co.*, 1 *Sawy.* (*U. S.*) 63.

If one be a *bona fide* holder of stock in a railroad company, and file a bill to enjoin the company from making a purchase not authorized by the charter, it is not a sufficient reply to the bill that plaintiff is not in good faith seeking the interests of the company, but is acting in the interests of a rival road. Each stockholder has a right to stand upon his contract, as provided by the charter. *Central R. Co.* v. *Collins*, 40 *Ga.* 582.

Plaintiff, claiming to be a stockholder in a railway, filed a bill against the directors, alleging that they held large sums of money in trust for the company. Defendants answered, denying that plaintiff was a stockholder and averring that certain shares subscribed for by him had been forfeited. The case was submitted on the preliminary question as to plaintiff's right to file the bill. *Held*, the question being attended with doubt, that the case must proceed to hearing, saving the benefit of the objection to defendants. *Light* v. *Woodstock & L. E. R. & H. Co.*, 7 *Grant's Ch.* (*U. C.*) 172.

129. Amendments—Limitation.—In a suit by certain stockholders against the directors, the other stockholders and others interested in the litigation, the petition charged that the directors, in fraud of their trust, had consolidated and merged its existence in another competing but insolvent corporation, misusing the revenues of the corporation and parting with the possession of its property, endangering its corporate existence, etc. Prayer for a receiver and a recovery in behalf of plaintiffs, and for general relief. By amendment relief was asked in the name of the corporation. In the amendment specific acts were given in addition to general allegations in the original. *Held*, that, as all the parties were before the court, and no new facts alleged by amendment, and as the relief requested was substantially the same in the amendment, such amendment could not be held as making a new party or alleging a new cause of action to which limitation could be pleaded. *Becker* v. *Gulf City St. R. & R. E. Co.*, 80 *Tex.* 475, 15 *S. W. Rep.* 1094.—DISTINGUISHING East Line & R. R. R. Co. *v.* Culberson, 72 Tex. 375.

130. Evidence—Burden of proof.—A stockholder filed a bill against his corporation and its directors to restrain them from paying themselves salaries fixed by a resolution passed by themselves, and to compel them to refund the amounts already received. *Held*, that by bringing the action plaintiff took upon himself the burden of showing that the corporation ought to have

exercised its right to demand the same relief. It does not appear simply from the fact that the directors voted themselves salaries that the corporation has been injured, or that the directors have acted dishonestly, and the burden of establishing these facts is upon plaintiff. *MacNaughton* v. *Osgood*, 3 *N. Y. S. R.* 795; *reversed on another point in* 114 *N. Y.* 574, 24 *N. Y. S. R.* 531, 21 *N. E. Rep.* 1044.

STOCK KILLING.

Allowing amendments in actions for, see PLEADING, **156.**

STOCK LAWS.

Constitutionality of, see STATUTES, **26-28.**

STOCK PENS.

Duty of carrier to provide, see CARRIAGE OF LIVE STOCK, **53.**
Receiving cattle in, see CARRIAGE OF LIVE STOCK, **16.**
See also CATTLE PENS.

STOCK YARDS.

Exposure of cattle in, during snowstorm, see CARRIAGE OF LIVE STOCK, **40.**
When deemed a nuisance, see NUISANCE, **7.**

1. Statutes.* — The mere fact that a stock-yard company owns and operates railways in connection with its yards is not, so far as the business of the yard is concerned, within the Illinois statute forbidding discrimination by railways. *Willoughby* v. *Chicago J. R. & U. S. Co.*, 50 *N. J. Eq.* 656, 25 *Atl. Rep.* 277.

2. Obligation to receive live stock. —A stock-yard company, the charter of which authorizes it to make contracts for the transportation and delivery of stock with the several railroad companies having a terminus in the county in which its yards are located, is under no obligation to receive stock from a railroad company except in so far as it binds itself to do so by contract. *Delaware, L. & W. R. Co.* v. *Central S. Y. & T. Co.*, 42 *Am. & Eng. R. Cas.* 524, 46 *N. J. Eq.* 280, 19 *Atl. Rep.* 185; *affirming* 37 *Am. & Eng. R. Cas.* 607, 45 *N. J. Eq.* 50, 17 *Atl. Rep.* 146.

The business of a stock-yard company, except in the character of the property which is the subject of bailment, is similar to the business of warehousemen, and it cannot be compelled, in the absence of a contract, to receive stock from any person or corporation. *Delaware, L. & W. R. Co.* v. *Central S. Y. & T. Co.*, 42 *Am. & Eng. R. Cas.* 524, 46 *N. J. Eq.* 280, 19 *Atl. Rep.* 185; *affirming* 37 *Am. & Eng. R. Cas.* 607, 45 *N. J. Eq.* 50, 17 *Atl. Rep.* 146.

3. Duty of company to deliver under contract. — A party keeping a stock yard may recover damages from a railroad for a breach of a contract to send all stock coming over its road to his yards, except such as may be ordered otherwise by shippers. *Terre Haute & I. R. Co.* v. *Struble*, 16 *Am. & Eng. R. Cas.* 597, 109 *U. S.* 381, 3 *Sup. Ct. Rep.* 270.

Where complainants have maintained a stock yard contiguous to defendant's road for twelve years, receiving stock over the road exclusively, defendant will be enjoined from altogether cutting them off, and refusing to deliver stock consigned to them, in pursuance of a contract with a rival stock-yard company. *Coe* v. *Louisville & N. R. Co*, 3 *Fed. Rep.* 775.—APPLYING Vincent *v.* Chicago & A. R. Co., 49 Ill. 33.—FOLLOWED IN Toledo, A. A. & N. M. R. Co. *v.* Pennsylvania Co., 53 Am. & Eng. R. Cas. 307, 54 Fed. Rep. 730; Toledo, A. A. & N. M. R. Co. *v.* Pennsylvania Co., 53 Am. & Eng. R. Cas. 293, 54 Fed. Rep. 746.

Where a railroad company assumes to receive, take care of, water, feed and forward stock as a part of its undertaking to transport it, it is at liberty to select such agencies as it may choose to employ for the purpose; but it cannot refuse to deliver stock consigned to one yard and deliver it to another, where both yards are contiguous and both connected by suitable switches, and the company can deliver to one as easily as to the other. Such a discrimination is contrary to a sound public policy and an injury to the owner of the yard discriminated against, and he may compel delivery by injunction. *McCoy* v. *Cincinnati, I., St. L. & C. R. Co.*, 13 *Fed. Rep.* 3.

4. Liability for injuries to live stock — Evidence — Negligence. — Plaintiff went to the office of a stock-yard company in advance of the arrival of horses which he was shipping by rail, to leave directions with the superintendent about the unloading and care of the horses upon their

* Stock yards and stock-yard companies, see note, 49 AM. & ENG. R. CAS. 156.

arrival; but was told that the superintendent had gone home. He then sought the head of the horse department of the yards and gave him directions, and was told that they would be carried out, and that it was not necessary for plaintiff to wait until the horses arrived. The horses came in on a stormy night and were considerably injured by not being properly cared for. *Held*, (1) that plaintiff was not guilty of contributory negligence in not seeking the superintendent himself; (2) that it was not error on the trial to admit as evidence the conversation had with the man that he did see about taking care of the horses. *St. Louis Nat. Stock Yards* v. *Tiblier*, 39 *Ill. App.* 422.

In an action to recover from a stock-yard company damages for injury to live stock, the measure of damages is the difference in the market value of the stock when received by the stock-yard company and when delivered to the consignee. *St. Louis Nat. Stock Yards* v. *Tiblier*, 39 *Ill. App.* 422.

5. Site—Rights of adjacent owners—Nuisance.*—Where, under express power in its charter, a railroad company builds a cattle yard near a station, and conducts the same in a careful manner, abutting owners cannot enjoin such yard as a nuisance and compel the choice of a site more isolated and less convenient to the company. *London, B. & S. C. R. Co.* v. *Truman*, 25 *Am. & Eng. R. Cas.* 116, 11 *App. Cas.* 45; *reversing* 29 *Ch. D.* 89, *which affirmed* 25 *Ch. D.* 423. — DISTINGUISHING Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193; Vaughan *v.* Taff Vale R. Co., 5 H. & N. 679.

6. Construction of contract between owner and company.—Defendant company entered into an oral contract to construct a track on its own land close to plaintiff's land, and was to run its stock trains over this track, and stop and deliver to plaintiff, upon his land, at cattle pens thereon erected, all the live stock that was to be transported over the road eastward, and was to receive and load it there, to the end that plaintiff might enjoy the profits arising from keeping and feeding the stock, and that in charge. *Held*, that the contract was within 2 N. Y. Rev. St. 134, § 6, providing that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust, or power over or concerning lands, or in any manner relating thereto," shall be created, unless by operation of law, or in writing. *Day* v. *New York C. R. Co.*, 31 *Barb.* (*N. Y.*) 548. — APPLYING Pitkin *v.* Long Island R. Co., 2 Barb. Ch. 222.

In such case it was necessary to construct a platform extending from the track on the company's land some distance over plaintiff's land, to be used in loading and unloading stock. *Held*, that this created a negative easement in the property of the company, that is, the power to restrict the company in the exercise of its natural rights as to the property, and to compel it to use it in a particular way, by keeping the platform thereon, and stopping its trains at the place for plaintiff's use and benefit; and, therefore, created an incorporeal hereditament which can only pass by grant, or deed under seal, or be acquired by prescription. *Day* v. *New York C. R. Co.*, 31 *Barb.* (*N. Y.*) 548.

* See also NUISANCE, 7.

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I. RIGHT TO CONSTRUCT AND OPERATE.*

1. *Right to Use Streets, Generally.*

1. Nature of interest acquired in street.†—The right of a company to lay its track through the streets of a city and to run its horse-cars thereon is an easement, or incorporeal hereditament; it is property of the company which must come through purchase and payment therefor. *Appeal of North Beach & M. R. Co.*, 32 *Cal.* 499.—QUOTED IN Northern Pac. R. Co. *v.* Carland, 5 Mont. 146.

A grant made, under legislative sanction, by a city to a street-railway company, of the right, not in express terms exclusive, to build and operate a railway upon one or more of its streets, confers upon the company no exclusive privilege as to such streets. The city, notwithstanding such grant, retains all the control it formerly possessed over those streets, subject only to the company's exclusive right, as against other railway companies, to use that portion covered by its track. *Gulf City St. R. Co.* v. *Galveston City R. Co.*, 65 *Tex.* 502.—FOLLOWED IN Mayor, etc., of Houston *v.* Houston City St. R. Co., 50 Am. & Eng. R. Cas. 380, 83 Tex. 548.

2. Can only use street by authority.‡—A private corporation, in the absence of either legislative or municipal permission, has no right to impose a permanent structure on a highway, and thereby sequester to its exclusive use and for its exclusive profit any portion thereof. *Stamford* v. *Stamford Horse R. Co.*, 36 *Am. & Eng. R. Cas.* 140, 56 *Conn.* 381, 1 *L. R. A.* 375, 15 *Atl. Rep.* 749.

A street-car company was chartered by the legislature between certain designated *termini* and over certain designated streets in a borough, with a provision that it might pass "over and across any highway within any of the points of commencing or termination aforesaid." *Held*, that the company had no right to lay its tracks through any street not specified; and it was no objection to granting an injunction against laying it on other streets that the borough would

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* Right to construct and operate street railways, see note, 8 L. R. A. 453.

† Nature of interest that street-railway companies hold in street, see notes, 25 AM. ST. REP. 476; 2 L. R. A. 255.

‡ Authority to street railways to use streets, see note, 1 L. R. A. 493.

Use of public streets for horse railroads, see note, 4 L. R. A. 624.

have the right to remove it by force. *Stamford* v. *Stamford Horse R. Co.*, 36 *Am. & Eng. R. Cas.* 140, 56 *Conn.* 381, 1 *L. R. A.* 375, 15 *Atl. Rep.* 749.

As it was the duty of the borough to keep its streets in proper repair, and it was liable for failing to do so, it was the proper party to apply for an injunction to restrain the laying of the tracks on streets not authorized. *Stamford* v. *Stamford Horse R. Co.*, 36 *Am. & Eng. R. Cas.* 140, 56 *Conn.* 381, 1 *L. R. A.* 375, 15 *Atl. Rep.* 749.

3. City has no power to tear up track.—Although a street-railway track constructed without authority may be technically a nuisance, yet where there is no general law of the city declaring such railway a nuisance and authorizing its abatement, the city is not authorized, under a charter provision empowering it "to cause any nuisance to be abated," to tear up such track. *Spokane St. R. Co.* v. *Spokane Falls*, 6 *Wash.* 521, 33 *Pac. Rep.* 1072.

4. Right of rival company to remove track or enjoin operation of road.—The use of a street by a street railroad is only one mode of using the street, and does not necessarily exclude the public. So one street-car company cannot enjoin another company from running cars on the same street, on the ground that doing so violates the purpose for which the street was opened; nor on the further ground that the defendant company has no franchise or license, as that is a matter that can only be raised on behalf of the public. *Market St. R. Co.* v. *Central R. Co.*, 51 *Cal.* 583, 12 *Am. Ry. Rep.* 219.

A street-railroad company without authority of law laid down a track upon a certain street, and subsequently another company obtained a legal franchise to lay down a track on the same street. *Held*, that the second company had a right to remove the track of the first company. *Omnibus R. Co.* v. *Baldwin*, 1 *Am. & Eng. R. Cas.* 316, 57 *Cal.* 160.

5. Right of attorney-general to enjoin construction or operation.—The attorney-general has the right to file an information in a court of chancery to enjoin a horse and dummy railroad company from constructing and using a track in and along a public street of a city, where it has not legally obtained permission so to do from the proper municipal authorities. *Hunt* v. *Chicago H. & D. R. Co.*, 121 *Ill.* 638, 13 *N. E. Rep.* 176, 11 *West. Rep.* 45; *affirming in part* 20 *Ill. App.* 282.

6. Right to lay additional track not barred by statute of limitations.—Where a donor of a street attaches a condition to it that a railroad company shall have a right to lay its tracks therein, and such company lays and uses only one track in such street, it does not lose its right to lay therein an additional track, even though more than twenty years have elapsed between the grant and the assertion of its right to lay the additional track. *Noblesville* v. *Lake Erie & W. R. Co.*, 130 *Ind.* 1, 29 *N. E. Rep.* 484.

2. *Under Legislative Grants.*

7. Rights derived from grant, express or implied. — The right to construct and operate a street railway in a city and to take tolls from persons traveling on the same is a franchise which the sovereign authority alone can grant. *Denver & S. R. Co.* v. *Denver City R. Co.*, 2 *Colo.* 673, 20 *Am. Ry. Rep.* 339.—QUOTING Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 595; People's R. Co. *v.* Memphis R. Co., 10 Wall. (U. S.) 50. REVIEWING Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506.

A grant of authority to lay and maintain street-railway tracks upon the public streets of cities may be conferred by the legislature, either in express words or by necessary implication. *Eichels* v. *Evansville St. R. Co.*, 5 *Am. & Eng. R. Cas.* 274, 78 *Ind.* 261, 41 *Am. Rep.* 561.

The authority of a railroad company to lay tracks in a public highway must be given by express enactment, or, if it rests upon implication, it must flow necessarily out of the law from which it is derived. *State* (*Hoboken L. & I. Co., Pros.*) v. *Mayor, etc., of Hoboken*, 35 *N. J. L.* 205.—FOLLOWING Morris & E. R. Co. *v.* Mayor, etc., of Newark, 10 N. J. Eq. 352.

That which a company is authorized by its charter to do, it may do; beyond that all its acts are illegal. The power must be given in plain words or by necessary implication; and all powers not given in a direct and unmistakable manner are withheld. *Com.* v. *Erie & N. E. R. Co.*, 27 *Pa. St.* 339.

A railway cannot occupy a street with its track, even temporarily, unless such right is clearly conferred by its charter. *Attorney-General* v. *Lombard & S. St. Pass. R. Co.*,

10 *Phila.* (*Pa.*) 352.—REVIEWING Barter *v.* Com., 3 P. & W. (Pa.) 259.

The councils of a city cannot confer such right; but only the people of the whole state by their legislature. *Attorney-General* v. *Lombard & S. St. Pass. R. Co.*, 10 *Phila.* (*Pa.*) 352.

8. Power of legislature to grant charters. — A legislative charter may confer upon a railroad company the right of way upon any street, highway or turnpike in the state, and the right to construct thereon its road. *Hepting* v. *New Orleans Pac. R. Co.*, 36 *La. Ann.* 898.

The legislature has the power to authorize the building of a railroad on a street of a city, and may directly exercise this power or devolve it upon the local or municipal authorities. *Hill* v. *Chicago, St. L. & N. O. R. Co.*, 38 *La. Ann.* 599.

The legislature has the power to confer upon a company the right to construct and use a horse railway on a street. *Hiss* v. *Baltimore & H. Pass. R. Co.*, 4 *Am. & Eng. R. Cas.* 201, 52 *Md.* 242, 36 *Am. Rep.* 371.

The legislature has the constitutional power to take possession of and appropriate the streets of an incorporated city to the use of a railroad, either directly or through a company created for the purpose. *Philadelphia* v. *Empire Pass. R. Co.*, 3 *Brews.* (*Pa.*) 547. *Philadelphia* v. *Empire Pass. R. Co.*, 7 *Phila.* (*Pa.*) 321.—FOLLOWING Philadelphia *v.* Empire Pass. R. Co., 3 Brews. (Pa.) 547.

9. Power of legislature to authorize city to grant franchise. — It is within the power of the legislature to delegate to municipal corporations the right to license or permit railroad companies to lay railroad tracks in the streets in such manner as not to divert them from their original uses; but a difference exists between the power of a municipal corporation to grant a corporate franchise and the right to permit a corporation vested with such franchise to place railroad tracks in the public streets. If the municipal body can ever grant a corporate franchise, such power must be expressly conferred by the legislature. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

A city having no authority under its charter to pass an ordinance granting the use of its streets for a railway, to be operated by horse or steam power, and the legislature being prohibited by the Constitution from passing local or special laws where a general law can be made applicable, it is not within the power of the legislature to ratify such ordinance by a special act, and thus accomplish indirectly what it cannot do directly, as the power to ratify a contract results from the power originally to authorize the contract. *Stange* v. *Dubuque*, 14 *Am. & Eng. R. Cas.* 107, 62 *Iowa* 303, 17 *N. W. Rep.* 518.—FOLLOWING Stange *v.* Hill & W. D. St. R. Co., 54 Iowa 669; Stanley *v.* Davenport, 54 Iowa 463.

Section 2 of the Bill of Rights does not inhibit the legislature from granting to municipal corporations the power to permit railway companies to construct and operate street railways therein. *Atchison St. R. Co.* v. *Missouri Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 439, 31 *Kan.* 660, 3 *Pac. Rep.* 284. —QUOTING Brown *v.* Duplessis, 14 La. Ann. 854.

The city of Ogden, Utah, is not precluded from granting, under general laws of the territorial legislature, the right to lay down railway tracks through its streets, by the Act of Congress of July 30, 1886, providing that territorial legislatures shall not pass local or special laws "granting to any corporation, association or individual the right to lay down railroad tracks," and "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise." *Henderson* v. *Ogden City R. Co.*, 46 *Am. & Eng. R. Cas.* 95, 7 *Utah* 199, 26 *Pac. Rep.* 286.

10. Power of city to acquire road at expiration of charter—Compensation.—A city, in pursuance of an agreement to that effect, proceeded to assume ownership of a street railway at the expiration of thirty years from the time it was first put in operation, and to fix by arbitration the amount to be paid therefor. In making their award the arbitrators refused to allow anything for the value of any franchise extending beyond thirty years. *Held*, that the franchise was not limited to thirty years only, because there was no obligation on the part of the city to assume the ownership of the railway at the expiration of that term; but, however, this privilege or franchise could not be construed to be "property," the value of which was intended to be taken into account by the arbitrators when the city assumed the ownership of the railway. No provision was made for its

valuation, either as to the basis on which it was to be ascertained, or otherwise, indicating that it was not contemplated by the respective parties that the city should in money pay to the company for that which they, with the sanction and authority of the legislature, had granted for a term which they had the right to terminate after a fixed period. *In re Toronto St. R. Co.*, 22 *Ont.* 374; *affirmed in* 54 *Am. & Eng. R. Cas.* 576, 20 *Ont. App.* 125.—DISTINGUISHING Queen *v.* London & N. W. R. Co., 3 El. & Bl. 443. QUOTING Morgan *v.* Louisiana, 93 U. S. 223.

By agreement with the company the city had, on payment by the former of a fixed sum per mile, constructed certain pavements which the company would otherwise have been bound to do, and for these pavements the arbitrators refused to allow anything. *Held*, that the arrangement between the company and the city as to the pavements did not entitle the former to have them treated as part of its railway property, to be valued and paid for by the city. *In re Toronto St. R. Co.*, 22 *Ont.* 374; *affirmed in* 54 *Am. & Eng. R. Cas.* 576, 20 *Ont. App.* 125.

A company was authorized by a city by-law and an agreement executed in pursuance thereof to construct and operate a street railway for a term of forty years from Feb. 9, 1865, the city reserving the right at the expiration of twenty years to assume ownership of the road by paying its value, after a notice of six months to be given within the twelve months immediately preceding the expiration of the twenty years. *Held*, that the company was entitled to a full six months' notice prior to Feb. 9, 1885, to be given within the twelve months preceding that date. Therefore a notice given in November, 1884, that the city would take possession in six months thereafter, was not sufficient. *Quebec St. R. Co.* v. *Quebec*, 38 *Am. & Eng. R. Cas.* 412, 15 *Can. Sup. Ct.* 164.

11. Power to authorize another company to connect.—A grant of a franchise to a street-railway company is for the purpose of facilitating and not of abridging the public use of the street; and the granting of a subsequent franchise to another company to connect with the track of the former company, and use the same in accordance with the provisions of the statute, is not a taking of the property of the former company for a higher or different purpose than that to which it had already been devoted. *Pacific R. Co.* v. *Wade*, 50 *Am. & Eng. R. Cas.* 362, 91 *Cal.* 449, 27 *Pac. Rep.* 768.

A passenger-railroad company, to whom, by its act of incorporation, was granted the right "to connect with any passenger railway now constructed, or hereafter to be constructed, so as to give them a complete route from Fairmount to the Exchange," cannot, under that right, connect with another passenger railway which was not made, nor the right of making granted, at the time the claimant's act of incorporation was passed. *North Branch Pass. R. Co.* v. *City Pass. R. Co.*, 38 *Pa. St.* 361.—QUOTED IN People's Pass. R. Co. *v.* Marshall St. R. Co., 20 Phila. 203.

12. Power under New York Constitution and laws.—The provision of N. Y. Const. art. 3, § 18, prohibiting legislation authorizing the construction or operation of a street railroad, except in the cases specified, is prospective in its operation, and has no reference to or effect upon previously existing laws. *People* v. *Brooklyn, F. & C. I. R. Co.*, 9 *Am. & Eng. R. Cas.* 454, 89 *N. Y.* 75; *affirming* 24 *Hun* 529, *mem.*

The fact that the Constitution, art. 3, § 18, prescribes conditions upon which street railroads may be constructed does not exclude the legislature from imposing conditions other than those so prescribed. Except as restrained by the Constitution, the legislative power is untrammeled and supreme, and a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of the legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. *In re Thirty-fourth St. R. Co.*, 102 *N. Y.* 343, 7 *N. E. Rep.* 172, 2 *N. Y. S. R.* 33; *reversing* 37 *Hun* 442, 2 *How. Pr. N. S.* 369.

The provision of the Street Surface Railway Act of 1884, ch. 252, § 14, imposing as a condition to the construction, extension or operation of a street railroad in a street or highway in which another street railway has been lawfully constructed that the consent of the company owning and maintaining such other road shall be obtained, is not a delegation of legislative power to the company whose consent is required, and is constitutional and valid. *In re Thirty-fourth St. R. Co.*, 102 *N. Y.* 343, 7 *N. E. Rep.* 172, 2 *N. Y. S. R.* 33; *reversing* 37 *Hun* 442, 2 *How. Pr. N. S.* 369.

The General Railroad Act of 1850, ch. 140, has no application to street railroads. Conceding that it does so apply, the authority was taken away, so far as relates to street railroads in the city of New York, by the act of 1860, ch. 10. *In re New York Dist. R. Co.*, 32 *Am. & Eng. R. Cas.* 202, 107 *N. Y.* 42, 14 *N. E. Rep.* 187, 11 *N. Y. S. R.* 753; *affirming* 42 *Hun* 621, 4 *N. Y. S. R.* 739.—FOLLOWING New York Cable Co. *v.* Mayor, etc., of N. Y., 104 N. Y. 1.

The title to streets in the city of New York is vested in the city, in trust for the people of the state; and under the Constitution and statutes, the state possesses authority to convey such title as is necessary for the purpose to corporations desiring to acquire the same for use as a street railroad. *People* v. *O'Brien*, 36 *Am. & Eng. R. Cas.* 78, 111 *N. Y.* 1, 18 *N. E. Rep.* 692, 19 *N. Y. S. R.* 173; *reversing* 10 *N. Y. S. R.* 596, 45 *Hun* 519.—APPLYING People *v.* Sturtevant, 9 N. Y. 263; Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506; Milhau *v.* Sharp, 27 N. Y. 611; New York *v.* Second Ave. R. Co., 32 N. Y. 261; Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Langdon *v.* Mayor, etc., of N. Y., 93 N. Y. 129; People *v.* Brooklyn, F. & C. I. R. Co., 89 N. Y. 75. FOLLOWING New Orleans, S. F. & L. R. Co. *v.* Delamore, 114 U. S. 501. QUOTING Brooklyn C. R. Co. *v.* Brooklyn City R. Co., 32 Barb. 364.—QUOTED IN Herzog *v.* New York El. R. Co., 37 N. Y. S. R. 567, 14 N. Y. Supp. 296. REVIEWED IN Lake Roland El. R. Co. *v.* Mayor, etc., of Baltimore, 54 Am. & Eng. R. Cas. 11, 77 Md. 352, 26 Atl. Rep. 510.

New York Act of 1886, amending the act of 1868, ch. 842, entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn * * * by means of pneumatic tubes to be constructed beneath the surface," is in violation of the state Constitution, art. 3, § 18, forbidding the passage of private or local bills granting to any corporation the right to lay down railroad tracks, except upon conditions specified, or granting to a private corporation any exclusive privilege, immunity or franchise. *Astor* v. *Arcade R. Co.*, 113 *N. Y.* 93, 20 *N. E. Rep.* 594, 22 *N. Y. S. R.* 1, 2 *L. R. A.* 789; *affirming* 48 *Hun* 562, 1 *N. Y. Supp.* 174, 16 *N. Y. S. R.* 141. —QUOTING In re Gilbert El. R. Co., 70 N. Y. 361.—DISTINGUISHED IN Re Third Ave. R. Co., 43 Am. & Eng. R. Cas. 222, 121 N. Y. 536, 24 N. E. Rep. 951, 31 N. Y. S. R. 693.

13. Under Pennsylvania statutes.—A supplement to the charter of a passenger-railway company provided that it should have the exclusive right to use and occupy for railroad purposes the streets named in the charter. Said railway company, by virtue of its charter, used and occupied a single square of a cross street so as to make the connection between the tracks on the two main streets upon which the cars ran. *Held*, that the exclusive grant must have a reasonable construction, and that its object was to protect the company from competition, nothing more. Therefore, there was nothing in the terms of the supplement to prevent another company from laying down a track on said single square of the cross street and running its cars thereon in an opposite direction to those of the company first named, the former company being entitled to compensation. *Philadelphia & G. F. Pass. R. Co.'s Appeal*, 20 *Am. & Eng. R. Cas.* 1, 102 *Pa. St.* 123.

Under Pa. Act of March 22, 1887, § 1, which provides that a street-railway company organized thereunder may lay tracks upon any street upon which "a passenger railway now is or may hereafter be constructed," such a company may enter upon streets and lay its tracks thereon, although the streets have not before been occupied by passenger railways. *Rafferty* v. *Central Traction Co.*, 50 *Am. & Eng. R. Cas.* 239, 147 *Pa. St.* 579, 23 *Atl. Rep.* 884.

The right of plaintiff company under the act of May 1, 1861, empowering it to construct and extend a street railway within defendant city, and to occupy the streets for such purpose, is not dependent on the will of the municipal authorities; and the company is entitled to an injunction restraining the city officials from interrupting its work in extending its tracks. *Harrisburg City Pass. R. Co.* v. *Harrisburg*, 149 *Pa. St.* 465, 24 *Atl. Rep.* 56.

A statute authorizing a street-railway company to extend its lines to portions of certain streets lying "between" Montgomery street and Germantown road does not allow an extension along the Germantown road, when construed in accordance with the principle that, in construing grants of powers to corporations, whatever is not given in clear and express terms, or by necessary implication, is conclusively considered to have been withheld. *Philadelphia* v. *Citizens' Pass. R. Co.*, 56 *Am. & Eng.*

R. Cas. 503, 151 *Pa. St.* 128, 24 *Atl. Rep.* 1099.

In the case of a legislative grant of a franchise to a private corporation, nothing is to be taken by implication against the public except what necessarily flows from the nature and terms of the grant; and the application of this doctrine will prevent a street-railway company, chartered by a special act in 1863, from occupying with its railway a street the use of which was granted to another company by the municipality, under a general statute, twenty-eight years later, where the grant to the latter company was definite as to location, and that to the former company was very indefinite. *Junction Pass. R. Co.* v. *Williamsport Pass. R. Co.*, 56 *Am. & Eng. R. Cas.* 462, 154 *Pa. St.* 116, 26 *Atl. Rep.* 295.

Where a grant by special act to a street-railroad company of the right to use a certain street in a borough is indefinite, the indefinite location can become fixed and definite only so far as the company has made a selection of streets and is in the actual occupation of them; and a delay of twenty-eight years, until the village has become a city, until science has substituted an entirely different motive power and until the state has granted to another company the unoccupied street sought to be taken, in clearly expressed terms, is unreasonable so as to preclude the former corporation from constructing its lines upon the said street. *Junction Pass. R. Co.* v. *Williamsport Pass. R. Co.*, 56 *Am. & Eng. R. Cas.* 462, 154 *Pa. St.* 116, 26 *Atl. Rep.* 295.

If a charter is inoperative because it describes a route not authorized by the statute, under which the corporation is formed, that question can only be determined in a proceeding in which the state is a party. (Mitchell, J., dissenting.) *Junction Pass. R. Co.* v. *Williamsport Pass. R. Co.*, 56 *Am. & Eng. R. Cas.* 462, 154 *Pa. St.* 116, 26 *Atl. Rep.* 295.

The act of 1849 was not intended to apply to street passenger railways, because they were not then in existence or contemplation, nor was the General Railroad Act of 1868, which expressly exempted them from its operation. *Potts* v. *Quaker City El. R. Co.*, 2 *Pa. Dist.* 200.

The act of April 4, 1868, does not authorize the erection of a railroad upon city streets. *Potts* v. *Quaker City El. R. Co.*, 2 *Pa. Dist.* 200

The act of May 14, 1889, "for the incorporation and government of street-railway companies," plainly intended to comprehend railways upon rural highways and other than suburban streets. *Gettysburg Battlefield Assoc.* v. *Gettysburg Elec. R. Co.*, 2 *Pa. Dist.* 659.

14. Under Tennessee Constitution —Consolidation.—The right to grant a franchise or an exclusive privilege to individuals is, by the Constitution of the state, vested in the legislature, and cannot be delegated, and is to be exercised by the legislature only when it is necessary for the public good. *Memphis City R. Co.* v. *Mayor, etc., of Memphis*, 4 *Coldw.* (*Tenn.*) 406.

Certain street-railway corporations, organized before the adoption of the Constitution of 1870, consolidated after the adoption of said Constitution. Nothing in the Constitution or subsequent acts of the legislature indicated any intention to deprive such consolidating companies of any privileges or franchises exercised under their old charters. The Constitution required all corporations to be formed in pursuance of general laws, whereas the consolidating companies had been organized under special charters. *Held*, that, under the rule that the presumption must be that the consolidated company preserves its original charter rights and burdens intact, unless the contrary is expressed, the corporations did not, by the act of consolidation, subject the irrevocable rights granted by the original charters to the dominion of the state; and neither the state nor a city thereof could take away from the consolidated company the right to use a certain street, under a right granted by the original charters to operate a street railway "on all or any of the streets in the city." *Citizens' St. R. Co.* v. *Memphis*, 56 *Am. & Eng. R. Cas.* 385, 53 *Fed. Rep.* 715.

Although a city has the right to regulate and control the use by street-car companies of the city streets, and street-railway franchises are granted by the legislature subject to that power, such regulation cannot be enlarged into a power of prohibition; nor can the city usurp the state power of creating franchises or taking them away, and a street-railway company duly organized can be deprived of its rights to use the streets of a city only by its own consent. *Citizens' St. R. Co.* v. *Memphis*, 56 *Am. & Eng. R. Cas.* 385, 53 *Fed. Rep.* 715.

It will not be understood that a street-railway company has abandoned its right to use a certain street unless its intention so to do has been unequivocally expressed. Therefore, where a street-car company which had constructed railways on certain streets contracted with the city to substitute electric power for horse power within two years, it could not be contended that the company had abandoned its right to use a certain street, although it had made but a limited use of the said street for a spur track and the like, and new tracks had not been laid upon the said street before the company had obtained from the city the surrender of certain bonds which it had given as security for the completion of the system, in accordance with the contract; and the railway company could, at any time within the two years, make use of the said street for the accommodation of its business. *Citizens' St. R. Co.* v. *Memphis*, 56 *Am. & Eng. R. Cas.* 385, 53 *Fed. Rep.* 715.

15. Under other state statutes.—Ill. Rev. St. ch. 66, entitled "Horse and Dummy Railroads," does not provide for the incorporation of companies to build and operate this class of railroads. It simply extends the provisions of the act to such companies as had been or might thereafter be incorporated under general laws. The incorporation of such companies is provided for in section 1 of chapter 32, entitled "Corporations," and it is doubtful whether the General Railroad Law (ch. 114) has any application to such roads. *Wiggins Ferry Co.* v. *East St. Louis Union R. Co.*, 20 *Am. & Eng. R. Cas.* 9, 107 *Ill.* 450.

Ind. Act of June 4, 1861 (1 Rev. St. 1876, p. 754), granting the right to street-railway companies to locate and maintain tracks upon the streets of cities, applies to cities organized under special charters. *Eichels* v. *Evansville St. R. Co.*, 5 *Am. & Eng. R. Cas.* 274, 78 *Ind.* 261, 41 *Am. Rep.* 561.

There being no general law of the state conferring the right and prescribing the terms and conditions on which the Baltimore Union Passenger R. Co. was to construct and operate its railway on certain streets in the city of Baltimore, the act of 1882, ch. 47, ratifying Ordinance No. 150, and authorizing said company to operate its railways on such streets and on such conditions as the city may prescribe, is not in conflict with Md. Const. art. 3, § 33, which provides that "the general assembly shall pass no special law for any case for which provision has been made by an existing general law." *Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603.

N. J. Act of April 9, 1866, incorporating the Paterson & Little Falls Horse & Steam railroad company, authorized the company to construct and operate a street railroad in the city of Paterson. *Paterson R. Co.* v. *Grundy*, 51 *N. J. Eq.* 213, 26 *Atl. Rep.* 788.

3. *Under Municipal Grants.*

a. In General.

16. Power to authorize.—The authority of a general nature to regulate and control streets usually granted to municipal bodies is generally deemed sufficient to clothe them with the right to grant or refuse, or otherwise to regulate, the use of streets for street railways operated by horse power. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590. *Michigan City* v. *Boeckling*, 122 *Ind.* 39, 23 *N. E. Rep.* 518. *Atkinson* v. *Asheville St. R. Co.*, 113 *N. Car.* 581, 18 *S. E. Rep.* 254.—FOLLOWING Burlington *v.* Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145; Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 521.—*Mayor, etc., of Houston* v. *Houston City St. R. Co.*, 50 *Am. & Eng. R. Cas.* 380, 83 *Tex.* 548, 19 *S. W. Rep.* 127.

The authority may be lawfully granted when no private right of the adjoining lot owners is thereby impaired. *Cincinnati & S. G. A. St. R. Co.* v. *Cumminsville*, 14 *Ohio St.* 523.

Under the general control over the streets and alleys given to cities of the second class by chapter 19, Comp. Laws 1879, a city council has the power to grant to a street-railway company permission to construct and operate a street railway on the streets of the city, and a track constructed by virtue of such permission may lawfully occupy the street. *Atchison St. R. Co.* v. *Missouri Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 439, 31 *Kan.* 660, 3 *Pac. Rep.* 284.—APPLIED IN Jackson County Horse R. Co. *v.* Interstate R. T. R. Co., 24 Fed. Rep. 306. DISTINGUISHED IN Detroit *v.* Detroit City R. Co., 56 Fed. Rep. 867.

The legislature, or municipal government, when the power is delegated to it, has the right to set apart a proper portion of a city

street, for a street railroad, if such a road will accommodate the public travel for which the street was designed. And it makes no difference that the road was constructed and operated by an incorporated company for its own gain. The fare charged is, as in the case of a turnpike and plank road built upon a public highway by legislative authority, only another way of keeping up and maintaining the highway. *Jersey City & B. R. Co.* v. *Jersey City & H. H. R. Co.*, 20 *N. J. Eq.* 61; *reversed in* 21 *N. J. Eq.* 550.—DISTINGUISHED IN Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290.

17. Power does not extend to steam motive power.—The construction of a street railway for operation by steam power is an illegal use of the street which renders the owners of such railway liable in damages for special injury caused thereby to adjoining property. (Adams, C. J., dissenting.) *Stange* v. *Hill & W. D. St. R. Co.*, 54 *Iowa* 669, 7 *N. W. Rep.* 115.—FOLLOWING Stanley *v.* Davenport, 54 Iowa 463. —FOLLOWED IN Stange *v.* Dubuque, 14 Am. & Eng. R. Cas. 107, 62 Iowa 303.

In the absence of express statutory authority, a city has no power to authorize or permit the use of steam motors upon its streets, either upon ordinary railroads or street railroads, and the grant of such authority or permission constitutes negligence which will render the city liable for damages caused thereby. *Stanley* v. *Davenport*, 54 *Iowa* 463, 2 *N. W. Rep.* 1064, 6 *N. W. Rep.* 706.—APPLIED IN Eichels *v.* Evansville St. R. Co., 5 Am. & Eng. R. Cas. 274, 78 Ind. 261, 41 Am. Rep. 561. FOLLOWED IN Stange *v.* Hill & W. D. St. R. Co., 54 Iowa 669; Stange *v.* Dubuque, 14 Am. & Eng. R. Cas. 107, 62 Iowa 303.

The fact that the action of the city council in granting such right was without authority would not protect the city from liability, corporations being responsible for the acts of their officers and agents done within the apparent scope of their authority, and the streets of a city being under the control of the city council. *Stanley* v. *Davenport*, 54 *Iowa* 463, 2 *N. W. Rep.* 1062, 6 *N. W. Rep.* 706.

The usual powers conferred by its charter on a municipal corporation over its streets are sufficient to authorize it to permit their use for horse railways, *alter* as to railways operated by steam. *State ex rel.* v. *Corrigan Con. St. R. Co.*, 29 *Am. & Eng. R. Cas.* 591, 85 *Mo.* 263, 55 *Am. Rep.* 361.—QUOTING Jersey City & B. R. Co. *v.* Jersey City & H. Horse R. Co., 20 N. J. Eq. 69.

18. Power of city of New Orleans.—The city has the power to sell a right of way in the streets to private individuals for a specified time, with the privilege of laying rails and running horse-cars over them, according to a tariff to be fixed by the common council; this right is conferred upon the city by the act incorporating it, and upon all incorporated cities or towns in the state, by the act of 1855 relative to the organization of corporations for works of public improvement. *Brown* v. *Duplessis*, 14 *La. Ann.* 854.

The franchise or exclusive privilege of running horse-cars through the streets of the city is within the meaning of La. Act No. 30 of 1876, § 10, and the city council has the right to appropriate the amount realized by sale thereof to the redemption of the bonded debt, as directed by said section. *State ex rel.* v. *Mayor, etc., of New Orleans*, 32 *La. Ann.* 268.

Under the statutes which make it the duty of the council of the city to turn over to the board of liquidation all the property, real and personal, of the city, to be disposed of by the board, and the proceeds applied to the city debt, the council cannot sell or grant a right of way through the streets to a railroad company, except for a consideration which can be realized and turned over to the board, and applied to the city debt. *Board of Liquidation* v. *New Orleans*, 32 *La. Ann.* 915.

The power of granting the right of way or franchise is inherent in the city itself, and not susceptible of transmission to the board of liquidation, but when the power has been exercised by the city, the result of it, the franchise, then becomes property in the legal sense of the word, and the price, consideration or proceeds of the same should, under the statutes, be transferred to the board of liquidation. *Board of Liquidation* v. *New Orleans*, 32 *La. Ann.* 915.

Under the ordinance of the city passed in 1881, conferring anew on defendant company the power of laying tracks from Basin to Carondelet, no power was conferred to use steam as a motive power, and the use of steam is a nuisance, if not actual, at least constructive. *Tilton* v. *New Orleans City R. Co.*, 35 *La. Ann.* 1062.

Where the city grants a franchise for a street railway for a term of twenty-one years, the grantee, after the expiration of the term, cannot enjoin the city from advertising and selling the same franchise, on the ground that the city has failed to comply with an alleged contract to take and pay for the railroad rolling stock, equipments and fixtures. If such an agreement existed, it could not operate to prolong the franchise or to restrain the city from exercising its sovereign authority over the streets for the benefit of the public. *Canal & C. St. R. Co.* v. *New Orleans*, 30 *Am. & Eng. R. Cas.* 146, 39 *La. Ann.* 709, 2 *So. Rep.* 388.

Where, in such case, the city only proposes to sell a franchise or right of way, and not the property of plaintiff who owns the existing track, the specifications of the sale expressly providing that the purchaser shall respect plaintiff's rights and settle for them, plaintiff may compete at the sale without waiving any rights. *Canal & C. St. R. Co.* v. *New Orleans*, 30 *Am. & Eng. R. Cas.* 146, 39 *La. Ann.* 709, 2 *So. Rep.* 388.

When the city grants a privilege to a corporation to construct a street railway through a street, the neglect of the corporation to comply with its obligation can be taken advantage of only by the city. *New Orleans, C. & L. R. Co.* v. *New Orleans*, 44 *La. Ann.* 748, 11 *So. Rep.* 77.

After the city has regularly advertised and sold a street-railroad franchise, in pursuance of La. Act No. 135 of 1888, providing that the council shall not have power to "dispose of any street-railroad franchise, except after at least three months' publication of the terms and specifications of said franchise," and then to the highest bidder at public auction, the council cannot, without another advertisement and sale, change the route so as to embrace quite a number of blocks not included in the franchise as advertised and sold. *Buckner* v. *Hart*, 52 *Fed. Rep.* 835; *affirmed in* 56 *Am. & Eng. R. Cas.* 430, 54 *Fed. Rep.* 925, 2 *U. S. App.* 488, 5 *C. C. A.* 1.

The provision in the above statute requiring such franchises to be sold to the highest bidder means the highest bidder for money, and a sale to the highest bidder "in square yards of gravel pavement" is invalid. *Buckner* v. *Hart*, 52 *Fed. Rep.* 835; *affirmed in* 56 *Am. & Eng. R. Cas.* 430, 54 *Fed. Rep.* 925, 2 *U. S. App.* 488, 5 *C. C. A.* 1.

19. Power of city of New York.—The city is not, by virtue of its general power over its streets, authorized to grant the right to construct and maintain, for a term of years, an ordinary street railway; and a resolution of the common council granting such right is void. *Davis* v. *Mayor, etc., of N. Y.*, 14 *N. Y.* 506; *reversing* 3 *Duer* 119.—QUOTING Beekman *v.* Saratoga & S. R. Co., 3 Paige (N. Y.) 75. —APPLIED IN People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173. DISTINGUISHED IN People *v.* Kerr, 27 N. Y. 188, 25 How. Pr. 258. FOLLOWED IN Mahon *v.* New York C. R. Co., 24 N. Y. 658; Milhau *v.* Sharp, 27 N. Y. 611. QUOTED IN Hickey *v.* Chicago & W. I. R. Co., 6 Ill. App. 172; Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 32 Am. & Eng. R. Cas. 209, 73 Iowa 513; Brooklyn C. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358. REVIEWED IN Jackson County Horse R. Co. *v.* Interstate R. T. R. Co., 24 Fed. Rep. 306; Denver & S. R. Co. *v.* Denver City R. Co., 2 Colo. 673.

The mayor and common council of the city have no power to make a grant of the right to construct a railroad in the city; and where such grant is attempted and the grantees convey to a corporation the right thus attempted, for a specific consideration, before the road is built, nothing of value in fact passes, and the grantees cannot sue to recover from the corporation the amount agreed to be paid therefor. N. Y. Act of 1864, ch. 140, § 3, only makes valid such grants in favor of parties and their assigns who have wholly or in part constructed the road authorized by the grant. *Coleman* v. *Second Ave. R. Co.*, 38 *N. Y.* 201; *affirming* 48 *Barb.* 371.—FOLLOWING Butts *v.* Wood, 37 N. Y. 317.

By New York Act of April, 1831, incorporating plaintiff company, it was provided that nothing therein contained should authorize the construction of a railway upon the streets of New York without the consent of the city authorities, who are authorized to grant permission to construct it, or to prohibit its construction, and if constructed, to regulate the manner of its operation. *Held*, that the city might grant the right on such terms and conditions as it might think proper. *New York & H. R. Co.* v. *Mayor, etc., of N. Y.*, 1 *Hilt.* (*N. Y.*) 562.

Under N. Y. Act of 1860, ch. 10, providing that it shall not be lawful thereafter to lay, construct or operate any railroad in or along the streets of the city, except under the authority of the legislature thereafter granted, the common council of said city has no power to authorize the extension of a street railroad except where such extension is necessary to the enjoyment of a previous valid grant. *People* v. *Third Ave. R. Co.*, 45 *Barb.* (*N. Y.*) 63, 30 *How. Pr.* 131; *affirmed* (?) *in* 31 *How. Pr.* 637.

20. Nature of grant in New York city.—A grant by the duly constituted authorities of the city of the right to construct and operate its road in the streets of the city is a grant in fee, vesting the grantee with an interest in the streets in perpetuity to the extent necessary for the purposes of its road. *People* v. *O'Brien*, 36 *Am. & Eng. R. Cas.* 78, 111 *N. Y.* 1, 18 *N. E. Rep.* 692, 19 *N. Y. S. R.* 173; *reversing* 10 *N. Y. S. R.* 596, 45 *Hun* 519.—QUOTING Memphis & L. R. R. Co. *v.* Railroad Com'rs, 112 U. S. 609.

21. Duty of city to give notice by publication before grant is made.—A failure to advertise in more than one newspaper the time and place when an application for a street-railway franchise will be presented to the board of aldermen, as required by New York Act of 1884, ch. 252, § 4, is fatal to the right of the board to entertain such application. *People ex rel.* v. *Grant*, 50 *N. Y. S. R.* 465, 21 *N. Y. Supp.* 232, 66 *Hun* 634; *affirmed in* 138 *N. Y.* 653, *mem.*, 53 *N. Y. S. R.* 931, 34 *N. E. Rep.* 513.

Where the invalidity of a street-railway franchise is patent, the mayor of said city is justified in refusing to designate the papers to publish the notice of the time, place and terms of sale thereof, and the court will not grant a mandamus to compel him to do so. *People ex rel.* v. *Grant*, 50 *N. Y. S. R.* 465, 21 *N. Y. Supp.* 232, 66 *Hun* 634; *affirmed in* 138 *N. Y.* 653, *mem.*, 53 *N. Y. S. R.* 931, 34 *N. E. Rep.* 513.

It seems that under N. Y. Act of 1886, ch. 65, as amended by ch. 642 of the same year, entitled "An act to secure adequate compensation of a right to construct * * * street railroads in cities," and under the provisions of the state constitution, municipal authorities have the absolute power to grant or withhold their consent to the construction of a street railroad, and may impose any conditions which they may deem proper as terms upon which their consent will be given. *People ex rel.* v. *Barnard*, 36 *Am. & Eng. R. Cas.* 70, 110 *N. Y.* 548, 18 *N. E. Rep.* 354, 18 *N. Y. S. R.* 542; *reversing* 48 *Hun* 57, 15 *N. Y. S. R.* 689.

In the notice of sale of the right to use a street for railroad purposes, under section 1 of the above statute, the conditions must be specified, and no other conditions can be inserted in the consent, or exacted from or imposed upon the successful bidder. *People ex rel.* v. *Barnard*, 36 *Am. & Eng. R. Cas.* 70, 110 *N. Y.* 548, 18 *N. E. Rep.* 354, 18 *N. Y. S. R.* 542; *reversing* 48 *Hun* 57, 15 *N. Y. S. R.* 689.

22. When power does not exist.—Where streets have been dedicated to the public as highways, the ultimate fee remaining in the original owners, a municipal corporation cannot, in the absence of express legislative authority, allow them to be used by a railroad company, to the injury of the adjacent lands; but it is otherwise where the fee to the streets has been dedicated to the public, or they have been condemned under the power of eminent domain. *Perry* v. *New Orleans, M. & C. R. Co.*, 55 *Ala.* 413.

The council of a city incorporated under the general act for the incorporation of cities and villages has not the right or power to grant to a horse or dummy railway company the use of any of its streets without a petition to the owners of the land representing more than one half of the frontage of such streets. *Hunt* v. *Chicago H. & D. R. Co.*, 121 *Ill.* 638, 13 *N. E. Rep.* 176, 11 *West. Rep.* 45; *affirming in part* 20 *Ill. App.* 282.

The ordinary powers of a municipality do not confer the right to permit a street-railway company to locate tracks and operate its road in the municipality. It must have special authority from the legislature for the purpose. *Eichels* v. *Evansville St. R. Co.*, 5 *Am. & Eng. R. Cas.* 274, 78 *Ind.* 261, 41 *Am. Rep.* 561.

A city has no power to confer upon individuals, by contract, the right to construct and operate, for their own benefit or individual use, street railroads on public streets. *Memphis City R. Co.* v. *Mayor, etc., of Memphis* 4 *Coldw.* (*Tenn.*) 406.

23. Power to grant for term beyond statutory limit.—Under the general statutes of Michigan, and the Constitution which provides that the life of a corporation, except municipal, railroad, plank-road and canal corporations, shall be

limited to thirty years, a city cannot, under its general power to control and regulate street railways, grant to a street-railway company the right to occupy streets for a period of time extending beyond its corporate life; it being a well-settled rule of law that, while a city may, under its legislative power of regulating the use of a street, permit a railway to be laid in the streets, it cannot by virtue of that power grant an irrevocable easement for any stated length of time. *Detroit* v. *Detroit City R. Co.*, 56 *Am. & Eng. R. Cas.* 337, 56 *Fed. Rep.* 867.

A city council is a trustee in the control of the streets, for the benefit of the public, and, though former trustees may have made an *ultra vires* contract, the public cannot be deprived of the benefits of ordinary equitable remedies to maintain its rights on the ground that both parties to the contract are *pari delicto*; and so, where a city council passed an invalid ordinance extending the right of a street-railway corporation to occupy a street beyond the limit of its corporate existence, which railway company assigned all its property and franchises to a second corporation, a subsequent ordinance fixing the time beyond which the company could not remain in the streets at the date when the corporate life of the original grantee should terminate was valid, and the continuance of the railway tracks in the streets after the time limited would become a public nuisance, which would be removed, at the instance of the city, by the power of injunction. *Detroit* v. *Detroit City R. Co.*, 56 *Am. & Eng. R. Cas.* 337, 56 *Fed. Rep.* 867.

Where a city by ordinance attempts to extend the time during which a street-railway company may occupy the streets of the city beyond the life of the corporation, it is not estopped, in a suit against the railway company to compel it to abandon the streets upon the termination of its corporate existence, from denying the validity of the ordinance, by reason of the fact that the company had relied upon the contract provisions of the ordinance with reference to the amount of taxes which it should pay, in an action by the city to collect taxes fixed by a subsequent ordinance, since the judgment rendered against the city in the former case did not involve the validity of the ordinance granting the said extension, and was therefore not *res adjudicata*. *Detroit* v. *Detroit City R. Co.*, 56 *Am. & Eng. R. Cas.* 337, 56 *Fed. Rep.* 867.

Although said ordinance was accepted by both parties as valid and quietly acquiesced in for ten years, and though the company expended large sums of money on the faith of the validity of the ordinance, and obligations were enforced by the city against the company which derived their binding force only from the ordinance, the plea of estoppel is no defense in favor of the company, upon whom the city council had no power to confer the grant to occupy the streets beyond the period of the corporate existence of the company, since those who made the investments ought to have known the statutory powers under which the city council acted. *Detroit* v. *Detroit City R. Co.*, 56 *Am. & Eng. R. Cas.* 337, 56 *Fed. Rep.* 867.

24. Compensation to owners of fee to street not necessary.—The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street for the tracks of a street-car company is of this class, and may be authorized by the city authorities without compensation to the owner of the fee of the street. *Finch* v. *Riverside & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 107, 87 *Cal.* 597, 25 *Pac. Rep.* 765.—DISTINGUISHING Weyl *v.* Sonoma Valley R. Co., 69 Cal. 203.

25. Selling privilege to company offering greatest bonus. — Where a statute of the state requires the sale of a street-railway franchise to be "to the highest bidder" at public auction, requiring a three months' advertisement of the purpose to sell the franchise, with particular specifications as to its scope, it must be taken to mean the highest bidder in money, and the sale of the franchise to the highest bidder "in square yards of gravel pavement" is invalid. *Hart* v. *Buckner*, 56 *Am. & Eng. R. Cas.* 430, 54 *Fed. Rep.* 925, 2 *U. S. App.* 488, 5 C. C. A. 1; *affirming* 52 *Fed. Rep.* 835.

A street-car charter authorized the company to construct its road over the streets of the city, with the provision "and to which the city council may consent, authority for which is hereby given to said council to make an agreement therefor." *Held*, that this authorized the city to make and enforce an ordinance offering the privileges to the company paying the city the largest annual bonus therefor. *Covington St. R. Co.* v. *Covington*, 9 *Bush (Ky.)* 127.

The action of a common council in refusing to entertain a proposition from a street-

railway company to pay the city $30,000 for a franchise, and granting the franchise to another company that does not pay anything to the city, amounts to malfeasance in office, and justifies a judgment holding the permission illegal and restraining the corporation from constructing any part of the proposed road. *Adamson* v. *Union R. Co.*, 74 *Hun* 3, 26 *N. Y. Supp.* 136, 56 *N. Y. S. R.* 214.

The common council of a city granted to defendants permission and authority to lay a double railway track, upon terms less advantageous to the city than had been offered by other persons. *Held*, (1) that the corporation, in making such grant, was guilty of a clear breach of trust, and that the court was bound to prevent the grant thus illegally made from being carried into effect; (2) that persons who were owners of property in the city, and taxpayers to a large amount, had such an interest in preventing the grant from being carried into effect that they had a right to institute a suit in their own names for the purpose of obtaining an injunction to prevent the construction of the railway track. *Milhau* v. *Sharp*, 15 *Barb.* (*N. Y.*) 193.

26. Power of city to alter, amend or repeal grant of franchise.* — A valid city ordinance granting the right to build and operate a street railway, after the acceptance and expenditure of large sums of money in constructing the road, constitutes a contract, which is protected by U. S. Const. art. 1, § 10, forbidding laws impairing the obligation of contracts. *Citizens' St. R. Co.* v. *City R. Co.*, 56 *Fed. Rep.* 746.—FOLLOWING Western P. & S. Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. Rep. 188, 28 N. E. Rep. 88; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

And where a legislature confers upon a city the power, by contract, when approved by ordinance, to grant franchises to street-car companies, the exercise of this power, with the approval of the city by ordinance, is "a law" within the meaning of the above provision of the federal Constitution. *Citizens' St. R. Co.* v. *City R. Co.*, 56 *Fed. Rep.* 746.—EXPLAINING Hamilton G. L. & C. Co. *v.* Hamilton City, 146 U. S. 258, 13 Sup. Ct. Rep. 90; Shreveport *v.* Cole, 129 U. S. 36, 9 Sup. Ct. Rep. 210. FOLLOWING Wright *v.* Nagle, 101 U. S. 791.

If the law of a city, or a municipal grant to a street-car company, is a valid enactment, except for its repugnancy to the provision of the United States Constitution which prohibits a state from passing any law impairing the obligation of contracts, then such repugnancy presents a federal question, and gives jurisdiction to a United States circuit court. *Citizens' St. R. Co.* v. *City R. Co.*, 56 *Fed. Rep.* 746.

At the time a street-car company was chartered it was only required to pave between the rails. By a subsequent statute and ordinance it was required to pave one foot outside of the rails. *Held*, that this was not in violation of the provision of the federal Constitution forbidding laws impairing the obligation of contracts, where a general statute provided that all corporations should be subject to legislative control. *Sioux City St. R. Co.* v. *Sioux City*, 40 *Am. & Eng. R. Cas.* 275, 78 *Iowa* 367, 43 *N. W. Rep.* 224.

Where a company is incorporated by the legislature, with power to construct, maintain and operate a railway in a city, upon the consent of the city, in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing the same upon a street, the grant by the city is a mere license, and not a franchise. The franchise emanates from the state. *Chicago City R. Co.* v. *People ex rel.*, 73 *Ill.* 541.—REVIEWED IN Chicago & W. I. R. Co. *v.* Dunbar, 95 Ill. 571; Chicago Mun. G. L. & F. Co. *v.* Lake, 130 Ill. 42, 29 Am. & Eng. Corp. Cas. 230, 22 N. E. Rep. 616, 27 Ill. App. 346.

Where an ordinance of a city, granting a railway company the right to construct and operate a track along a street, upon certain conditions, has been accepted, the rights of the contracting parties will be governed by such ordinance, and the city cannot impose new conditions and burdens upon the company without its consent, such as the construction and operation of an extended line of its road. *People ex rel.* v. *Chicago W. D. R. Co.*, 25 *Am. & Eng. R. Cas.* 258, 118 *Ill.* 113, 7 *N. E. Rep.* 116.

Where a city grants to a street-railway company the right to lay a double track, and thereupon the company expends a large amount of money, the city cannot afterward, by amending the ordinance conferring

* See *post*, 56.

Power of city to repeal grant of franchise to street-railway company, see note, 54 AM. & ENG. R. CAS. 27.

the franchise, limit the company to a single track in a certain street, unless it appears that the exercise of the original right works an injury, when the city may restrict the right, under the exercise of its police power. *Burlington* v. *Burlington St. R. Co.*, 49 *Iowa* 144. — DISTINGUISHED IN Sioux City St. R. Co. *v.* Sioux City, 46 Am. & Eng. R. Cas. 169, 138 U. S. 98.

Where the public safety and convenience require it, a city may revoke a grant to a street-railway company of the right to lay its tracks in the city streets, even after the tracks have been laid. The repeal of the granting ordinance gives the company no right to compensation where the tracks were laid after the mayor and city solicitor had informed the president of the company that at the first meeting of the city council an ordinance would be submitted to prohibit the laying of the tracks. *Lake Roland El. R. Co.* v. *Mayor, etc., of Baltimore*, 54 *Am. & Eng. R. Cas.* 11, 77 *Md.* 352, 26 *Atl. Rep.* 510. — REVIEWING People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1; Illinois C. R. Co. *v.* Illinois, 146 U. S. 387.

Where a city, by authority of its charter, grants to a street-railway company the right to construct a branch road over a certain street, it cannot, by a subsequent ordinance, arbitrarily annul its license; and when, under such latter ordinance, it attempts by force to prevent the completion of the road then in process of construction, injunction will issue restraining the city from such interference. *Asheville St. R. Co.* v. *Asheville*, 109 *N. Car.* 688, 14 *S. E. Rep.* 316.

The consent by a city council that a company may occupy a street with its road is not a grant in the nature, and having the elements and consequences, of a contract, and which can only be forfeited by judicial procedure. It is but a license, which may be withdrawn at any time before it is acted on by the company. If, under such license, a road be built, and be afterwards abandoned, the right to occupy may be conferred by the city on another company without first procuring a judicial decree of forfeiture against the company that first procured the license. *Great C. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 26 *Am. & Eng. R. Cas.* 114, 63 *Tex.* 529.

Where a city council, having the power, grants a franchise to a company to use the streets of the city, and such grant is duly accepted and acted upon, it becomes a vested right, which, in the absence of a constitutional prohibition of the granting of such franchises, cannot be subsequently impaired by the city authorities. *Mayor, etc., of Houston* v. *Houston City St. R. Co.*, 50 *Am. & Eng. R. Cas.* 380, 83 *Tex.* 548, 19 *S. W. Rep.* 127.

27. Power of legislature to alter, amend or repeal grant of franchise. —When a municipal corporation, by authority of the state, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the state. Such a contract is *pro hac vice* the contract of the state, and cannot be impaired by it. Hence, where the common council of a city, in the exercise of power conferred by the legislature, makes an absolute grant to a horse-railroad company of the right to build its road on certain streets, and the company accepts the grant and builds a part of the road at great expense, the legislature cannot, by a subsequent amendment of the city charter, make the right of the company to build the rest of the road dependent on the consent of a majority of the property owners on the street, such act being unconstitutional as impairing the obligation of a contract. *Hovelman* v. *Kansas City Horse R. Co.*, 20 *Am. & Eng. R. Cas.* 17, 79 *Mo.* 632.

The fact that the legislature may confer upon a city or county the power to grant to an existing corporate body a franchise, or to create a corporation with certain franchises and powers, does not take away the constitutional power of the legislature conferred by Wis. Const. art. 2, § 1, to take away the power so granted to the city or county, or to alter or repeal the acts of the city or county taken under such delegated authority. *State ex rel.* v. *Hilbert*, 36 *Am. & Eng. R. Cas.* 118, 72 *Wis.* 184, 39 *N. W. Rep.* 326.

28. Repeal of grant or charter. — Where a street railroad is constructed on the streets of a city, in pursuance of a municipal ordinance, the subsequent repeal of the ordinance will not render the road a nuisance. *Ingram* v. *Chicago, D. & M. R. Co.*, 38 *Iowa* 669.

A city granted to a company the right to construct and operate its road in the streets of the city, and to make traffic contracts with another company by which the latter should obtain the right to run cars over the tracks of the former, which grant imposed no conditions or restrictions in respect to the duration or otherwise of such contract

rights. *Held*, that the company did not take a mere license, but an estate in fee in perpetuity, which estate constitutes property of which it and its grantees cannot be deprived by a subsequent act repealing its charter. *People* v. *O'Brien*, 36 *Am. & Eng. R. Cas.* 78, 111 *N. Y.* 1, 18 *N. E. Rep.* 692, 19 *N. Y. S. R.* 173; *reversing* 10 *N. Y. S. R.* 596, 45 *Hun* 519.—APPROVING Detroit *v.* Detroit & H. Plank Road Co., 43 Mich. 140. DISTINGUISHING People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174; Erie & N. E. R. Co. *v.* Casey, 26 Pa. St. 287. EXPLAINING Greenwood *v.* Union Freight R. Co., 105 U. S. 13. FOLLOWING Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518. QUOTING Fletcher *v.* Peck, 6 Cranch (U. S.) 87; Sinking Fund Cases, 99 U. S. 700; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454; People *v.* National Trust Co., 82 N. Y. 287; Com. *v.* Essex Co., 13 Gray (Mass.) 239. REFERRING TO People ex rel. *v.* Boston & A. R. Co., 70 N. Y. 569; Philips *v.* Wickham, 1 Paige (N. Y.) 590; Munn *v.* Illinois, 94 U. S. 113.

29. Special grants.*—If a city ordinance specially authorizing a particular street-railway company by name to occupy certain streets is invalid as a special grant to said company, it is absolutely void; it cannot be given a general effect, so as to enure to the benefit of another company having a prior charter for the streets named. *Larimer & L. St. R. Co.* v. *Larimer St. R. Co.*, 137 *Pa. St.* 533, 20 *Atl. Rep.* 570.—DISTINGUISHING Com. *v.* Harris, 10 W. N. C. 10; Reimer's Appeal, 100 Pa. St. 183.

Whether by Pa. Const. art. 3, § 7, or by Act of May 16, 1889, § 52, relating to streets and sewers in cities of the second class, the council of such a city is precluded from passing a special ordinance granting consent to the construction of a street railway by a particular company, incorporated under Act of May 14, 1889, not decided. *Larimer & L. St. R. Co.* v. *Larimer St. R. Co.*, 137 *Pa. St.* 533, 20 *Atl. Rep.* 570.

30. Permission to extend track.—The exercise in good faith, by the council of a city or village, of the discretion vested in it by Ohio Rev. St. § 2505, as corrected (77 Ohio L. 42), to grant permission to any corporation, company or individual owning or having the right to construct a street railroad to extend its track, where the council may deem such extension beneficial to the public, will not be interfered with by the court. *Sims* v. *Brooklyn St. R. Co.*, 4 *Am. & Eng. R. Cas.* 132, 37 *Ohio St.* 556.

The ordinance granting permission to extend the track is not an act conferring corporate powers. It is merely a permit to the corporation to exercise the corporate powers conferred by general law; therefore such an ordinance is not an act conferring corporate powers, which is prohibited by the Ohio Constitution, art. 13, § 1. *Sims* v. *Brooklyn St. R. Co.*, 4 *Am. & Eng. R. Cas.* 32, 37 *Ohio St.* 556.

An extension of the route of a street railway, when made according to law, is to be deemed and taken to be a part of the charter, as if the same had originally been made a part thereof, and is to be treated with like consideration as the original grant. *Braddock & T. C. R. Co.* v. *Braddock Elec. R. Co.*, 1 *Pa. Dist.* 44.

31. Mandamus to compel extension of track.—An ordinance granting to a company the right to extend its track from its then terminus to the city limits required the track to be extended to a certain park, being a point short of the city limits, by a given time, and from that point on to the city limits as soon as the same could be constructed, operated and kept in repair without actual loss, and the company to accept the ordinance within ten days after its approval by the mayor. The ordinance was accepted, and the track was built and operated to the park. On mandamus to compel the building and operation of the track to the city limits, the answer showed that it could not be constructed, etc., without actual loss, which was admitted by demurrer. *Held*, that the answer showed a good reason why the company should not be compelled to build and operate such part of the road. *People ex rel.* v. *Chicago W. D. R. Co.*, 25 *Am. & Eng. R. Cas.* 258, 118 *Ill.* 113, 7 *N. E. Rep.* 116.

32. How grants are made—Duration.—Under Ohio Municipal Code, §§ 411, 412, a grant by the council of a municipal corporation to build a street railroad must be made by ordinance directly to a corporation, individual or individuals to be therein named; and the authority to make the grant cannot be delegated by the council to any officer or board. *State ex rel.* v. *Bell*, 34 *Ohio St.* 194, 21 *Am. Ry. Rep.* 84.

* Special charters and general statutory provisions, see note, 5 AM. & ENG. R. CAS. 284.

A preliminary ordinance passed in pursuance of a general ordinance of a city relating to street railroads, designating the route, and directing the city clerk to advertise for sealed proposals to construct and operate the road, is not an ordinance creating a right, or granting a franchise, or involving the expenditure of money, within the meaning of Ohio Rev. St. § 1666, and does not require the approval of the mayor of the city before it takes effect. *tate ex rel.* v. *Henderson*, 38 *Ohio St.* 644.

The duration of a grant, as long as it does not create a perpetuity, is a matter for the exclusive determination of the city council. *Mayor, etc., of Houston* v. *Houston City St. R. Co.*, 50 *Am. & Eng. R. Cas.* 380, 83 *Tex.* 548, 19 *S. W. Rep.* 127.

33. How grants are construed. — Grants of franchises are to be strictly construed, and no exclusive privileges will pass, unless by express grant or necessary implication. *Citizens' St. R. Co* v. *Jones*, 34 *Fed. Rep.* 579. *Wyandotte* v. *Corrigan*, 35 *Kan.* 21, 10 *Pac. Rep.* 99. *Ransom* v. *Citizens' R. Co.*, 104 *Mo.* 375, 16 *S. W. Rep.* 416.

Charters and statutes, granting powers, are to be strictly construed against corporations, and nothing given by implication. So a street-railway company was refused the right to use steam engines where a grave doubt existed as to whether the statute granting the right had not been repealed. *Com.* v. *Central Pass. R. Co.*, 52 *Pa. St.* 506. —REVIEWED IN West Philadelphia Pass. R. Co. *v.* Philadelphia, 10 Phila. (Pa.) 70; People's Pass. R. Co. *v.* Marshall St. R. Co., 20 Phila. 203.

So a provision in a street-railway charter that the city might regulate the paving of the streets and the laying of gas and water pipes along them—*held*, not to take away the power of the city to impose a license on cars. The rule of construction *expressio unius est exclusio alterius* did not apply. *Johnson* v. *Philadelphia*, 60 *Pa. St.* 445.

34. Conditional disapproval of right to construct road. — Where the act of incorporation gives the city councils power by disapproval, within thirty days after its passage, to prevent the construction of a road, and councils pass an ordinance the first section of which is a direct disapproval, but the second section prescribes conditions upon performance of which the first section is to be inoperative, this is not the disapproval which, under the act, would divest the powers granted by it, and the railroads complying with the conditions imposed by the second section of the ordinance retain their franchises. *Faust* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 164.

The company may enter into an obligation to obey and submit to all regulations imposed by ordinance of councils; such obligation imposes no new duty, nor involves any surrender of chartered rights, for councils cannot legally pass any ordinances abridging the corporate powers of the company. *Faust* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 164.

35. Company need not be incorporated. — Where municipal authorities grant by ordinance the right to lay a street railway, and it is confirmed by the legislature, it is immaterial whether the persons owning the franchise are organized into a corporation or merely a partnership. *Nash* v. *Lowry*, 37 *Minn.* 261, 33 *N. W. Rep.* 787.

There is no statute or rule of law in force in the territory of Utah to prevent an individual from constructing and operating a railroad; and a license granted by a city for the construction of a street railway is not invalid because given to an individual. *Henderson* v. *Ogden City R. Co.*, 46 *Am. & Eng. R. Cas.* 95, 7 *Utah* 199, 26 *Pac. Rep.* 286.

36. Injunction by or against company.* — A court of equity has jurisdiction to restrain the placing of an obstruction upon the streets of a city, and such city may maintain a bill to restrain an obstruction of its streets. *Metropolitan City R. Co.* v. *Chicago*, 2 *Am. & Eng. R. Cas.* 291, 96 *Ill.* 620. —DISTINGUISHING Dunning *v.* Aurora, 40 Ill. 481; Cairo & V. R. Co. *v.* People, 92 Ill. 170.

It is no ground for an information in equity by the attorney-general to restrain a street-railroad corporation from laying its tracks and running its cars in a certain street, under an order of the board of aldermen, that the corporation had failed to accept the order by a writing filed with the city clerk within thirty days from the passage of the order, as required by its terms, the information having been filed before the end of such thirty days; and that the tracks as laid did not comply with the order, the variation not being stated, and

* Street railways. Obstruction of streets by, see note, 50 AM. & ENG. R. CAS. 178.

not appearing to be material or intentional. *Attorney-General* v. *Metropolitan R. Co.*, 125 *Mass.* 515.

Where a license to lay down a railway track on certain streets is granted by a city to "F. and his associates, to be known as the A. company," who could act as a corporation only upon taking out letters of incorporation or obtaining a legislative charter, the question whether such incorporation has been duly obtained, or whether those parties have attempted to exercise corporate functions without it, cannot be raised in an action by one who, claiming to be the owner of the franchise, seeks to have an assignment of the same to defendant company set aside and to enjoin the company from operating under it. *Atkinson* v. *Asheville St. R. Co.*, 113 *N. Car.* 581, 18 *S. E. Rep.* 254.

Defendant and other members of a city council were restrained from granting a franchise to a street railroad, and defendant was subsequently attached for contempt in violating the injunction by voting to pass a resolution granting the right which was restrained. In defense he insisted that his voting on the resolution was an act of legislation by the common council, and as such, beyond the control of the courts. The ordinance was subject to a condition to be accepted by the company. *Held*, that defendant's act was not legislation, but a mere grant of a franchise, subject to the condition imposed. *People ex rel.* v. *Sturtevant*, 9 *N. Y.* 263; *affirming* 1 *Duer* 451, 512.

Under Pa. Act of June 19, 1871, which authorizes courts of equity to restrain injurious acts committed by corporations in the exercise of powers not conferred upon them by their charters, a street-railway company has a standing as a complainant in a bill in equity to restrain another company from unlawfully laying tracks in a street already occupied by the complainant. *Germantown Pass. R. Co.* v. *Citizens' Pass. R. Co.*, 151 *Pa. St.* 138, 24 *Atl. Rep.* 1103.

A county court in Tennessee has the power to consent that a street-car company may run along a public road of the county; but where it becomes necessary to cross an existing railroad track, the right will be determined by (1) whether the public road is legally established as such, and (2) upon making compensation to the company owning the existing road; and where such company is proceeding to cross without such compensation being made, and where the public road has only been established subject to certain conditions, which have never been complied with, its construction may be enjoined at the suit of the railroad company. *Cincinnati Southern R. Co.* v. *Chattanooga Elec. St. R. Co.*, 44 *Fed. Rep.* 470.

37. Quo warranto to prevent, or to compel surrender of charter.—An ordinance giving the right to construct an ordinary single-track street railway in the centre of a street fifty feet wide, of which twenty-five feet are paved, in such a manner as to leave a space of nearly nine feet for the passage of vehicles, which is sufficient for ordinary vehicles to pass in, is not so unreasonable as to require the interference of the court. *People ex rel.* v. *Ft. Wayne & E. R. Co.*, 92 *Mich.* 522, 52 *N. W. Rep.* 1010.—DISTINGUISHING People *v.* Plymouth Plank Road Co., 31 Mich. 178; Thompson *v.* Moran, 44 Mich. 602. FOLLOWING People ex rel. *v.* Mutual Gas-Light Co., 38 Mich. 154. LIMITING Detroit City R. Co. *v.* Mills, 85 Mich. 647. —QUOTED IN Attorney-General *v.* Detroit Suburban R. Co., 96 Mich. 65.

The right to construct such a railway being one which the common council has a right to grant, which right it has exercised, the case presented is not such a one as calls for the exercise of the jurisdiction of this court in a special proceeding instituted by *quo warranto*. *People ex rel.* v. *Ft. Wayne & E. R. Co.*, 92 *Mich.* 522, 52 *N. W. Rep.* 1010.

Under Wis. Rev. St., § 1862, a municipal ordinance granting to a street-railway corporation a franchise to occupy and use public streets for the purposes of its railway has the force and effect of a statute of the state; and for a violation of the provisions of such ordinance an action may be maintained under section 3241, to vacate the charter or annul the existence of such corporation. *State ex rel.* v. *Madison St. R. Co.*, 36 *Am. & Eng. R. Cas.* 135, 72 *Wis.* 612, 40 *N. W. Rep.* 487.—APPROVED IN Citizens' Horse R. Co. *v.* Belleville, 47 Ill. App. 388.

38. Right of city to construct sewers, etc. — Rights of mortgagees of road.—A city must construct sewers with reference to the rights of an existing street-car line; and if they be laid so as to interfere with the track, and prevent the running of cars, when other parts of the street were

equally suitable for the sewers, the city is liable; but it is not required to incur additional expense by reason of having authorized the street-car line. *Clapp* v. *Spokane*, 53 *Fed. Rep.* 515.

The holder of a mortgage on a street railroad is as much entitled to protection from injury by unnecessary interference with the track by the city in laying sewers as the holder of any other kind of property; and an allegation that the action of the city in such interference will impair the mortgage security more than $2000 is sufficient to give jurisdiction to a federal court. *Clapp* v. *Spokane*, 53 *Fed. Rep.* 515.

In such case, where it appears that the street-car company is insolvent, and will be unable to repair the damage and operate its road after such interference by the city, and that a judgment against the city cannot be collected, and that the railroad property, after the injury, will not be adequate security for the mortgage debt, the holders of the mortgage are entitled to an injunction to restrain the interference. *Clapp* v. *Spokane*, 53 *Fed. Rep.* 515.

A contract for a right of way, etc., between a city and a company, provided that the city should not be liable for any damage "from any delay in the transportation of passengers that may be incurred by the laying of sewers, water or gas pipes." The company refused to take up its track to enable the city to construct a sewer, and thereupon the city caused the track to be taken up and refused to replace it. *Held*, that the city did not become liable in damages to the company. *Louisville City R. Co.* v. *Louisville*, 8 *Bush* (*Ky.*) 415.

The easement of a street railway, in the city of Baltimore, is held subject to the power of the city, under Md. Code Pub. Loc. Laws, art 4, § 835, to construct sewers, and the company cannot resist the act of the city in tearing up its tracks for that purpose. *Kirby* v. *Citizens' R. Co.*, 48 *Md.* 168.

The provision of N. Y. Act of 1860, ch. 512, § 4, that the city authorities are prohibited from doing "any act to hinder, delay or obstruct the operation of" the railroad chartered by the act, is to be construed as prohibiting the city from doing anything purposely to obstruct the road, but not so as to prevent the city from completing a general sewerage plan. And where the legislature subsequently passes a statute authorizing the city to adopt a general plan of sewerage, it is to be inferred that it was the intention to withdraw any obstacles to the work which any prior law permitted. *Dry Dock, E. B. & B. R. Co.* v. *Mayor, etc., of N. Y.*, 55 *Barb.* (*N. Y.*) 298.

And where it became necessary in carrying out the sewerage plan temporarily to obstruct the running of cars, the prohibitory language of the act of 1860 can not operate to prevent the construction of the sewers. The law will tolerate a private loss rather than a public evil. *Dry Dock, E. B. & B. R. Co.* v. *Mayor, etc., of N. Y.*, 55 *Barb.* (*N. Y.*) 298.

Where a city reserves "authority to enter upon said streets or any part thereof for the construction of sewers," the city may cause the construction of sewers in that portion of the streets covered by a company's tracks. *Spokane St. R. Co.* v. *Spokane*, 5 *Wash.* 634, 32 *Pac. Rep.* 456.

39. Waiver of objection to laying track on unauthorized street.—Where a company, under an ordinance granting it a right to lay tracks in certain streets, lays and operates in connection with such system a track upon a street not named in its franchise, the city is estopped to interfere therewith, when it had knowledge thereof through its officers, the tracks, in fact, being laid under the direction of its superintendent of streets, and the company having, for several years, operated its railway thereon without objection, and paid taxes assessed upon the property by the city. *Spokane St. R. Co.* v. *Spokane Falls*, 6 *Wash.* 521, 33 *Pac. Rep.* 1072.

40. Advertising and selling right to construct road.— A city advertised for bids for the construction of a street railroad, and a bid was made by an unincorporated company, and accepted with certain modifications, which were agreed to. No formal contract was signed, but the city passed a resolution giving permission to the company to incorporate, but expressly providing that nothing was to change the conditions "of the propositions heretofore made and accepted by the parties respectively." The company incorporated and offered to execute a formal contract and carry out the work, but in the meantime opposition to the road had been made, and the city resolved to recede from its project of having the road built, and refused to complete the contract. *Held*, that there was not such a perfect contract between the city and

the unincorporated company as to be binding; and even if there was, there was no evidence that the city had accepted the incorporated company in the stead of the unincorporated one. *People's R. Co.* v. *Memphis R. Co.*, 10 *Wall.* (*U. S.*) 38.—QUOTED IN Denver & S. R. Co. *v.* Denver City R. Co., 2 Colo. 673.

41. Motive power on "horse railroads."—In an ordinance of a city consenting to the construction and operation of a railroad within the city, the words "horse-railroad track or tracks" must be taken as descriptive of the railroad to be constructed, and not of the motive power to be used, where the terms "horse railroad" and "street surface railroad" have come to be convertible. *Paterson R. Co.* v. *Grundy*, 56 *Am. & Eng. R. Cas.* 486, 51 *N. J. Eq.* 213, 26 *Atl. Rep.* 788.

42. Rights and liabilities of subsequent purchasers of road.—A city granted to a company the right to construct a street railway on certain streets under an ordinance requiring a stated car service to be furnished. The company thereafter executed to defendant a deed granting, assigning and conveying to defendant all franchises, powers, privileges and immunities possessed by it. Defendant accepted the deed, and operated the line for a time. *Held*, that defendant thereby assumed the performance of the duties toward the public which before rested on the grantor. *Potwin Place* v. *Topeka R. Co.*, 56 *Am. & Eng. R. Cas.* 549, 51 *Kan.* 609, 33 *Pac. Rep.* 309.

43. Special Georgia act construed.—Ga. Act of August 26, 1872, incorporating the West End & Atlanta St. R. Co., does not authorize the company to construct and use street railroads in all of the streets of Atlanta, but each route selected by the company shall be first approved by the city council, and it shall have the right to construct its railroad thereon. *West End & A. St. R. Co.* v. *Atlanta St. R. Co.*, 49 *Ga.* 151.

b. Exclusive Privileges.

44. Power to grant, generally.*—A city cannot grant to one street-car company the exclusive privilege, for a term of years, of operating cars on streets so as to take away its power to grant similar privileges to other companies, unless it be specially authorized to do so by the legislature. *Jackson County Horse R. Co.* v. *Interstate R. T. R. Co.*, 24 *Fed. Rep.* 306.—APPLYING Atchison St. R. Co. *v.* Missouri Pac. R. Co., 31 Kan. 660, 3 Pac. Rep. 284. REVIEWING Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506.

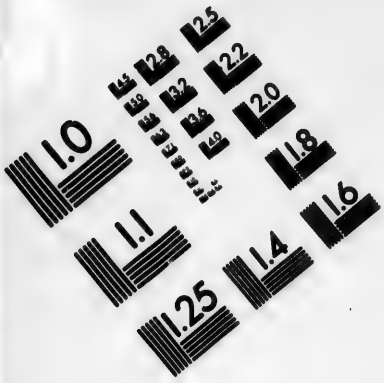
The grant of a right of way to a street-railway company amounts to an extinguishment of the right of the grantors, the city, and implies a contract not to reassert the right by granting it to another company; and the grantee company should be protected from impairment of its privileges and franchises by attempting to appropriate them to the use of another company. *Fidelity T. & S. V. Co.* v. *Mobile St. R. Co.*, 53 *Fed. Rep.* 687.

While the exclusive power conferred upon a city to grant a license does not authorize it to grant an exclusive license, yet such power is conferred when it is authorized to grant or refuse a license. *Burlington & H. County Ferry Co.* v. *Davis*, 48 *Iowa* 133.—EXPLAINED IN Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 32 Am. & Eng. R. Cas. 209, 73 Iowa 513.

A city ordinance granting to a company the right to lay a single or double track along all its streets, and providing further that "the right herein granted to said company to operate said railway shall be exclusive for the term of thirty years," and that "the said city shall not, until the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights or privileges herein granted to said company"—*held*, to mean that the city should not permit rival companies to operate street railways on its streets during that time, and not simply that it would grant no right to interfere with said company in operating the railroad which it might build. *Des Moines St. R. Co.* v. *Des Moines Broad-Gauge St. R. Co.*, 32 *Am. & Eng. R. Cas.* 209, 73 *Iowa* 513, 33 *N. W. Rep.* 610, 35 *N. W. Rep.* 602.

Whether the common council has the power to grant an exclusive use of a street for street-railway purposes, *quære*, it not appearing that any attempt has been made by others than the respondent to acquire a similar privilege, and the grant being good to the extent of the power vested in the council under the statute; and, if such power has been exceeded, the question can properly be raised when other interests re-

*Grant of exclusive privileges to street-railway companies, see notes, 32 AM. & ENG. R. CAS. 216; 36 *Id.* 116.



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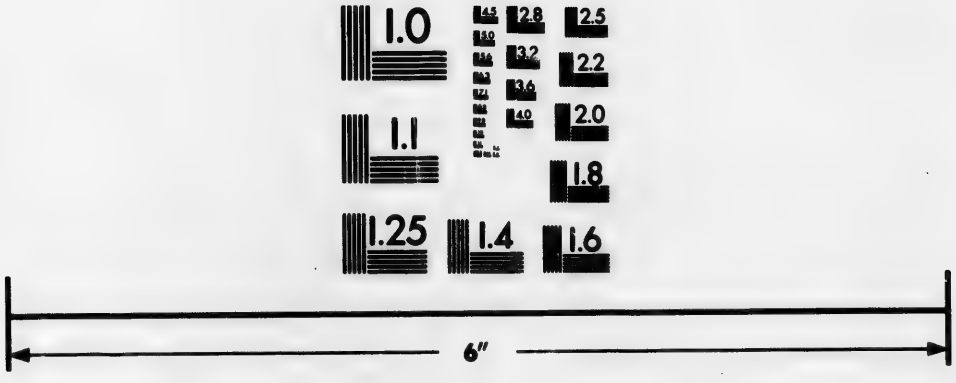

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quire it. *People ex rel.* v. *Ft. Wayne & E. R. Co.*, 92 *Mich.* 522, 52 *N. W. Rep.* 1010.

Under a city charter not authorizing the council to grant franchises that are exclusive, the council cannot grant an exclusive right of way upon streets in the city. *Henderson* v. *Ogden City R. Co.*, 46 *Am. & Eng. R. Cas.* 95, 7 *Utah* 199, 26 *Pac. Rep.* 286.—FOLLOWED IN Ogden City R. Co. *v.* Ogden City, 7 Utah 207.

45. Legislative sanction necessary.—A municipal corporation cannot grant to a street railway the exclusive use of its streets unless it has legislative sanction to do so. *People's Pass. R. Co.* v. *Memphis*, (*Tenn.*) 16 *S. W. Rep.* 973.

And the power must be expressed in plain words, or so direct as to amount to the same thing by implication. *Parkhurst* v. *Capital City R. Co.*, 56 *Am. & Eng. R. Cas.* 455, 23 *Oreg.* 471, 32 *Pac. Rep.* 304.—APPROVING Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. Rep. 536; Grand Rapids E. L. & P. Co. *v.* Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep. 659. DISAPPROVING Newport *v.* Newport Light Co., 84 Ky. 167; Des Moines St. R. Co. *v.* Des Moines Broad Gauge St. R. Co., 73 Iowa 513, 33 N. W. Rep. 610, 35 N. W. Rep. 602.

A grant to a city of exclusive power "to permit, allow, and regulate the laying down of tracks for street-cars upon such terms and conditions as the council may prescribe" does not authorize the city to grant a company an exclusive franchise on its streets for a term of years. *Parkhurst* v. *Capital City R. Co.*, 56 *Am. & Eng. R. Cas.* 455, 23 *Oreg.* 471, 32 *Pac. Rep.* 304.

46. Power of city of New Orleans to grant.—The city has no power under its charter and the laws of Louisiana to grant to a company the sole and exclusive right to the use of the public streets of the city for a street railroad. *New Orleans City R. Co.* v. *Crescent City R. Co.*, 12 *Fed. Rep.* 308. *New Orleans, C. & L. R. Co.* v. *New Orleans*, 44 *La. Ann.* 748, 11 *So. Rep.* 77.

So as to deprive succeeding councils of the power of performing the duty of regulating the use of the streets in such manner as they may deem best for the public interest. *Canal & C. St. R. Co.* v. *Crescent City R. Co.*, 40 *Am. & Eng. R. Cas.* 329, 41 *La. Ann.* 561, 6 *So. Rep.* 849.

An injunction that has issued to restrain other parties from erecting a street railroad on a particular piece of ground, predicated on the alleged exclusive right on the part of the petitioner, will be dissolved and set aside if it be not shown that he has such exclusive right. The fact that the vendor of the petitioner had acquired the exclusive right from the city to build a street railroad over the neutral ground on Canal street, and afterwards abandoned it, will not of itself confer the exclusive right upon a third party who may obtain permission from the city to build a railroad thereon. *New Orleans City R. Co.* v. *Crescent City R. Co.*, 23 *La. Ann.* 759.

The power of regulating the streets, delegated to the city by the legislature, embraces authority to establish street railways on its streets, but it does not include authority to grant to any person or corporation an exclusive privilege to operate a railway on any street. *New Orleans, C. & L. R. Co.* v. *New Orleans*, 50 *Am. & Eng. R. Cas.* 391, 44 *La. Ann.* 728, 11 *So. Rep.* 78.

If the city does not declare the grant of exclusive privileges forfeited, and the corporation, without interference on the part of the city, constructs its road, the city is estopped from forfeiting the grant. *New Orleans, C. & L. R. Co.* v. *New Orleans*, 44 *La. Ann.* 748, 11 *So. Rep.* 77.

Another corporation running a line of street-cars over the same street cannot interpose the defenses of the city in aid of a grant of an exclusive privilege over the same street. *New Orleans, C. & L. R. Co.* v. *New Orleans*, 44 *La. Ann.* 748, 11 *So. Rep.* 77.

47. Power of city of Cincinnati to grant.—Contracts made by the council, granting to street-railroad companies easements in the streets of a city, are contracts made in behalf of the city, within the meaning of section 159 of the municipal code. *Cincinnati St. R. Co.* v. *Smith*, 29 *Ohio St.* 291.

The city council has not the power to pass an ordinance giving to a street railroad the exclusive right to operate its road upon a street. *Cincinnati St. R. Co.* v. *Smith*, 29 *Ohio St.* 291.

Under the municipal code of the city, the city council is not authorized to pass an ordinance giving to street-railroad companies the exclusive right to maintain and operate such railroads upon streets, or to grant the right to construct such railroads on streets to be designated to such corporation or company of individuals as will bid "the lowest price of commutation tickets in

packages," the law requiring such grants to be let to the one that "will agree to carry passengers at the lowest rate of fare"; and where an ordinance contains such unauthorized provisions, and they are so connected with authorized provisions that their separation is impracticable, the whole ordinance is invalid. *Cincinnati St. R. Co.* v. *Smith*, 29 *Ohio St.* 291.

48. Power to authorize second road.—Cal. Act of 1870, granting to city councils the power to authorize street railroads, does not prohibit them, when there is one track in a street, from granting the right to construct another in the same street. *Oakland R. Co.* v. *Oakland, B. & F. V. R. Co.*, 45 *Cal.* 365, 5 *Am. Ry. Rep.* 148.

Defendants were granted a right of way for a street railroad over a portion of Montgomery avenue in San Francisco. Plaintiff was granted a similar right of way for more than five blocks over the same portion of the street. *Held*, that under Cal. Code, § 499, providing that two companies shall not occupy the same street or track for more than five blocks, the grant to plaintiff was void. (Thornton, J., dissenting.) *Omnibus R. Co.* v. *Baldwin*, 1 *Am. & Eng. R. Cas.* 316, 57 *Cal.* 160.

The city of New Orleans has power to grant to another the use of a street railway already constructed. *Canal & C. St. R. Co.* v. *Crescent City R. Co.*, 40 *Am. & Eng. R. Cas.* 329, 41 *La. Ann.* 561, 6 *So. Rep.* 849.

A clause in a city ordinance conferring the power on a second company to use a street provided "that the tracks of said company shall be so laid as not to injure or destroy any tracks now laid by any other corporation, and that the location of the route of said railway shall not in any manner interfere with any unforfeited rights of way heretofore granted by the municipal assembly by proper ordinance." *Held*, that a prior company's privilege was not a qualified right of way; and that the second company could lay its tracks in the street upon territory not occupied by the prior company, or which the prior company had not the right by ordinance to occupy when it desired to do so. *St. Louis Transfer R. Co.* v. *St. Louis M. B. T. R. Co.*, 111 *Mo.* 666, 20 *S. W. Rep.* 319.

Mere priority of a grant to construct a street railway will not give the company an exclusive privilege to the use of the streets; and in the absence of an exclusive privilege, either in the grant or by permission from the city, none will be implied. And one company cannot prevent another, by laying its track, from laying another track in the same street. If the laying of either track obstructs the street so as to amount to a nuisance, complaint must be made by the public, and not by the other company. *Brooklyn City & N. R. Co.* v. *Coney Island & B. R. Co.*, 35 *Barb.* (*N. Y.*) 364.—EXPLAINING Brooklyn C. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358.—APPROVED IN Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75.

A city has the right to designate what particular portion of its streets shall be occupied by a street-railway company, and the grant of a right to use a street for a railway track will not preclude the city from granting a like privilege over the same street to another company, unless the right granted in the first instance cannot be made available if the second grant is exercised. *Ft. Worth St. R. Co.* v. *Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 4 *S. W. Rep.* 534.

In such case, if the first grant be general, and the second specifies a particular portion of the street on which the track may be laid, the enjoyment of the right under the specific grant will be protected when, in the public interest, the road is constructed under it. *Ft. Worth St. R. Co.* v. *Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 4 *S. W. Rep.* 534.

The charter of a street railway incorporated under the general law can confer, in and of itself, no right to use any street, no matter what may be its provisions. The right to use particular streets must be acquired from the municipal government. *Ft. Worth St. R. Co.* v. *Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 4 *S. W. Rep.* 534.

A franchise or privilege extended by a city to a company to construct and maintain a railway along its streets does not interfere with the power of the city authorities over the streets nor prevent a like grant to others. Such grant is not a monopoly. *Mayor, etc., of Houston* v. *Houston City St. R. Co.*, 50 *Am. & Eng. R. Cas.* 380, 83 *Tex.* 548, 19 *S. W. Rep.* 127.

49. Under New York Act of 1884.—New York Act of 1884, ch. 252, providing for the construction and operation of street surface railroads in cities, does not prohibit

the construction of such a road upon a street where another company claims a prior franchise for the same purpose, but has not yet constructed any part of its road; it does prohibit the laying of such a road on a street where a like one has already been built, unless by the consent of the owners of such road. *New York Cable R. Co.* v. *Chambers St. & G. S. F. R. Co.*, 40 *Hun* (*N. Y.*) 29.

A company was organized under the act of 1875, ch. 606, providing for the construction and operation of steam railways, and received the sanction of the city authorities to lay a track on certain streets, but had not obtained the consent of property owners, as required by the act, at the time of the passage of the act of 1884, ch. 252, providing for the construction and operation of street surface railroads in cities, neither was any portion of its road then constructed. It filed a bill to restrain a company, organized under the act of 1884, from laying a track on the same street. *Held*, that the franchise granted under the act of 1875 was not exclusive, and the bill could not be maintained. *New York Cable R. Co.* v. *Chambers St. & G. S. F. R. Co.*, 40 *Hun* (*N. Y.*) 29.

50. Right of city to determine when new lines should be built.—A city ordinance granting to a company authority to construct one or more lines on either of certain streets designated, but reserving to the city council the right to determine when any further track than the one selected by the company should be necessary, will be construed to mean that one or more lines might be constructed on one only of the streets named, to be determined by the selection of the company, not that lines might be constructed on all the streets, and the company will be limited to the selection made. *Ft. Worth St. R. Co.* v. *Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 4 *S. W. Rep.* 534.

By the same ordinance it was provided that the city council should notify the company when new lines were desirable, said notice to be complied with within a fixed time, and the council passed two ordinances in May and November, 1882, allowing the company to construct lines in other streets, to be completed within ninety days from the date of the ordinances, which the company failed to do. *Held*, that the two ordinances of 1882 were sufficient notices that the city desired a line to be placed upon the streets mentioned in said ordinances, and that the company lost its right to use those streets by non-compliance with the ordinances. *Ft. Worth St. R. Co.* v. *Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 4 *S. W. Rep.* 534.

The company claimed the right to use a certain street under the first ordinance, the right to use the centre of which street was granted to another company by a later ordinance. *Held*, that, even if the former had a general right, under the first ordinance, to use such street, the city had power to permit both companies to construct lines on the same street; but that the express grant to the latter company of the right to use the centre of the street would exclude the former from using that particular part of the street. *Ft. Worth St. R. Co.* v. *Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 4 *S. W. Rep.* 534.

51. Forfeiture of exclusive grant.—A municipal ordinance gave to a street-railway company the exclusive right to lay its tracks in such streets as should be designated by the council, if accepted by the company within a certain time. *Held*, that the company, after forfeiting such right as to specified streets, could not maintain a bill to enjoin another company, upon which the right had subsequently been conferred, from laying its track in streets not so designated to complainant, unless it could show actual injury thereby to its own interests. *Grand Rapids St. R. Co.* v. *West Side St. R. Co.*, 7 *Am. & Eng. R. Cas.* 95, 48 *Mich.* 433, 12 *N. W. Rep.* 643.

Where a city contracts with certain individuals that if they shall incorporate as a street-car company it will grant the exclusive use of its streets for street-car purposes for a term of years, and the charter is obtained with a provision that tracks may be laid in the streets "with the consent of the said city," a failure to get such consent renders the former grant by the city inoperative, and the street-car company cannot maintain an action against the city for breach of contract. *People's Pass. R. Co.* v. *Memphis*, (*Tenn.*) 16 *S. W. Rep.* 973.—APPROVING Memphis City R. Co. *v.* Mayor, etc., of Memphis, 4 Coldw. (Tenn.) 406; People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38.

52. First road building acquires exclusive use.—A city cannot give to a street-railway company a right to occupy all its streets to the exclusion of all other

companies, so preventing itself from afterwards giving similar grants to other companies. But if it make such a grant and then make a similar grant to another company, that company which first occupies a street, or which first enters upon the construction of a particular line of street railroads, and has expended its money in the prosecution of the work, is entitled to the possession of such street, or to the streets over which such particular line passes, although the effect is that such company thus acquires the exclusive possession of such street or streets. *Indianapolis Cable St. R. Co.* v. *Citizens' St. R. Co.*, 43 *Am. & Eng. R. Cas.* 234, 127 *Ind.* 369, 24 *N. E. Rep.* 1054, 26 *N. E. Rep.* 893.

53. Authorizing second road with different motive power.—The exclusive right to construct and operate a horse railway in a city is not infringed by constructing in the same city a road to be operated by steam. *Denver & S. R. Co.* v. *Denver City R. Co.*, 2 *Colo.* 673, 20 *Am. Ry. Rep.* 339.

The charter of a street-car company granted the power to operate a "horse railway," and prohibited the running of locomotives or cars propelled by steam, or the cars of any other railway company, on its tracks. *Held:* (1) that the term "horse railway" could not be used as the equivalent of "street railway," so as to include and prohibit cable railways, which were not known at the time; (2) that no monopoly of all kinds of street railways except cars drawn by engines was created. *Omaha Horse R. Co.* v. *Cable Tramway Co.*, 30 *Fed. Rep.* 324.

An exclusive grant for a term of years of the right to operate street railroads by horse power in a city does not prevent the city, during the term, from granting to others the privilege of operating cars by electricity, especially where cars operated by electricity were not known at the time of the grant. The mere diminution of the revenues of the company is not such an impairment of its rights as to prohibit a further grant. *Teachout* v. *Des Moines Broad-Gauge St. R. Co.*, 36 *Am. & Eng. R. Cas.* 108, 75 *Iowa* 722, 38 *N. W. Rep.* 145.

54. Constitutional prohibitions of exclusive privileges not applicable to municipal grants.—The constitutional prohibition, in art. 4, § 22, as to the grant of any special or exclusive privilege, immunity, or franchise, is a limitation upon the general assembly, and not a limitation upon the power of a municipal corporation to designate streets and fix the conditions upon which a company may build and operate its road. *Chicago City R. Co.* v. *People ex rel.*, 73 *Ill.* 541.

Iowa Const. art. 8, § 12, which declares that "no exclusive privileges, except as in this article provided, shall ever be granted," does not apply to a grant by a city of the exclusive right to build and operate street railways. *Des Moines St. R. Co.* v. *Des Moines Broad-Gauge St. R. Co.*, *Am. & Eng. R. Cas.* 209, 73 *Iowa* 513, *N. W. Rep.* 610, 35 *N. W. Rep.* 602.

55. Ratification of former void ordinance.—A city in Iowa granted the exclusive right to build and operate a street railway for a term, before the passage of section 464 of the Code, giving to cities the power to authorize or forbid the laying of tracks for street railways. *Held*, that if it be admitted that the city had not the power to grant such an exclusive right, it had a right afterward to ratify the grant, and to make it exclusive by withholding it from others. *Des Moines St. R. Co.* v. *Des Moines Broad-Gauge St. R. Co.*, 32 *Am. & Eng. R. Cas.* 209, 73 *Iowa* 513, 33 *N. W. Rep.* 610, 35 *N. W. Rep.* 602.—DISTINGUISHING Boston & L. R. Corp. *v.* Salem & L. R. Co., 2 Gray (Mass.) 1. EXPLAINING Burlington & H. County Ferry Co. *v.* Davis, 48 Iowa 133. QUOTING Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506.

56. Impairing obligation of contracts—Federal questions.*—A bill in equity alleging that complainant made a valid contract with a city by which it was authorized to build and operate its railway on all the streets of the city; that complainant has expended large sums of money in building and equipping its lines; that it has fully performed all the duties and obligations imposed upon it by the city ordinances; that the city provided by ordinance that it would not grant to any other person or corporation any privilege impairing the rights of complainant; that the common council of the city did by ordinance contract with defendant railway company for the construction and operation of lines which would substantially destroy the franchises granted to complainant; that defendant company cannot build and operate its railway without interfering with and substan-

* See also *ante*, **26.**

tially destroying complainant's lines—exhibits a cause of action arising under the Constitution of the United States. *Citizens' St. R. Co.* v. *City R. Co.*, 56 *Am. & Eng. R. Cas.* 415, 56 *Fed. Rep.* 746.

If the law of a state, or a municipal grant under state authority, is a valid enactment, except for its repugnancy to the constitutional provision prohibiting a state from passing any law impairing the obligation of contracts, such repugnancy presents a federal question and gives the circuit court jurisdiction, notwithstanding that the federal prohibitions were attempted to be read into the state statute so as to make the acts of the city *ultra vires*. *Citizens' St. R. Co.* v. *City R. Co.*, 56 *Am. & Eng. R. Cas.* 415, 56 *Fed. Rep.* 746.

Valid city ordinances granting to a company the right to build and operate street-railway lines, and providing that the city shall not grant to any other person or corporation any privilege which may impair the rights of the company, constitute a contract protected in the Constitution of the United States by the section forbidding states to make any law impairing the obligation of contracts; and where the company, relying upon the good faith of the city, has accepted the ordinances and expended large sums of money upon its works, a federal court has jurisdiction of a bill in equity to prevent the city from granting to another corporation the right to build and operate lines of railway interfering with the rights granted to the former company. *Citizens' St. R. Co.* v. *City R. Co.*, 56 *Am. & Eng. R. Cas.* 415, 56 *Fed. Rep.* 746.

57. Right to determine where road shall be built.—Where a city is authorized to confer the exclusive privilege of the use of its streets for a street railway, the exclusive right to the use of the streets attaches only when the use begins; it is the duty of the city to determine when and on what streets the road is to be built, and it has no power to devolve that duty on the company or its contractor. *Citizens' St. R. Co.* v. *Jones*, 34 *Fed. Rep.* 579.

4. *Under Right of Eminent Domain.*

58. Nature and extent of interest acquired.—The right of a corporation to condemn property for a horse or dummy railway in streets is derived from the state law, and the consent of the city is not a condition precedent to proceedings to condemn. *Metropolitan City R. Co.* v. *Chicago W. D. R. Co.*, 87 *Ill.* 317, 19 *Am. Ry. Rep.* 64.

A company acquires no estate or interest in the land itself, but the mere right to the use of the highway or public easement. *Hinchman* v. *Paterson Horse R. Co.*, 17 *N. J. Eq.* 75.—APPROVING Williams *v.* New York C. R. Co., 18 Barb. (N. Y.) 222; Case of Philadelphia & T. R. Co., 6 Whart. (Pa.) 25; Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 354; Elliott *v.* Fair Haven & W. R. Co., 32 Conn. 579; People *v.* Kerr, 37 Barb. 357; Brooklyn C. & J. R. Co. *v.* Brooklyn City R. Co., 33 Barb. 420; Brooklyn City & N. R. Co. *v.* Coney Island & B. R. Co., 35 Barb. 364. FOLLOWING Morris & E. R. Co. *v.* Newark, 10 N. J. Eq. 358.

The state, in the exercise of the right of eminent domain, or a street-railway company to whom it has delegated the right, is not bound to take the entire estate, and, strictly, should only take such an interest as is necessary to be acquired to accomplish the public purpose in view. *Sixth Ave. R. Co.* v. *Kerr*, 72 *N. Y.* 330.

59. What is "property" that may be taken.—Where a company has, by contract with a city, acquired a right to exclude a similar railway on certain other streets running parallel with its road, this is "property," and not a franchise, in the sense of the Eminent Domain Act, and may be condemned for the use of a new company, where the public necessity so requires. *Metropolitan City R. Co.* v. *Chicago W. D. R. Co.*, 87 *Ill.* 317, 19 *Am. Ry. Rep.* 64.—DISTINGUISHING Central City Horse R. Co. *v.* Ft. Clark Horse R. Co., 81 Ill. 523; Peoria, P. & J. R. Co. *v.* Peoria & S. R. Co., 66 Ill. 174.—QUOTED IN Chicago & W. I. R. Co. *v.* Dunbar, 5 Am. & Eng. R. Cas. 253, 100 Ill. 110.

60. Power to take private property.*—Under N. Y. Street Railroad Act of 1884, ch. 252, § 3, giving to a corporation organized under it the right to construct its road "through, along, and upon any private property which said company may acquire for the purpose," and giving it the powers and privileges granted to corporations organized under the General Railroad Act, conceding that a street-railroad corporation has power to condemn lands of a pri-

* Condemnation of land for street railways. Power to condemn for a line which does not run on streets, see 46 AM. & ENG. R. CAS. 165, *abstr.*

vate owner in some cases and for some purposes, as to which *quære*, the purposes are those, and those only, which the law of its organization describes and defines, and which are certified to in its articles of association; those purposes are limited to the construction of a street surface railroad. *In re South Beach R. Co.*, 119 *N. Y.* 141, 23 *N. E. Rep.* 486, 28 *N. Y. S. R.* 942; *affirming* 25 *N. Y. S. R.* 328.

Where the articles of association of a corporation organized under the above act state its purpose to be to construct and operate a street surface railroad through certain specified avenues in a village, and the corporation subsequently files a map of its intended route, which is not along the specified streets, but upon private property outside of the streets for nearly the whole distance, the corporation has no right to condemn the lands upon which the proposed route is located, as they are not required for the purposes of its incorporation. While a right to change the specified route might exist, this does not authorize a change which involves not only a contradiction and violation of the articles of association, but also of the character and quality of the corporation. *In re South Beach R. Co.*, 119 *N. Y.* 141, 23 *N. E. Rep.* 486, 28 *N. Y. S. R.* 942; *affirming* 25 *N. Y. S. R.* 328.

61. —— under New York Act of 1884.—A company organized under N. Y. Act of May 6, 1884, authorizing the construction of street surface railroads, and requiring the consent of local authorities to be obtained, and of a certain portion of the abutting owners, or in default of the last, the certificate of chosen commissioners, and after certifying its object to be the construction of a road upon certain designated streets, cannot depart from such streets and condemn private lands for the purposes of its regular track. *In re South Beach R. Co.*, 53 *Hun* 131, 26 *N. Y. S. R.* 649, 6 *N. Y. Supp.* 172; *affirmed in* 119 *N. Y.* 141, 28 *N. Y. S. R.* 942, 23 *N. E. Rep.* 486.

62. Right of abutting owners to compensation.—The construction of a surface street railroad in a public street, with the consent of the legislature, and for the carriage of passengers, the cars to be drawn by horses, is not such an infringement upon the property rights of an abutting landowner, who has no title to the bed of the street, as to entitle him to compensation under the provision of the Constitution that private property shall not be taken for public use without just compensation. *Clark* v. *Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 903, 50 *Hun* 600, 2 *N. Y. Supp.* 563.—FOLLOWING People *v.* Kerr, 27 N. Y. 188; Kellinger *v.* Forty-second St. & G. S. F. R. Co., 50 N. Y. 206; Story *v.* New York El. R. Co., 90 N. Y. 122; Mahady *v.* Bushwick R. Co., 91 N. Y. 148.

And there is no substantial difference between the cases in which the legal title to the bed of the street is in private individuals and those in which it is in the public as to the rights of the public therein, and in either case the street is to be deemed open and free for public passage, and may be used for the operation of a street surface railroad. *Clark* v. *Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 903, 50 *Hun* 600, 2 *N. Y. Supp.* 563.

63. Right to appointment of commissioners, under N. Y. statutes, to determine as to construction of part of road.—Under the provision of N. Y. Laws 1884, ch. 252, § 4, that in case the consent of abutting property owners to the construction of a surface road cannot be obtained, the company may obtain the appointment of commissioners to determine whether the road ought to be constructed, the company has the right to make successive applications for the appointment of commissioners to determine as to the construction of different parts of the road, and is not confined to one application embracing the whole route. *In re People's R. Co.*, 38 *Am. & Eng. R. Cas.* 404, 112 *N. Y.* 578, 20 *N. E. Rep.* 367, 21 *N. Y. S. R.* 496; *affirming* 48 *Hun* 617, *mem.*—DISTINGUISHED IN Re Saratoga Elec. R. Co., 58 Hun 287, 34 N. Y. S. R. 556, 12 N. Y. Supp. 318; In re Cross-Town St. R. Co., 52 N. Y. S. R. 295.

If the application relate to but one street, or to any number of streets less than the total contained in the article of association, those only are proper parties to the proceedings who are interested in the property along the streets in regard to which the petition is presented; and no determination made by such commissioners can bind, or in any manner affect, other property owners along other streets not mentioned in the petition. *In re People's R. Co.*, 38 *Am. & Eng. R. Cas.* 404, 112 *N. Y.* 578, 20 *N. E. Rep.* 367, 21 *N. Y. S. R.* 496; *affirming* 48 *Hun* 617, *mem.*

N. Y. Act of 1890, ch. 565, provides that a street-railway corporation failing to obtain the consents of a majority of the property owners may apply to a general term of the supreme court "for the appointment of three commissioners to determine whether such railroad ought to be constructed and operated." *Held*, that this contemplates the road as a whole, and the company has no right to divide up its road and ask for commissioners as to a part of it. *In re Cross-Town St. R. Co.*, 52 *N. Y. S. R.* 295, 22 *N. Y. Supp.* 818.

An application for commissioners under the above statute should not be granted where it does not appear that the company has made an effort, and has failed, to procure the requisite consents of the property owners for the entire distance of the proposed road, or that it has procured the consent of the city authorities to a change of route. *In re Cross-Town St. R. Co.*, 52 *N. Y. S. R.* 295, 22 *N. Y. Supp.* 818.—DISTINGUISHING In re People's R. Co., 112 N. Y. 578, 21 N. Y. S. R. 496.

64. Procedure on coming in of commissioners' report.—N. Y. Act of 1884, ch. 252, provides for the appointment of commissioners who shall determine whether a street railroad ought to be constructed. Section 6 provides that the commissioners shall determine, after a public hearing of all the parties, whether the road ought to be constructed and operated, and shall make a report, together with the evidence taken, to the general term, whether the road ought to be constructed, which, when confirmed by the court, shall be taken in lieu of the consent of the property owners. *Held*, that this requires no action by the court, except to confirm or refuse to confirm a favorable report. Where the report is unfavorable, there is nothing for the court to act upon. *In re Nassau Cable Co.*, 36 *Hun* (*N. Y.*) 272, 2 *How. Pr. N. S.* 124.

Such commissioners do not constitute a judicial tribunal, bound to proceed according to technical rules in hearing the parties, but they are a tribunal like a legislative committee, not bound to regard the rules of evidence strictly. They may take into consideration all matters material to determine whether the road ought to be constructed; may view the matter with their own eyes, and exercise their own judgment; but they must give the parties interested an opportunity to be heard, as provided by the statute, and conduct the proceedings in a regular and orderly manner. *In re Nassau Cable Co.*, 36 *Hun* (*N. Y.*) 272, 2 *How. Pr. N. S.* 124.

The court has the implied power, in confirming the report, to determine whether the commissioners have performed their duty under the statute; and if it appear that they have refused to hear the parties, or to take evidence, or the report is such as plainly to show fraud or irregularity, then the report may be sent back or referred to new commissioners; but an error in excluding testimony, or in admitting immaterial or incompetent evidence, is not sufficient to warrant sending a case back for another hearing. *In re Nassau Cable Co.*, 36 *Hun* (*N. Y.*) 272, 2 *How. Pr. N. S.* 124.

65. Locating road on highway—Consent of highway commissioners necessary.—Although a turnpike corporation has acquired a right to the use and control of a town highway for its purposes, there still remains in the highway commissioners a general control over it as a highway, and they have a duty to perform towards the public in connection with its proper maintenance as such. Where, therefore, a turnpike company has acquired from adjoining landowners the right to a strip of land on each side of the highway for a bridle path, and has given consent to a company organized under N. Y. Act of 1884 to use a portion of said bridle path for its railroad, this is not the consent required by the act. It has no effect except as to the rights and interests of the turnpike company; and the highway has not ceased to be such because used as a turnpike, and the administrative duty of the highway commissioners of the town remains unimpaired, so far as its exercise is required for the preservation of the rights and interests of the public; and their consent is requisite. *In re Rochester Elec. R. Co.*, 46 *Am. & Eng. R. Cas.* 157, 123 *N. Y.* 351, 25 *N. E. Rep.* 381, 33 *N. Y. S. R.* 695; *affirming* 57 *Hun* 56, 32 *N. Y. S. R.* 1, 10 *N. Y. Supp.* 379.

In such proceedings to acquire title to lands outside of the bridle path for the purposes of its road, the consent of the highway commissioners to the construction of the road is an essential prerequisite, as the right of the petitioner to exercise the franchise of constructing and operating its road upon the highway does not become a vested right until the consent is obtained; and

this not having been obtained, the petitioner cannot maintain the proceedings. *In re Rochester Elec. R. Co.*, 46 *Am. & Eng. R. Cas.* 157, 123 *N. Y.* 351, 25 *N. E. Rep.* 381, 33 *N. Y. S. R.* 695; *affirming* 57 *Hun* 56, 32 *N. Y. S. R.* 1, 10 *N. Y. Supp.* 379.—DISTINGUISHING In re New York C. & H. R. R. Co., 77 N. Y. 248. REVIEWING In re Thirty-fourth St. R. Co., 102 N. Y. 343; In re Kings County El. R. Co., 105 N. Y. 97.

In 1887 the petitioner filed a map and profile indicating its proposed route upon the bridle-path portion of the highway. The present proceedings were instituted in 1889. The petition alleged the making and filing of a map and survey; it made no mention of the road as previously built, nor of the previous proceedings. It appeared that no map except the original one was ever filed, and no map was ever made and filed of the route in connection with which this proceeding was sought to be maintained. *Held*, that as said act requires the proceeding to be in accordance with the requirements of the General Railroad Act of 1850, ch. 140, and as that act requires the petitioner to allege that it has made a map or survey designating its line or route, and has located its road in accordance therewith (section 22), proof of compliance with this provision was an essential prerequisite, and to meet this requirement the map filed upon the previous proceeding was not sufficient; that to give validity and force to said proceeding it was essential that all the steps pointed out by the general statute should be strictly followed. *In re Rochester Elec. R. Co.*, 46 *Am. & Eng. R. Cas.* 157, 123 *N. Y.* 351, 25 *N. E. Rep.* 381, 33 *N. Y. S. R.* 695; *affirming* 57 *Hun* 56, 32 *N. Y. S. R.* 1, 10 *N. Y. Supp.* 379.

Under New York Street Surface Railway Act of 1884, ch. 252, § 3, authorizing companies organized under it to acquire a right of way through streets or highways, provided that "the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to construct and operate such railroad * * * be first obtained," where the railroad is proposed to be constructed upon a highway in a town, the "local authorities" whose consent is required are the officers whose duties and powers relate to the supervision, care, and maintenance of the highway, i. e., the highway commissioners of the town. *In re Rochester Elec. R. Co.*, 46 *Am. & Eng. R. Cas.* 157, 123 *N. Y.* 351, 25 *N. E. Rep.* 381, 33 *N. Y. S. R.* 695; *affirming* 57 *Hun* 56, 32 *N. Y. S. R.* 1, 10 *N. Y. Supp.* 379.

66. Constitutionality of New York Act of 1860.—N. Y. Act of 1860, ch. 513, allowing the Seventh Avenue railroad company in New York city to "run upon, intersect, and use" any portion of other railroad tracks, upon making full compensation therefor, is constitutional. *Sixth Ave. R. Co.* v. *Kerr*, 72 *N. Y.* 330.—APPLIED IN People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173.

It is competent for the legislature to authorize one street-car company to use the tracks of another company, upon making compensation therefor, whenever in the judgment of the legislature the public good requires it. *Sixth Ave. R. Co.* v. *Kerr*, 72 *N. Y.* 330.

II. CONSTRUCTION OF CHARTERS.

67. Generally.—The right and privilege to construct and operate a horse railroad in the streets of a city for the purpose of carrying passengers for hire is property, if such road is constructed and completed in accordance with the terms imposed. *Citizens' Horse R. Co.* v. *Belleville*, 47 *Ill. App.* 388.

Individuals, like corporations, can manage street railways, ferries, turnpikes, or bridges, the franchises of which may nevertheless be perpetuated. *McKee* v. *Grand Rapids & R. L. St. R. Co.*, 41 *Mich.* 274.

A company incorporated under a general statute has no powers other than those conferred by the statute; and the charter of a company so incorporated cannot, in itself, grant the right to use any city street; such right must be granted by the municipal government. *Ft. Worth St. R. Co.* v. *Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 4 *S. W. Rep.* 534.

68. Constitutionality of acts.—Cal. Act of April 1, 1874, § 17, attempted to exempt two specially named street railroads from conditions imposed upon street railroads in general by the General Street Railroad Act of March 29, 1870, afterwards substantially adopted into the Civil Code; it therefore attempted to prevent the uniform operation of the general law, and was consequently unconstitutional and void. *Omnibus R. Co.* v. *Baldwin*, 1 *Am. & Eng. R. Cas.* 316, 57 *Cal.* 160.—DISTINGUISHING

California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398. FOLLOWING San Francisco *v.* Spring Valley Water Works, 48 Cal. 493; Waterloo Turnpike Co. *v.* Cole, 51 Cal. 381.

A supplementary act whose object is to confer additional privileges upon a corporation under the name mentioned in the title to the supplement is constitutional, as there is no necessity of referring in the title to all the powers given by the supplement. *Paterson R. Co.* v. *Grundy*, 56 *Am. & Eng. R. Cas.* 486, 51 *N. J. Eq.* 213, 26 *Atl. Rep.* 788.

A statute which requires a company to pay to the city annually a percentage of its gross earnings in lieu of a fee for each car used by it, as required by its charter, is to be deemed an amendment of the charter in that respect, and is valid under constitutional and statutory provisions reserving the right to alter, suspend, or repeal the charter. *Mayor, etc., of N. Y.* v. *Twenty-third St. R. Co.*, 41 *Am. & Eng. R. Cas.* 640, 113 *N. Y.* 311, 21 *N. E. Rep.* 60, 22 *N. Y. S. R.* 958; *affirming* 48 *Hun* 552, 16 *N. Y. S. R.* 137, 1 *N. Y. Supp.* 295.

An act of incorporation authorized a company to lay tracks in a number of streets designated. Another act was passed, entitled "A supplement [to the first act] authorizing the company to declare dividends quarterly, and to lay additional tracks." *Held*, that under the clause in the Constitution prohibiting laws "containing more than one subject, which shall be clearly expressed in the title," a provision authorizing it to lay tracks in streets not authorized by the original act was unconstitutional. *Union Pass. R. Co.'s Appeal*, 81* *Pa. St.* 91.

Pa. Act of March 19, 1879, for the incorporation of street railways in cities of the second and third classes, being special and local, is in violation of section 7, art. 3, of the Constitution. *Weinman* v. *Wilkinsburg & E. L. Pass. R. Co.*, 118 *Pa. St.* 192, 11 *Cent. Rep.* 54, 12 *Atl. Rep.* 288, 20 *W. N. C.* 455.—DISTINGUISHED IN Reeves *v.* Philadelphia Traction Co., 152 Pa. St. 153.

An act entitled "An act to incorporate the Lawrenceville & Evergreen Passenger railway company" is sufficient to authorize the passage thereunder, prior to the Constitution of 1874, of an act granting a special charter for a steam railroad. *Millvale* v. *Evergreen R. Co.*, 46 *Am. & Eng. R. Cas.* 219, 131 *Pa. St.* 1, 18 *Atl. Rep.* 993.

An act entitled "A supplement to an act to incorporate the Lawrenceville & Evergreen Passenger railway company, approved May 13, 1871," which authorizes such company to extend its road, and gives it certain additional powers, is not unconstitutional by reason of its title. *Millvale* v. *Evergreen R. Co.*, 46 *Am. & Eng. R. Cas.* 219, 131 *Pa. St.* 1, 18 *Atl. Rep.* 993.

69. When franchise void.—When an application for a franchise is referred to a committee of two, and upon their favorable report the franchise is granted, the fact that one of the committee is a subscriber to the stock of the company renders the franchise void. *Finch* v. *Riverside & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 107, 87 *Cal.* 597, 25 *Pac. Rep.* 765.—FOLLOWING San Diego *v.* San Diego & L. A. R. Co., 44 Cal. 106.

It makes no difference that the corporation for whose benefit the franchise was granted was not yet formed; it is sufficient that the franchise was granted to a committee of subscribers for the benefit of the corporation. *Finch* v. *Riverside & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 107, 87 *Cal.* 597, 25 *Pac. Rep.* 765.

70. Gauge of track. — A street-railway company was chartered with power to construct a road with a fixed gauge. Afterwards its property and franchises were sold, and an act passed providing for a new company under the charter, but with "all the rights, powers, liberties, privileges, franchises, and immunities" granted by the General Railroad Law, which left the gauge of railroads to the discretion of directors. *Held*, that this conferred the right on the new company to construct a road of a different gauge from that fixed in the original charter. *Com.* v. *Central Pass. R. Co.*, 52 *Pa. St.* 506.

71. Rate of speed. — A franchise to construct, maintain and use a horse railroad over a highway authorizes the grantees to drive their cars upon their track at the rate of speed used for vehicles drawn by horses for the carriage of passengers, so far as this right can be enjoyed without preventing other vehicles on the highway from moving at their usual rate of speed. *Com.* v. *Temple*, 14 *Gray* (*Mass.*) 69.—QUOTED IN State *v.* Foley, 31 Iowa 527; Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290.

72. Right to construct extensions or branches. — Under Pa. Act of March 22, 1865 (P. L. 568), authorizing the Citizens' Passenger railway company to extend

its road northwardly on Tenth and Eleventh streets in Philadelphia, "between Montgomery street and the Germantown road, with the right to connect the same on any street between those two points," said company has no right, even with the consent of councils, to construct or operate an extension of its railway on Germantown road or avenue. *Philadelphia* v. *Citizens' Pass. R. Co.*, 151 *Pa. St.* 128, 24 *Atl. Rep.* 1099. *Germantown Pass. R. Co.* v. *Citizens' Pass. R. Co.*, 151 *Pa. St.* 138, 24 *Atl. Rep.* 1103.

A company, chartered in 1863, was authorized "to lay out and construct a railway, commencing at Third and Market streets, in the borough of Williamsport, and continuing westwardly along Third street, or any other street in said borough, to the village of Newberry in said county, and eastwardly through said Third street or streets in said borough, as may be deemed advisable by said company, to and through the borough of Montoursville, with the right to construct branches to the main track of said passenger railway through any of the said streets of this borough of Williamsport, with single or double tracks." *Held:* (1) that the company had no right to occupy streets running north and south, but was limited to the use of streets running east and west; (2) that the right to construct branches conferred no power of indefinite location, without limit in duration of time, but only the right to select and occupy streets with branches within a reasonable time; (3) that after the expiration of twenty-eight years, and after the village had grown to a city, the right to construct branches was exhausted. *Junction Pass. R. Co.* v. *Williamsport Pass. R. Co.*, 154 *Pa. St.* 116, 26 *Atl. Rep.* 295.—DISTINGUISHING Williamsport Pass. R. Co. *v.* Williamsport, 120 Pa. St. 1. REVIEWING Mayor, etc., of Allegheny *v.* Ohio & P. R. Co., 26 Pa. St. 358; Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 339.

Pa. Act of April 21, 1858, incorporating the Germantown Passenger railway company, and authorizing it to construct such branches as may be necessary to connect it with any other railway within the city of Philadelphia, refers only to railways then in existence. *People's Pass. R. Co.* v. *Marshall St. R. Co.*, 20 *Phila.* (*Pa.*) 203.—QUOTING North Branch Pass. R. Co. *v.* City Pass. R. Co., 38 Pa. St. 361. REVIEWING Com. *v.* Central Pass. R. Co., 52 Pa. St. 521; Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 339.

Even if it were otherwise, the corporation would not be permitted to prevent the construction of a railway by another company over certain streets for the mere reason that the city had given to the Germantown company its consent to the building of such a connection, no work of any kind having been done upon it. If the company does not promptly make use of its right to build the road, it cannot be allowed to prohibit others from obtaining and exercising such a right. *People's Pass. R. Co.* v. *Marshall St. R. Co.*, 20 *Phila.* (*Pa.*) 203.

73. Location of termini.—A charter authorized the company "to survey, lay out, and construct a railroad from some suitable point in the township of O. to some suitable point in O. street or some street north of said street or south of M. street, in the city of N." *Held*, that this referred not to the route, but to the termination of the road, and did not exclude a location of the road in or through M. street. *McFarland* v. *Orange & N. H. C. R. Co.*, 13 *N. J. Eq.* 17.

By New York Act of April 25, 1832, the company thereby created was authorized to construct a railroad, "commencing at an eligible point within the village of Brooklyn, and extending to any point within the village of Jamaica." The company made a location in Brooklyn, and constructed its road, which it adhered to for many years. *Held*, that it was thereby concluded as to the location. *Brooklyn C. R. Co.* v. *Brooklyn City R. Co.*, 32 *Barb.* (*N. Y.*) 358.

A railroad was chartered to commence in the city of Brooklyn, Kings county, and to terminate at Newtown, Queens county, the next adjoining county, the road to be about twenty-five miles long. There were both a township and a village called Newtown, the village being about twenty-five miles from Brooklyn, but the township bordered on the city of Brooklyn. *Held:* (1) that the word "Newtown" must be held to mean the village; (2) that the provisions that the road must terminate "at" Newtown authorized it to be built to some convenient point in the place, and not merely to its border. *Mason* v. *Brooklyn City & N. R. Co.*, 35 *Barb.* (*N. Y.*) 373.—REVIEWING Mohawk Bridge Co. *v.* Utica & S. R. Co., 6 Paige (N. Y.) 554.

74. Right to lay double track—Forfeiture.—If the grantee of a street-railway franchise makes an assignment of a

portion thereof and the assignee enters into possession, the question whether the grantee can thus divide his franchise is one which concerns the public alone. *Oakland R. Co.* v. *Oakland, B. & F. V. R. Co.*, 45 *Cal.* 365, 5 *Am. Ry. Rep.* 148.

Where a charter authorizes the company to build a single or double track over any streets in the city, as has been or should be authorized by the common council, and full permission is given by ordinance to lay a track, in which a time is fixed for its completion, and a forfeiture is provided for in case of non-completion, and before the expiration of the time the ordinance is amended and the time extended for the period of ten years, this latter ordinance extends the time for ten years after the expiration of the time fixed by the previous ordinance. *McNeil* v. *Chicago City R. Co.*, 61 *Ill.* 150, 12 *Am. Ry. Rep.* 457.

After this latter ordinance was adopted, the company passed a resolution adopting the terms of the ordinance on the condition of the repeal of certain other ordinances, and agreed to a postponement of laying the track for the time mentioned. Subsequently the common council accepted the proposition contained in the resolution, reciting that the company had obligated itself to postpone the laying of the track for the period of ten years, and the amendatory ordinance was affirmed. *Held*, that this did not constitute an abandonment of the right to build by the company, but merely a postponement of the right. *McNeil* v. *Chicago City R. Co.*, 61 *Ill.* 150, 12 *Am. Ry. Rep.* 457.

A company laid tracks on a street and used them for seven years; then the double track was removed, and a single one laid which sufficed for the business of the road for the next ten years. The business again requiring the double track, the company proceeded to tear up the single track, to relay again the double one, when a bill was filed to restrain it on the ground that it had forfeited its right to relay this track by nonuser. *Held*, that there was no ground for forfeiture. *Hestonville, M. & F. Pass. R. Co.* v. *Philadelphia*, 89 *Pa. St.* 210.—DISTINGUISHED IN Henderson *v.* Central Pass. R. Co., 20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358. QUOTED IN Allentown & B. Rapid Transit Co., 1 Pa. Dist. 430.

Where a street passenger railway acquires the right to lay a double track, but constructs at first only a single track, which it uses for some seven years, it is not thereby excluded from laying an additional track. There is no rule of law requiring a company to exercise all the powers contained in its grant, in the beginning, or which declares the powers lost which are not immediately exercised. *People's Pass. R. Co.* v. *Baldwin*, 14 *Phila.* (*Pa.*) 231.

75. Right to cross bridge.*—A street railway company was authorized by law to lay its track across a bridge, with the provision that if the bridge company and the railway company could not agree on the rate of toll for the street cars, then the court of quarter sessions should fix the rate. Afterwards the bridge company was authorized to erect a new bridge. *Held*, that said court still had the power to fix the rate of tolls. *Monongahela Bridge Co.* v. *Pittsburgh & B. R. Co.*, 114 *Pa. St.* 478, 8 *Atl. Rep.* 233.

76. Motive power to be used.—A charter authorizing the company to maintain and operate a street railway along and over a public street in an incorporated town, which is silent as to the motive power to be used for propelling the cars, will be intended as giving the right to use that kind of motive power which would be most conducive to the best interest and safety of the public having occasion to use said streets as a highway, and which was at the time of passing the charter in ordinary use. *North Chicago City R. Co.* v. *Lake View*, 11 *Am. & Eng. R. Cas.* 42, 105 *Ill.* 207.

Authority in a charter to build either a horse railroad or a steam railroad within a city confers a continuing option to use either steam or animal power, or both, upon the road, or any part of it, which may be exercised from time to time. Under it the use of either motive power may be changed and the other substituted, as the company may see fit. *McCartney* v. *Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

A city may prescribe the motive power to be used in moving cars, and when it prescribes one kind of power the company cannot use another; and in a contest for the possession of a street between rival companies, one of which is using a motive power not authorized by its charter, the other company may attack its right to use such street by showing such violation of its

* Street cars. Appropriating county bridge; right of county to compensation, see 32 AM. & ENG. R. CAS. 170, *abstr.*

franchise. *Indianapolis Cable St. R. Co.* v. *Citizens St. R. Co.*, 43 *Am. & Eng. R. Cas.* 234, 127 *Ind.* 369, 24 *N. E. Rep.* 1054, 26 *N. E. Rep.* 893.

The use of the term "passenger railway" in the title of an act incorporating a railway company does not restrict the franchise conferred to the operation of a railway upon the streets of a municipality, without authority to carry anything but passengers, or to use steam cars or the kind of rails appropriate therefor. *Millvale* v. *Evergreen R. Co.*, 46 *Am. & Eng. R. Cas.* 219, 131 *Pa. St.* 1, 18 *Atl. Rep.* 993.—QUALIFYING Com. *v.* Central Pass. R. Co., 52 Pa. St. 506. QUOTING Hestonville M. & F. Pass. R. Co. *v.* Philadelphia, 89 Pa. St. 210.

77. What streets may be used, and how.—A company petitioned the legislature for a charter for a horse railroad, and specified the streets on which it desired to lay its tracks, and published a notice of the same, as required by law, which specified the streets. The charter was granted, specifying the terminal points of the road and the particular streets through which it might run, omitting two named in the petition and adding one that was not named. *Held*, that the company had no right to lay its tracks on streets not specified, though the charter contained a clause that the road might run "over and across any highway within any of the points of commencing or termination aforesaid." *Stamford* v. *Stamford Horse R. Co.*, 36 *Am. & Eng. R. Cas.* 140, 56 *Conn.* 381, 1 *L. R. A.* 375, 15 *Atl. Rep.* 749.

Where a company is authorized by its charter to lay its tracks on such streets as may be authorized by the city authorities, and the city authorizes the company to use certain streets, which the company accepts, and constructs its road, this constitutes a contract which cannot be impaired by a subsequent resolution or ordinance by the city. *People* v. *Chicago W. D. R. Co.*, 18 *Ill. App.* 125.

The charter of a company authorized it to lay tracks "upon" and "over" such streets as the municipal authorities might designate, except "in" certain specified streets, in which tracks were not to be laid. Two of the designated streets debouched on to one of the excluded streets almost but not quite opposite each other. *Held*, that the company could lay its tracks accross the excluded street, making a continuous track through the designated streets. *State* v. *Newport St. R. Co.*, 16 *R. I.* 533, 18 *Atl. Rep.* 161.

78. When injunction will lie.—Where the state authorities have issued a charter under Pa. Act of May 14, 1889, to a company, specifying the straight line of a north and south street as the route of the proposed railway, the supreme court will not enjoin the construction of the railway on the ground that the route is not a circuit within the meaning of the act, in a proceeding to prevent the construction of the road, where the state is not a party. *Junction Pass. R. Co.* v. *Williamsport Pass. R. Co.*, 154 *Pa. St.* 116, 26 *Atl. Rep.* 295.

79. Application of general laws to street railroads.—The provisions of Kan. Comp. Laws 1879, ch. 23, § 7, as to statement of termini in charters, do not apply to a street railway company, incorporated for the purpose of constructing and operating a horse-car railway in the streets of a single city. *Atchison St. R. Co.* v. *Missouri Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 439, 31 *Kan.* 660, 3 *Pac. Rep.* 284.

A provision in a charter that no other "railroad" should be constructed between two named points in a city cannot be construed as prohibiting the construction of street railways anywhere within the city for the convenience of its inhabitants. In a technical sense, a street railway is not a railroad, and in such contradistinctive sense the term "railroad" was used in the charter. *Louisville & P. R. Co.* v. *Louisville City R. Co.*, 2 *Duv.* (*Ky.*) 175.—REVIEWING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289.—DISTINGUISHED IN Johnson *v.* Louisville City R. Co., 10 Bush (Ky.) 231.

A proviso in the charter of a city railway company that its railways shall not "affect the legal rights of any other companies" only protects the latter in the use of their roads and the exclusive right to railroad profits, and does not prohibit the construction of a street railway. *Louisville & P. R. Co.* v. *Louisville City R. Co.*, 2 *Duv.* (*Ky.*) 175.

Ill. Act of Feb. 12, 1855, entitled "An act to enable railroad corporations to enter into operative contracts, and to borrow money," extends to horse railways, and they may, under it, unite their tracks and make running agreements with each other. *Chicago* v. *Evans*, 24 *Ill.* 52.—REVIEWED IN Lieberman *v.* Chicago & S. S. R. T. R. Co., 141 Ill. 140.

A certificate of incorporation recited that certain persons had associated "for the purpose of constructing a horse railroad in accordance with the provisions of the Act of 1870, ch. 476," entitled "An act to provide for the creation and regulation of incorporated companies in the state of Maryland." The *termini* of the road were to be the city of Baltimore and a certain village. The whole route of the road passed through Baltimore county, the Baltimore *terminus* being within the city. The certificate was acknowledged before a justice in the city and certified by a judge of the supreme bench of the city. *Held*, that the provisions of the act are not restricted to steam railways, and that this horse railway could be legally incorporated under it. *Oler* v. *Baltimore & R. R. Co.*, 41 *Md.* 583, 7 *Am. Ry. Rep.* 495.

The mere fact that a charter contains some provisions usually included in special charters granted to railroad companies, such as condemnation of lands and the taking of the railroad by the state, does not require the charter to be construed so as to prevent the construction and operation of a street railway within a city, where the charter expressly confers upon the company the right to construct its railroad from some point within the city to a point without, as well as along any street of the city. *Paterson R. Co.* v. *Grundy*, 56 *Am. & Eng. R. Cas.* 486, 51 *N. J. Eq.* 213, 26 *Atl. Rep.* 788.

80. Change of location. — Under Mass. Act of 1864, ch. 229, the selectmen of a town may revoke the location of a street railway which is chartered to extend beyond the limits of the town. *Medford & C. R. Co.* v. *Somerville*, 111 *Mass.* 232.

A company refused to obey an order of the selectmen of a town to remove its tracks from the side to the middle of a street. The selectmen then gave notice to all persons interested to show cause why the location of the track should not be revoked, and after a hearing revoked the location as to the public. *Held*, that the notice was a sufficient compliance with Mass. Act of 1864, ch. 229, §§ 14, 15, providing that the selectmen of a town may grant or refuse the location of a street railway, or revoke the same, upon giving notice to all parties interested, by publication in some newspaper "or otherwise, as they may determine." *Medford & C. R. Co.* v. *Somerville*, 111 *Mass.* 232.

Where a company has refused to build an additional road lawfully required by the common council, it is discretionary with the council to make such changes in the proposed route as to form a junction with the road of some company that will build it, even though, in so doing, a street in which the former company had exclusive rights is used as a connecting link. If such a use infringes the rights of the former company, it is *damnum absque injuria*. *Grand Rapids St. R. Co.* v. *West Side St. R. Co.*, 7 *Am. & Eng. R. Cas.* 95, 48 *Mich.* 433, 12 *N. W. Rep.* 643.

The powers of a corporation organized under N. Y. Act of 1884, ch. 252, § 3, are limited to the construction of a street surface railroad; and when its articles of association state its purpose to be to construct and operate a street surface railroad through certain specified avenues, it has no power to change its route so as to run through private property, or to condemn private property for the purpose of the road. When a change of route involves not only a contradiction and violation of the articles of association, but also of the character and quality of the corporation, it becomes more than a mere change. *In re South Beach R. Co.*, 119 *N. Y.* 141, 28 *N. Y. S. R.* 942, 23 *N. E. Rep.* 486; *affirming* 25 *N. Y. S. R.* 328, 6 *N. Y. Supp.* 172, 53 *Hun* 131.

III. CONDITIONS ANNEXED TO GRANTS.

1. *In General*

81. Imposing conditions, generally.—Under Ill. Act of July 1, 1874, a city has the legal right and authority to impose such terms and conditions on street-railway companies as it deems best for the public interests; and the courts only have the power to determine whether such terms and conditions contravene established principles of law. *Citizens' Horse R. Co.* v. *Belleville*, 47 *Ill. App.* 388.

A city has the power to impose terms upon a street railway as to the time and character of the road to be constructed, upon the fulfilment of which depends the maturing of the grant; and while such conditions are being fulfilled within the time prescribed, if there is a limit the grant remains inchoate, and they are termed conditions precedent; while those terms imposed that affect the manner of operating the road and its state of repair after its proper con-

struction are conditions subsequent: in which case such a grant becomes vested property with all the rights attached that secure tangible property. *Citizens' Horse R. Co.* v. *Belleville*, 47 *Ill. App.* 388.

After a street-railway company has accepted the conditions imposed upon it by a city ordinance, and constructed its road, it obtains vested rights; and thereafter the question of forfeiture is for the courts and not the city. Anything short of a judicial determination would not be "due process of law." *Citizens' Horse R. Co.* v. *Belleville*, 47 *Ill. App.* 388.

A grant by city authorities of certain overflowed lands, on condition that the grantees will fill up, grade, and pave a part of the lands filled, to be used as a street, does not convey to the grantees the legal title to the lands so filled up. *Waterbury & E. R. Ferry Co.* v. *Dry Dock, E. B. & B. R. Co.*, 54 *Barb.* (*N. Y.*) 388, 32 *How. Pr.* 193; *reversing* 30 *How. Pr.* 39.

82. Limiting time in which road shall be completed—Waiver.—Where a company is, by ordinance of the city, given license to lay a track along a street to the city limits within fifteen months, and the same is constructed half the way within the time required, the common council has the power to waive the condition as to the time for completing the same, it being a provision in favor of the city to secure the public interests. *Chicago City R. Co.* v. *People ex rel.*, 73 *Ill.* 541.

Where a city authorizes a street-railroad company to lay its track in a certain street within a specified time, the privilege must be used, if at all, before the expiration of the time limited. *Atchison St. R. Co.* v. *Nave*, 36 *Am. & Eng. R. Cas.* 29, 38 *Kan.* 744, 17 *Pac. Rep.* 587.

Where a city grants the right to build a street railroad, but stipulates in the contract that in case the contractor fails to complete the work within the time prescribed he shall forfeit all claims for work done, and the city shall have the right to resell the privilege and right of way, at the risk of the contractor and his sureties *in solido*, this only gives to the city the right to resell the right of way and the privilege to build, but does not include the structure or any equipment placed on the ground. *Young* v. *Magazine St. R. Co.*, 24 *La. Ann.* 53.

The failure of a company to begin the work of constructing its tracks within the time prescribed by an ordinance cannot be taken advantage of or enforced collaterally or incidentally, as a ground of forfeiture of the rights of the company; it can only be availed of by a direct proceeding for that purpose against the company. *Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603.

The common council of a city granted to a company a right of way over certain streets, providing in the ordinance that the road should be completed within twelve months from acceptance of the grant by the company, and that in case of failure so to complete it the council might take away the franchise. *Held*, that this provision was a condition subsequent, and that the right of way, when accepted by the company, vested at once, subject to be defeated at the election of the city for breach of the condition, but that a private citizen could not take advantage of a breach. *Hovelman* v. *Kansas City Horse R. Co.*, 20 *Am. & Eng. R. Cas.* 17, 79 *Mo.* 632.—FOLLOWING Knight *v.* Kansas City, St. J. & C. B. R. Co., 70 Mo. 231; Atlantic & P. R. Co. *v.* St. Louis, 66 Mo. 228. QUOTING Brooklyn C. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 364.

A city ordinance granted to plaintiff company the right to construct and operate a railway upon certain streets on condition that a portion thereof should be completed within one year from date, and the balance within two years. "And so much of said right of way as may not be occupied by said company within said time shall be considered as abandoned." *Held*, that upon failure to occupy, etc., within the time, the company forfeited its rights beyond that so occupied, and no further; i. e., the forfeiture did not extend to the completed work. *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

The extent to which the streets were occupied by the company was a fact for the jury; it was improper for the court to charge the jury that such occupancy existed "if the ties were laid and the rails placed and spiked thereon." *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

The fact that the company has made large expenditures is not of itself a reason why its time for completing the road should be extended. *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

Where the city by its repealing ordinance involves the right of the company to continue its work of construction in so much doubt as to justify the discontinuance of the work until the effect of the ordinance can be judicially determined, the time intervening between the passage of that ordinance and the final determination in favor of the right of the railway to continue its work should not be estimated against it. *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

83. Requiring indemnity or security.—Where a company is given permission by the board of county commissioners to lay its track along a public highway, and is required to deposit in the county treasury a certain sum of money, which is to be repaid upon the performance by it of certain conditions, it can only recover the money so deposited by showing a performance of the conditions, or a legal excuse for not doing so. *St. Joseph County Com'rs* v. *South Bend & M. St. R. Co.*, 118 *Ind.* 68, 20 *N. E. Rep.* 499.

The fact that the performance of the conditions by the company will put it to great inconvenience and cause it a large outlay of money is not a sufficient excuse for nonperformance. *St. Joseph County Com'rs* v. *South Bend & M. St. R. Co.*, 118 *Ind.* 68, 20 *N. E. Rep.* 499.

Where a common council has advertised and sold a street-railway franchise, no conditions can be imposed which are not required by statute, or resolution of the common council, or the notice of sale. The statute provides for giving a bond, containing certain conditions, among others, for the commencement and completion of the road within a specified time; but where a sufficient bond is tendered, containing these conditions, the city comptroller cannot refuse it because it does not contain other conditions imposed. *People ex rel.* v. *Barnard*, 36 *Am. & Eng. R. Cas.* 70, 110 *N. Y.* 548, 18 *N. E. Rep.* 354, 18 *N. Y. S. R.* 542; *reversing* 48 *Hun* 57, 15 *N. Y. S. R.* 689.

While a municipal corporation cannot legalize a nuisance, it has power to control the use of streets for a lawful purpose, and may require indemnity from a person allowed to use the streets, on which to rely in case a cause of action should result from the act or omission of the person to whom such right may be granted. *Taylor* v. *Dunn*, 80 *Tex.* 652, 16 *S. W. Rep.* 732.—QUOTING Becker *v.* Keokuk Waterworks, 79 Iowa 419; Kansas ex rel. *v.* O'Connell, 99 Mo. 357. REVIEWING Blake *v.* Ferris, 5 N. Y. 48.

84. Requiring purchase of omnibus line.—Where the charter of a company provides that the company shall purchase the stock of omnibuses, horses, etc., of omnibus companies now running on the streets which the railway company desires to occupy, and that an appraisement of such stock shall be made by appraisers to be chosen in a manner prescribed, if it does not appear to the satisfaction of a court of equity that the conditions have been complied with, an injunction will be decreed until such shall appear to be the case. *Whitson* v. *Philadelphia & G. F. Pass R. Co.*, 3 *Phila.* (*Pa.*) 284. — FOLLOWING Deschamps *v.* Second & T. St. Pass. R. Co., 3 Phila. 279.

The line of omnibuses on Green and Coates streets in Philadelphia was embraced within the provision of Pa. Act incorporating "The Green and Coates Street Passenger railway company." On the refusal of the company to buy the horses, the owners of the omnibus line neither tendered them nor resorted to a resale within a reasonable period, but sued the corporation for damages for a breach of contract, by refusing to join in the appraisement. *Held*, that the damages should be strictly commensurate with the actual loss sustained. *Moore* v. *Green & C. St. Pass. R. Co.*, 4 *Phila.* (*Pa.*) 261.

2. Consent of Local Authorities.

85. Generally.—Certain property owners in a city petitioned the city authorities to grant permission to a street-railway company to extend its line to a point named, and requesting the council to pass an ordinance, or to issue such order as it might legally issue, to compel such company to lay its tracks and run its cars upon said extended line without unnecessary delay. *Held*, that the petition did not request the grant of the permission upon any condition whatever, although the consent to the laying of the track might have been made to depend upon conditions which the council could not have disregarded. *People ex rel.* v. *Chicago W. D. R. Co.*, 25 *Am. & Eng. R. Cas.* 258, 118 *Ill.* 113, 7 *N. E. Rep.* 116.

A municipality does not stand in the same relation to a street-railway charter and franchise, merely because it has control of

the streets, that an individual does who owns lands within the line of the right of way of an ordinarily incorporated railroad company. *Citizens' Horse R. Co.* v. *Belleville*, 47 *Ill. App.* 388.

The consent of a municipality to the occupancy of a street by a street-railway company is not destructive of the right of the municipality to repair or construct works necessary for the health of its inhabitants or the protection of their persons or property; and an employé of the municipality engaged in such work within the space occupied by the railway company's tracks is not a trespasser. *Owens* v. *People's Pass. R. Co.*, 155 *Pa. St.* 334, 26 *Atl. Rep.* 748.

The approval or disapproval by the city councils of the occupancy of a street by a passenger railway cannot be inferred until proof of notice of the intention to use the street is given to the city authorities. *Hestonville M. & F. R. Co.* v. *Schuylkill River Pass. R. Co.*, 6 *Phila.* (*Pa.*) 141.—FOLLOWING Faust *v.* Second & T. St. Pass. R. Co., 3 Phila. 164. REVIEWING Stormfeltz *v.* Manor Turnpike Co., 13 Pa. St. 560.

86. When consent necessary. — Under the Constitution of Illinois the legislature cannot grant the right to construct and operate a street railroad within any city, town, or incorporated village, except by acquiring the consent of the local authorities having control of the streets; and this applies to horse railways. *Metropolitan City R. Co.* v. *Chicago*, 2 *Am. & Eng. R. Cas.* 291, 96 *Ill.* 620.

Where a charter is granted for the purpose of building and using a passenger railway in certain streets, subject "to all the ordinances of the councils of the said city," the company by accepting the charter agrees to obtain the consent of the councils to its work, agreeably to the ordinances of the city. *Philadelphia* v. *Lombard & S. St. Pass. R. Co.*, 3 *Grant's Cas.* (*Pa.*) 403.

A charter authorized a company to lay tracks along certain streets of a city, "Provided, that before said company shall use and occupy any of said streets, the consent of the councils of the city or borough within which the said street lies shall first be obtained by ordinance duly passed." By a supplementary act, which contained no direction requiring the consent of councils, the company was authorized to lay tracks between certain points, the route between which was partly within the city limits. *Held*, that before tracks could be laid under the latter act the consent of councils must be obtained. *Appeal of Pittsburgh, A. & M. Pass. R. Co.*, 1 *Pennyp.* (*Pa.*) 449.

Though the company was incorporated in 1859, and the supplementary act was passed in 1861, the company was subject to the Act of March 19, 1879, which provides that no street passenger railway shall be constructed without the consent of the local authorities. *Appeal of Pittsburgh, A. & M. Pass. R. Co.*, 1 *Pennyp.* (*Pa.*) 449.

Under Pa. Const. art. 17, § 9, and the Act of May 14, 1889, § 15, the consent of a city to the construction of a street railway upon its highways is a condition precedent thereto, and without it a company incorporated under the act of 1889 has no right, present or prospective, to occupy streets for that purpose. *Larimer & L. St. R. Co.* v. *Larimer St. R. Co.*, 137 *Pa. St.* 533, 20 *Atl. Rep.* 570.

A company not having obtained such consent has no standing by a bill for an injunction to question the right of another company, subsequently incorporated, to occupy streets covered by the prior charter; having itself no right to occupy such streets, the older company cannot be said to suffer special damage. *Larimer & L. St. R. Co.* v. *Larimer St. R. Co.*, 137 *Pa. St.* 533, 20 *Atl. Rep.* 570.

In Texas a street-railway company cannot be incorporated by special act, and the legislature cannot by general law confer on a street-railway corporation the right to establish its roadbed on any street without the consent of the local municipal authorities. (Const. art. 3, § 56; art. 10, § 7.) *Great C. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 26 *Am. & Eng. R. Cas.* 114, 63 *Tex.* 529.

87. When consent not necessary. —The dominant control of highways and streets is vested in the legislative power of the state, and by virtue of legislative enactment a railroad, operated either by steam or animal power, may be constructed across or along them without the consent of the municipal authorities. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

The state has the right to lay an additional servitude upon the streets and squares of the city of Savannah, by granting to a corporation the right to run a street railway through them without the consent of the mayor and aldermen. *Savannah & T. R.*

Co. v. *Mayor, etc., of Savannah*, 45 *Ga.* 602, 3 *Am. Ry. Rep.* 36.

The legislature, unless restricted by the Constitution, may, even without the consent of a municipality, and without allowing it compensation, authorize railroads to be laid in its highways; but the statute may require the consent of the municipality. *Floyd County* v. *Rome St. R. Co.*, 77 *Ga.* 614, 3 *S. E. Rep.* 3.

A village incorporated for the special purpose of being a road district is not one of the municipal corporations whose consent to the construction of a street railway is required by the Street Railway Act of April 10, 1861, § 5; nor is the consent of the trustee of such a corporation necessary, under section 7 of that act, when the railway is laid upon the roadbed of a turnpike company, and in pursuance of an agreement with such company. *Cincinnati & S. G. A. St. R. Co.* v. *Cumminsville*, 14 *Ohio St.* 523.

Pa. Const. of 1874, art. 17, § 9, and the Act of May 23, 1878, § 16, providing that no street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of the local authorities thereof, has no application to a street-railway company which was chartered and had made large expenditures before the adoption of the Constitution, but subsequent to the constitutional amendment of 1867, which amendment only authorized a repeal for cause and on just terms, and did not operate to change the charter of such company, so as to make the consent of the city council a condition precedent to the laying of its tracks in the city, according to its original charter. *Williamsport Pass. R. Co.* v. *Williamsport*, 36 *Am. & Eng. R. Cas.* 125, 120 *Pa. St.* 1, 13 *Atl. Rep.* 496.—DISTINGUISHED IN Junction Pass. R. Co. *v.* Williamsport, 154 Pa. St. 116. FOLLOWED IN Gloninger *v.* Pittsburgh & C. R. Co., 139 Pa. St. 13. QUOTED IN Millvale *v.* Evergreen R. Co., 46 Am. & Eng. R. Cas. 219, 131 Pa. St. 1.—*Stroudsburg* v. *Stroudsburg Pass. R. Co.*, 2 *Pa. Dist.* 35.—DISTINGUISHING Pennsylvania R. Co. *v.* Duncan, 129 Pa. St. 181.

Texas Const. art. 10, § 7, withdraws from the legislature the power to authorize the construction and operation of street railways within any city, town, or village, or upon any public highway, "without first acquiring the consent of the local authorities." This, however, applies to railways for carrying passengers, etc., and not to a road built to carry material used in building the state capitol. *Taylor* v. *Dunn*, 80 *Tex.* 652, 16 *S. W. Rep.* 732.

88. Validity of charter granted subject to local consent.—A charter to a street-railway company, granted subject to the consent or approval of the city authorities, is valid, and is not open to the objection that it is an attempt to delegate legislative powers to the city councils. *Philadelphia* v. *Lombard & S. St. Pass. R. Co.*, 4 *Brews.* (*Pa.*) 14.

89. Power of municipality to consent.—In Texas cities have the power to consent that their streets may be used to a reasonable extent by street railways. *Texas & P. R. Co.* v. *Rosedale St. R. Co.*, 22 *Am. & Eng. R. Cas.* 160, 64 *Tex.* 80.—QUOTING Houston & T. C. R. Co. *v.* Wilson, 60 Tex. 144.

Such power is clearly recognized by Tex. Const. art. 10, § 7, prohibiting the legislature from "granting a right to construct and operate a street railway within any city, town, or village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied." *Mayor, etc., of Houston* v. *Houston City St. R. Co.*, 50 *Am. & Eng. R. Cas.* 380, 83 *Tex.* 548, 19 *S. W. Rep.* 127.—FOLLOWING Gulf City St. R. Co. *v.* Galveston City R. Co., 65 Tex. 502.

90. Extent to which municipality may impose conditions.—The right of a municipality, under the statute, to refuse its consent to the operation of a street railway in its streets is an absolute one, and its power, in the first instance, to impose conditions is unlimited, and in the imposition of further conditions after giving such consent it is only necessary that it keep within the scope of the reservation in the original ordinance. *Detroit* v. *Ft. Wayne & B. I. R. Co.*, 95 *Mich.* 456, 54 *N. W. Rep.* 958.

Under New York Constitution, and the Act of 1886, ch. 65, as amended in the same year by ch. 642, relating to selling the right to construct street railroads, municipal authorities have the absolute power to grant or withhold their consent to the construction of a road, and may impose any condition which, in the exercise of their discretion, they deem proper. *People ex rel.* v. *Barnard*, 36 *Am. & Eng. R. Cas.* 70, 110 *N. Y.* 548, 18 *N. E. Rep.* 354, 18 *N. Y. S. R.* 542; *reversing* 48 *Hun* 57, 15 *N. Y. S. R.* 689.

A common council required, as a condition to its consent, that the purchaser of a street-railroad franchise should carry passengers, for a single fare, to and from points beyond the *termini* of the proposed route over the road of other street railways. *Held*, that this was a condition which it had a right to impose. *People ex rel.* v. *Barnard*, 36 *Am. & Eng. R. Cas.* 70, 110 *N. Y.* 548, 18 *N. E. Rep.* 354, 18 *N. Y. S. R.* 542; *reversing* 48 *Hun* 57, 15 *N. Y. S. R.* 689.

Municipal authorities may impose reasonable conditions to the giving of their consent to the building of a street railway, in addition to those imposed by New York Act of 1890, ch. 505, as amended in 1892, ch. 676, provided they do not contravene the statute, nor relate to matters over which other bodies have complete control. *Abraham* v. *Meyers*, 29 *Abb. N. Cas.* (*N. Y.*) 384.

Where the statute requires street railroads to be constructed within three years, a condition imposed by a municipality, in granting its consent, that the purchaser of the franchise of a road that will cost at least $2,000,000 shall deposit one half the amount, and expend the same within two years, is not unreasonable or unlawful. *Abraham* v. *Meyers*, 29 *Abb. N. Cas.* (*N. Y.*) 384.

The charter of a company subjected the construction and use of its track to the "assent of the city council, upon such terms and conditions," etc., "as said city council may impose." *Held*, that this was sufficient authority for the imposition, by the city, of a money payment for the use of the streets. *Providence* v. *Union R. Co.*, 12 *R. I.* 473.

91. Nature of municipal consent. —Since the adoption of the Constitution of 1870, the right to create and perfect a street-car franchise rests in both the state and the municipality, and the consent of the latter when granted is a part of the franchise; and the fact that the ordinance, when accepted by the company, created a contract between the parties does not affect this view. The charter of defendant is in a sense just as much a contract with the state as is the ordinance with the municipality. *Citizens' Horse R. Co.* v. *Belleville*, 47 *Ill. App.* 388.

Where a city authorizes a company to construct a road on certain streets within a fixed time, the privilege must be used, if at all, during the time limited. The permission thus conferred is a mere license and not a contract; and if the road is not built within the time, no act of revocation or declaration of forfeiture is required to terminate the same. *Atchison St. R. Co.* v. *Nave*, 36 *Am. & Eng. R. Cas.* 29, 38 *Kan.* 744, 17 *Pac. Rep.* 587.

When an act of assembly incorporating a city passenger railway provides that permission must be obtained from the local authorities, who can prescribe reasonable conditions, before the road is constructed, a municipal ordinance passed under the authority of the act and accepted by the company becomes the contract between the railway company and the municipality. *Norristown* v. *Norristown Pass. R. Co.*, 148 *Pa. St.* 87, 23 *Atl. Rep.* 1060.

92. Proper local authorities to consent. — Under N. Y. Street Surface Railway Act of 1884, ch. 252, § 3, which authorizes companies organized under it to acquire a right of way through streets or highways, provided that "the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to construct and operate such railroad * * * be first obtained," where the railroad is proposed to be constructed upon a highway in a town, the "local authorities" whose consent is required are the officers whose duties and powers relate to the supervision, care, and maintenance of the highway, i. e., the highway commissioners of the town. *In re Rochester Elec. R. Co.*, 46 *Am. & Eng. R. Cas.* 157, 123 *N. Y.* 351, 25 *N. E. Rep.* 381, 33 *N. Y. S. R.* 695; *affirming* 57 *Hun* 56, 32 *N. Y. S. R.* 1, 10 *N. Y. Supp.* 379.

Under N. Y. Act of 1890, ch. 565, providing that consent in cities to the building of street railways shall be given by the common council, subject to veto by the mayor, it is not necessary that a full board of aldermen act in the first instance in the matter. It is sufficient if the matter goes before a committee of the board, and their report is afterward approved. *Abraham* v. *Meyers*, 29 *Abb. N. Cas.* (*N. Y.*) 384.

The supervisor of an independent road district is the proper local authority to consent, or to refuse consent, to the occupation of its highways by a street railway, under Pa. Act of 1889. Such district is a part of the township, and is included within the meaning of that word as used by the Constitution and the act of 1889. *Hain* v. *Lebanon & A. St. R. Co.*, 1 *Pa. Dist.* 452.

93. Granting consent by popular vote.—Where the question of giving con-

sent to a company to construct and maintain a street railroad upon the streets of a city is submitted to the electors of the city on the day of the general election, and the ballot upon that proposition is taken at the same place, by the same election officers, and but one poll list made, and all the votes are canvassed and returned, in some of the precincts and wards, upon the same tally sheet and return, but in all of the wards a separate ballot box is prepared into which the votes upon the proposition are deposited, but without other formality to separate the vote of the general election, in order to give the required consent the affirmative of the proposition must receive a majority of all the votes cast. *State ex rel.* v. *Bechel*, 22 *Neb.* 158, 34 *N. W. Rep.* 342.

94. Declaring grant forfeited and withdrawn.—Where a company is authorized by the legislature to construct and operate a railroad through the streets of a city, and the common council thereof gives its assent, on certain conditions, it has no power to annul or impair the grant on account of a failure to complete the road within the time limited by the conditions. *Brooklyn C. R. Co.* v. *Brooklyn City R. Co.*, 32 *Barb.* (*N. Y.*) 358.—FOLLOWING Attorney-General *v.* Mayor, etc., of N. Y., 3 Duer 119.—APPLIED IN Brooklyn City R. Co. *v.* Furey, 4 Abb. Pr. N. S. (N. Y.) 364. DISTINGUISHED IN Atlantic & P. R. Co. *v.* St. Louis, 66 Mo. 228. EXPLAINED IN Brooklyn City & N. R. Co. *v.* Coney Island & B. R. Co., 35 Barb. 364. QUOTED IN Atlantic & P. R. Co. *v.* St. Louis, 66 Mo. 228; Hovelman *v.* Kansas City Horse R. Co., 20 Am. & Eng. R. Cas. 17, 79 Mo. 632; People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173.

A condition that a street railroad shall be completed within a stated time is a condition subsequent, and the franchise vests in the company, subject to be defeated for a failure to comply with the condition; but such failure does not *ipso facto* defeat the franchise, but makes it liable to be defeated at the election of the grantor, which must be declared by judicial decision. *Brooklyn C. R. Co.* v. *Brooklyn City R. Co.*, 32 *Barb.* (*N. Y.*) 358.

And the question whether the acts of the grantor have amounted to a waiver of the conditions imposed can only be determined by the judgment of a court, and not by individuals. *Brooklyn C. R. Co.* v. *Brooklyn City R. Co.*, 32 *Barb.* (*N. Y.*) 358.

95. Right to use street or highway without consent.—Under a provision in the charter of a street-car company that it should not "use any portion of any railroad, turnpike, or artificial road," except for crossings, without consent of the owners, it cannot use a graded and paved street without consent of the city. *Com.* v. *Central Pass. R. Co.*, 52 *Pa. St.* 506.

A company, incorporated under Pa. Act of May 10, 1889, has no right to construct its railway within the limits of a borough, upon the bed of a turnpike road, with the consent of the turnpike company, and without the consent of the borough authorities. *Steelton* v. *East Harrisburg Pass. R. Co.*, 1 *Pa. Dist.* 667.

96. Consent to extensions.—Where the municipal authorities have consented to the extension of a street railroad, the work of extension will not be restrained because the proper street committee has not defined the exact location of the tracks. *Trenton* v. *Trenton Horse R. Co.*, (*N. J. Eq.*) 19 *Atl. Rep.* 263.

Written acceptance by a street-car company of the provisions of a city ordinance, granting it the right to extend its road, with the condition that it waives no vested rights under its charter, is an ample acceptance, and does not change the rights of the parties. *Trenton* v. *Trenton Horse R. Co.*, (*N. J. Eq.*) 19 *Atl. Rep.* 263.

A company by its charter was authorized to occupy certain streets of a city with consent of councils, and such consent should be taken to be given if councils did not within thirty days signify their disapproval. Councils, within the time limited, declared their disapproval, but provided that if the company would bind itself to be subject to all ordinances passed or to be passed the disapproval should have no effect. The company so agreed. By Pa. Act of March 22, 1865, the company was authorized to extend its road on certain streets, subject to all the limitations and restrictions, and with all the privileges granted under the act of incorporation. Subsequent ordinances required the consent of councils for the laying of railway tracks. *Held*, that the company was subject to the ordinances passed subsequent to the act of 1865. *Philadelphia* v. *Citizens' Pass. R. Co.*, 56 *Am. & Eng. R. Cas.* 503, 151 *Pa. St.* 128, 24 *Atl. Rep.* 1099.

When a charter requires the consent of the city council for any extension of the railway lines, and a supplement authorizes the extension of the road without consent, a second supplement which is silent as to consent is to be taken subject to the requirement of the charter that consent shall be obtained. *Philadelphia* v. *Citizens' Pass. R. Co.*, 56 *Am. & Eng. R. Cas.* 503, 151 *Pa. St.* 128, 24 *Atl. Rep.* 1099. *Philadelphia* v. *Lombard & S. St. Pass. R. Co.*, 4 *Brews.* (*Pa.*) 14.

97. Joint use of track.—Where there are two companies, each empowered to construct a railroad through a city to a ferry, and instead of separate tracks consent is given to one company to lay its track on a particular route, upon condition that the other shall have the joint use of it on certain terms, the first company takes its franchise burdened with that condition, and the other is authorized to operate the same kind of a road to the same locality. *Jersey City & H. H. R. Co.* v. *Jersey City & B. R. Co.*, 21 *N. J. Eq.* 550; *reversing* 20 *N. J. Eq.* 61.

In such case the ordinance did not expressly state that the second company should be liable to contribute to the expense of laying the track, or pay for its use; but it provided that in case of disagreement as to the expense or manner of laying the tracks, or the use thereof, such disagreement should be settled by the common council. *Held*, that this presupposed an agreement by the parties concerning the construction of the tracks, or an equivalent for the use, with the condition in case of dispute to leave the matter to the common council. *Jersey City & H. H. R. Co.* v. *Jersey City & B. R. Co.*, 21 *N. J. Eq.* 550; *reversing* 20 *N. J. Eq.* 61.

In such case the failure of the companies to agree does not defeat the right to use the track jointly. The right continues and the disagreement is to be settled by the common council. *Jersey City & H. H. R. Co.* v. *Jersey City & B. R. Co.*, 21 *N. J. Eq.* 550; *reversing* 20 *N. J. Eq.* 61.

Where two companies are authorized to use a track jointly the fact that one company ceases to use the track for a few months while it is in dispute cannot be taken as an abandonment of the track. *Jersey City & H. H. R. Co.* v. *Jersey City & B. R. Co.*, 21 *N. J. Eq.* 550; *reversing* 20 *N. J. Eq.* 61.

98. Legislative confirmation of municipal consent. — Where the common council of a city passes a resolution authorizing the construction of a street railroad, and the legislature subsequently passes an act to confirm the grant and to authorize the road, it must be taken that it was the intention of the legislature to make valid the grant of the city, whether regular or irregular, whether valid or invalid, and whether the consent of the city was sufficient or not. And the effect of the act is a legislative declaration and adjudication that such consent was intended to be given. *People* v. *Law*, 34 *Barb.* (*N. Y.*) 494, 22 *How. Pr.* 109.

That act intended to confer, and actually conferred, an original grant of power to construct said railroad. It had that effect, independent of the consent of the common council; and it was effectual in form to accomplish that purpose. *People* v. *Law*, 34 *Barb.* (*N. Y.*) 494, 22 *How. Pr.* 109.

99. Laying track different from terms of consent.—Where a company is incorporated to construct a road, subject to the consent of the city, and by an ordinance of the city all railway companies are required to submit a plan to a board of surveyors of the city, and such plan is submitted and approved, which shows that the track is to be laid in the middle of a street, the company has no right to lay its track on the side of the street, and may be enjoined from doing so. *Philadelphia* v. *Continental Pass. R. Co.*, 11 *Phila.* (*Pa.*) 315.

100. Publishing notice of application or of consent.—Under Ill. Act in regard to horse and dummy railroads, approved March 9, 1874, the city, town, or village authorities are prohibited from giving consent to construct and operate a horse railroad in the streets, unless at least ten days' public notice of the time and place of presenting the petition shall first have been given by publication in some newspaper published in the city or county where such road is to be constructed. The publication of the report of a committee recommending the granting of such leave, ten days before the adoption of an ordinance authorizing the construction of such road, and the publication of the ordinance, is not a compliance with the statute. *Metropolitan City R. Co.* v. *Chicago*, 2 *Am. & Eng. R. Cas.* 291, 96 *Ill.* 620.

What is known as the Consolidation Act, § 80, providing that no resolution or ordi-

nance of the aldermen of New York city contemplating "the alienation, or appropriation, or leasing of any property of the city" shall be adopted, until the same has been published in a certain way, does not apply to a resolution giving the consent of the city to the building of a street railroad. *Abraham* v. *Meyers*, 29 *Abb. N. Cas.* (*N. Y.*) 384.

101. Filing and recording consent. —In Maine, before the construction of a road across a city street the written assent of the mayor and aldermen must be obtained, stating the manner and conditions upon which such crossing may be made; and this must be recorded in the county commissioners' office. But the provision requiring it to be recorded is merely directory, and does not constitute a condition precedent, to be performed before the company is authorized to proceed with the construction of its road. *Veazie* v. *Mayo*, 45 *Me.* 560.

New York Act of 1884, ch. 252, § 4, relative to the construction of street surface railways in cities, towns, and villages, which declares that the consent of the local authorities shall in all cases be filed in the office of the county clerk of the county in which said railroad is located, does not make it necessary to allege that such consent has been filed as a condition precedent to an application for the appointment of commissioners. *In re People's R. Co.*, 38 *Am. & Eng. R. Cas.* 404, 112 *N. Y.* 578, 20 *N. E. Rep.* 367, 21 *N. Y. S. R.* 496; *affirming* 48 *Hun* 617, *mem.*

Pa. Act of May 14, 1889, § 4, places no restriction as to the filing by a street-railway company, in the office of the secretary of the commonwealth, an exemplification of a resolution extending its route, except that the company must name in the exemplification the streets and highways on which it desires to operate. *In re Easton Transit Co.*, 2 *Pa. Dist.* 649.

The limitation of the statute requiring the consent of the local authorities before beginning the construction of the road refers to the construction of the road, and not to the filing of the exemplification; and where there is a dispute as to the proper location and the consent of local authorities, the secretary's department will not determine the dispute, but will permit the exemplification to be filed, and let the parties settle their controversies in the courts. *In re Easton Transit Co.*, 2 *Pa. Dist.* 649.

3. *Consent of Abutting Owners.*

102. May be authorized without consent.—A grant of authority to lay and operate a railway in the streets of a city, without requiring the consent of owners of property along the route, is lawful. It does not conflict with that clause of the Constitution requiring compensation to be first made. *Paterson & P. Horse R. Co.* v. *Mayor, etc., of Paterson*, 24 *N. J. Eq.* 158.

The legislature has the power to confer the privilege of building and using a horse railroad in the streets of the city of Brooklyn, without the consent of the owners of the soil over which the streets are laid out, because such a use of the street is merely a mode of exercising the public right of travel, and not an appropriation of the property of the owners of the land, requiring compensation in damages. *Brooklyn City & N. R. Co.* v. *Coney Island & B. R. Co.*, 35 *Barb.* (*N. Y.*) 364. — FOLLOWING Brooklyn C. & J. R. Co. *v.* Brooklyn City R. Co., 33 Barb. 420.

103. Consent not required. — The consent of property owners provided for in Ohio Act of 1866, as amended in 1868, to the construction and operation of a new street railroad is not required since the amendment of section 412 of the Municipal Code (67 Ohio L. 77); and the consent mentioned in that section, by whomsoever obtained, enures to the benefit of the lowest bidder. *State ex rel.* v. *Bell*, 34 *Ohio St.* 194, 21 *Am. Ry. Rep.* 84.

A street-railway company organized under Tenn. General Incorporation Act of 1875, ch. 142, § 13, having, by lawful contract with the city, permission to construct its road over the public streets, is not required, in addition, to obtain consent of abutting lot owners where they do not own the fee in the street, or in any case where the proposed road is not of a character to be an additional burden upon the fee in the street. *Smith* v. *East End St. R. Co.*, 38 *Am. & Eng. R. Cas.* 470, 87 *Tenn.* 626, 11 *S. W. Rep.* 709.

104. Acquiescence as evidence of consent.—Where the right to allow a city railway in a street is made to depend upon obtaining the consent of the owners of two thirds of the property on such street, by lineal measure, after the lapse of over ten years, and the acquiescence of property holders, and the destruction of all written

evidences by fire, slight evidence is sufficient to establish the fact of consent. *Chicago City R. Co.* v. *People ex rel.*, 73 *Ill.* 541.

Under a charter requiring that before a railway should be constructed in the streets of a city the consent of a majority of the property owners along the proposed route, and also of the city, should be first obtained, the consent of such majority is not a condition precedent to the consent of the city. The two consents are independent. In such case, the acquiescence of the property owners, in standing by without protest and seeing the company construct and operate its road under a claim of right, will be regarded as evidence of consent. *Paterson & P. Horse R. Co.* v. *Mayor, etc., of Paterson*, 24 *N. J. Eq.* 158.—DISTINGUISHED IN Meredith *v.* Sayre, 32 N. J. Eq. 557; Cape May & S. L. R. Co. *v.* Cape May, 9 Am. & Eng. R. Cas. 474, 35 N. J. Eq. 419.

105. Consent to lay track opposite public square.—For the purpose of consent, required by the charter of a street-railroad company to be obtained from property owners along the proposed route of the railway before it can be laid, the city corporation is to be regarded as the owner of an open public square dedicated to the public use forever, whether the fee be in the corporation or not, or in whomsoever it may be. *Paterson & P. Horse R. Co.* v. *Mayor, etc., of Paterson*, 24 *N. J. Eq.* 158.

106. When consent a condition precedent.—The power conferred by Ill. General Incorporation Act upon the common councils of cities to grant the use of streets for railway purposes lies dormant, and cannot be exercised until the requisite number of lot owners along the street authorize its exercise, by petition. When this is done, the council is invested with power to act, and not before; and this applies to all railroads, whether operated by horse or steam power. *Hunt* v. *Chicago H. & D. R. Co.*, 121 *Ill.* 638, 13 *N. E. Rep.* 176, 11 *West. Rep.* 45; *affirming in part* 20 *Ill. App.* 282.

The act for the incorporation of cities and villages, art. 5, § 1, par. 90, prohibiting the grant to any steam or horse railway company of the right to lay any railroad tracks in any street except upon a petition of the owners of the land representing more than one half of the frontage of the street, is a limitation upon the power granted by paragraphs 9, 24 and 25 of the same section. *Hunt* v. *Chicago H. & D. R. Co.*, 121 *Ill.* 638, 13 *N. E. Rep.* 176, 11 *West. Rep.* 45; *affirming in part* 20 *Ill. App.* 282.

The above paragraph is not repealed by the act of March 19, 1874, entitled "An act in regard to horse and dummy railroads," there being no inconsistency between their provisions. *Hunt* v. *Chicago H. & D. R. Co.*, 121 *Ill.* 638, 13 *N. E. Rep.* 176, 11 *West. Rep.* 45; *affirming in part* 20 *Ill. App.* 282.

Where a company is enjoined from constructing a horse railroad on the ground that it has not obtained the consent of a majority of the abutting property owners, as required, which ground is denied by the defendant's answer, the answer to be good must set out the names of the property owners who consent, and show that they are a majority. *Brooklyn City & N. R. Co.* v. *Coney Island & B. R. Co.*, 35 *Barb.* (*N. Y.*) 364.

Under New York Act of 1854, ch. 140, which prohibits cities from giving their consent, where the railroad begins and ends in the city, unless a majority of the property owners upon the street have also consented, a consent given by the municipality without the consent of such property owners is a nullity. *Schaper* v. *Brooklyn & L. I. C. R. Co.*, 4 *N. Y. S. R.* 860, 42 *Hun* 657; *affirmed in* 124 *N. Y.* 630, *mem.*, 3 *Silv. App.* 335, 26 *N. E. Rep.* 311, 35 *N. Y. S. R.* 112.

The exception provided for in the charter of the city of Brooklyn (Laws 1873, ch. 863, title 19, § 23) of "such other companies as are or may be authorized by law" means those authorized by special act, and the defendant is not so authorized. *Schaper* v. *Brooklyn & L. I. C. R. Co.*, 4 *N. Y. S. R.* 860, 42 *Hun* 657; *affirmed in* 124 *N. Y.* 630, *mem.*, 3 *Silv. App.* 335, 26 *N. E. Rep.* 311, 35 *N. Y. S. R.* 112.

Repealing legislation which should dispense with the existing requirement of consent by the property owners would be as unconstitutional as affirmative legislation assuming to authorize the building of street railroads without such consent. *Schaper* v. *Brooklyn & L. I. C. R. Co.*, 4 *N. Y. S. R.* 860, 42 *Hun* 657; *affirmed in* 124 *N. Y.* 630, *mem.*, 3 *Silv. App.* 335, 26 *N. E. Rep.* 311, 35 *N. Y. S. R.* 112.

Under Ohio Act of 1860, § 15, a majority in interest of the property holders must consent to the building of a street railroad, to be determined by reference to the assessed value of the property located on the street or avenue. *Held*, that the action of

the city council in granting permission is not conclusive as against the property owners. *Roberts* v. *Easton*, 19 *Ohio St.* 78.—REVIEWED IN Cincinnati College *v.* Nesmith, 2 Cin. Super. Ct. 24.

107. Consent to one track does not authorize a second.—The fact that a majority in interest of the abutting property owners have consented to a single track is not sufficient to authorize a double track a year later, when others may have become property owners on the street. *Roberts* v. *Easton*, 19 *Ohio St.* 78.

108. Burden on company to show consent.—As a railroad constructed in a public street without authority would be a public nuisance, the burden of proof is upon the company claiming the right to construct it to show that it has such authority. *Hilton* v. *Thirty-fourth St. R. Co.*, 1 *How. Pr. N. S.* (*N. Y.*) 453.

109. Change of location.—Plaintiff granted a right of way to a street railroad to lay a track in the highway in front of his premises, and in pursuance of such grant the railroad was located in the centre of the street. *Held*, that such location was a practical location of the right of way, and that defendant could not afterwards, by virtue of such grant, take up the track, and lay a new track between the sidewalk and the curb. *McCruden* v. *Rochester R. Co.*, 25 *N. Y. Supp.* 114, 5 *Misc.* 59; *affirmed in* 77 *Hun* 609.—FOLLOWING Edridge *v.* Rochester City & B. R. Co., 54 Hun 194, 7 N. Y. Supp. 439.

110. Consent of either abutters or city.—Where a charter provides that a street railroad may be located in any street, with the consent of the city council, or of a majority of the abutters, consent of either is sufficient. *Brooklyn City & N. R. Co.* v. *Coney Island & B. R. Co.*, 35 *Barb.* (*N. Y.*) 364.—FOLLOWING Brooklyn C. & J. R. Co. *v.* Brooklyn City R. Co., 33 Barb. (N. Y.) 420.

111. Enjoining company that proceeds without consent.—Where a company chartered under New York Rapid Transit Act of 1875 has not obtained the consent of the municipal authorities, or of commissioners, or the abutting property owners, it has no right in the street that it can enforce by injunction to prevent another company from constructing the road. *New York Cable R. Co.* v. *Forty-second St., M. & St. N. A. R. Co.*, 13 *Daly* (*N. Y.*) 118.

Where a statute provides that city authorities shall not permit the construction of a street railroad without the consent of a majority in interest of the property owners, any abutting property owner may enjoin the construction of a road until such consent is obtained. *Roberts* v. *Easton*, 19 *Ohio St.* 78.

112. Either consent or condemnation necessary in New York.—Under N. Y. Const. art. 3, § 18, providing that "no street railroad shall be authorized by law without the consent of a fixed proportion of adjacent property owners, or, if that cannot be had, without the determination of commissioners appointed by the general term" and the confirmation of their report, a report by commissioners has no force until confirmed; and it is discretionary with the general term to confirm the report or not, and their decision is not reviewable on appeal. *In re Kings County El. R. Co.*, 2 *Am. & Eng. R. Cas.* 431, 82 *N. Y.* 95; *dismissing appeal from* 20 *Hun* 217.—APPLYING In re New York C. & H. R. R. Co., 64 N. Y. 60; In re New York El. R. Co., 70 N. Y. 327.—QUOTED IN Re Union El. R. Co., 112 N. Y. 61, 19 N. E. Rep. 664, 20 N. Y. S. R. 498, 51 Hun 644, 2 L. R. A. 359. REVIEWED IN Re East River B. & C. I. S. T. Co., 26 Hun 490.

Under the above constitutional provision and N. Y. Act of 1884, ch. 252, where the court is applied to for the appointment of commissioners it cannot go into the question of the utility of the proposed road; nor can it refuse the application because another company has refused its consent. *In re Thirty-fourth St. R. Co.*, 102 *N. Y.* 343, 7 *N. E. Rep.* 172, 2 *N. Y. S. R.* 33; *reversing* 37 *Hun* 442, 2 *How. Pr. N. S.* 369.—FOLLOWED IN Forty-second St. & G. S. F. R. Co. *v.* Thirty-fourth St. R. Co., 102 N. Y. 691. REVIEWED IN Re Rochester Elec. R. Co., 123 N. Y. 351.

Both the Constitution and the statute of 1884 make it necessary to have the consent of the owners of one half in value of the property bounded on each street or portion of a street upon which it is proposed to construct a street railroad, and not merely the consent of the owners of one half in value of the property bounded upon the whole of the route over which it is proposed to build the road. *Hilton* v. *Thirty-fourth St. R. Co.*, 1 *How. Pr. N. S.* (*N. Y.*) 453.

If such consents cannot be had, then the road must be authorized by three commis-

sioners appointed by the general term of the supreme court, and their report confirmed by the court. *Hilton* v. *Thirty fourth St. R. Co.*, 1 *How. Pr. N. S.* (*N. Y.*) 453.

The act of May 6, 1884, provides two modes in which a company may acquire a right to construct and operate its road. One is by obtaining the consent in writing of the owners of one half in value of the property bounded on the street or highway where the road is to be constructed, and the consent of the local authorities having control of the same. The other is by applying to the general term for the appointment of three commissioners, where such consent cannot be obtained, to report whether the road ought to be constructed, and the confirmation of a favorable report by the court; but the statute does not define the order in which the various steps prescribed must be taken. If the property owners refuse their consent, the appointment of commissioners may be asked for before the consent of the local authorities is obtained. (Daniels, J., dissenting.) *In re Broadway Surface R. Co.*, 34 *Hun* (*N. Y.*) 414.

The establishment of a horse railroad in a public street is the imposition of an additional burden upon the land of the proprietor, and cannot lawfully be done without a grant from the owner or procuring the land to be condemned for that purpose. *Thayer* v. *Rochester City & B. R. Co.*, 15 *Abb. N. Cas.* (*N. Y.*) 52.—APPROVING Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404.

113. Consent need not be under seal.—N. Y. Const. art. 3, § 18, prohibiting the construction or operation of street railroads, "except upon the condition that the consent of the owners of one half in value of the property bounded on" the street or highway be obtained, does not require that the consent of the property owners should be under seal, or that it should convey to the company any interest which the abutting owners may have in the street or highway. *In re Cortland & H. Horse R. Co.*, 31 *Hun* (*N. Y.*) 72; *affirmed in* 98 *N. Y.* 336.

114. Proceeding to condemn—Necessary averment as to consent.—In an application for the appointment of commissioners, under the New York statute, the affidavit must show that the consent of the required number of abutting owners could not be obtained, and must also state facts so showing. A general statement that the owners declined to consent, or that such consents could not be obtained by reason of the absence of the owners, merely states inferences and conclusions, and is not sufficient. *In re New York Cable R. Co.*, 36 *Hun* (*N. Y.*) 355.—DISTINGUISHED IN Re Suburban Rapid Transit Co., 38 Hun 553. RECONCILED IN Re People's R. Co., 38 Am. & Eng. R. Cas. 404, 112 N. Y. 578; In re People's R. Co., 21 N. Y. S. R. 496.

115. Changing motive power—Consent not required.—The provision of the New York Const. art. 3, § 18, that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of half in value of the property bounded on, and the consent also of the local authorities having control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained," does not apply where it is proposed to change the motive power of a street railroad to cable or electricity, instead of animal or horse power, and a statute which authorizes a street railway to make such change upon the consent only of one half in value of the abutting proprietors is valid. *In re Third Ave. R. Co.*, 43 *Am. & Eng. R. Cas.* 222, 121 *N. Y.* 536, 24 *N. E. Rep.* 951, 31 *N. Y. S. R.* 693; *reversing* 56 *Hun* 537, 31 *N. Y. S. R.* 645, 9 *N. Y. Supp.* 686, 833.—DISTINGUISHING Astor *v.* Arcade R. Co., 113 N. Y. 93. FOLLOWING In re New York El. R. Co., 70 N. Y. 327.

4. *Time within Which to Construct Road.*

116. When time begins to run.—Under Cal. Civil Code, § 502, the period of three years within which a street railway must be completed begins from the date of the commencement of the work, and not from the date of the ordinance granting the right of way; and at any time before the expiration of that time the grantee of the franchise may, with the consent of the authorities granting the right of way, abandon the uncompleted portion. *People ex rel.* v. *Los Angeles Elec. R. Co.*, 91 *Cal.* 338, 27 *Pac. Rep.* 673.

117. Absolute forfeiture without suit.—Where the legislature grants a franchise to construct a street railroad within a certain time, with a condition that if the provisions of the act are not complied with

the franchise shall be forfeited, a failure to lay the track within the time limited works a forfeiture of the right, without a suit by the state, and the legislature may confer the franchise upon any other company or person. *Oakland R. Co.* v. *Oakland, B. & F. V. R. Co.*, 45 *Cal.* 365, 5 *Am. Ry. Rep.* 148.

118. Proceeding by people to declare forfeiture.—If a company fails to lay its tracks and to operate its road within the time and in the manner substantially as it is required to, or if, in the management of its cars, it unlawfully occupies or obstructs public streets, the remedy is, in the one case, by proceeding on behalf of the public, by the attorney-general, to annul and forfeit the franchise, and in the other, by indictment or proceedings under the statute. *Elmira* v. *Maple Ave. R. Co.*, 21 *N. Y. S. R.* 544, 4 *N. Y. Supp.* 943, 51 *Hun* 638.—QUOTING Moore *v.* Brooklyn City R. Co., 108 N. Y. 98, 13 N. Y. S. R. 97.

119. Forfeiture may be waived.—A city ordinance requiring a passenger-railway company to commence the work of constructing its tracks within a prescribed time is intended for the benefit of the city, and its authorities may waive it at pleasure. *Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603.

120. Forfeiture for failing to begin work within one year.—Under Cal. Code, § 502, mere failure by a street-car company to commence work within one year does not work a forfeiture. It must fail both to commence work within the year and to complete the road within three years in order to work a forfeiture; and even then it is optional with the authorities granting the right whether the forfeiture shall be total or partial. (Ross, J., dissenting.) *Omnibus R. Co.* v. *Baldwin*, 1 *Am. & Eng. R. Cas.* 316, 57 *Cal.* 160.

The general law under which a company was chartered required that work upon the road should be commenced within one year, but how much work, or at what point, or in what manner it should be done, was not specified. The trial court found that work was done at a certain place on the road within one year. *Held*, that the question whether the company did or did not commence the work within the year was a question of fact for the trial court, and the appellate court would not disturb its findings, where there was some evidence that work was commenced within the year. The amount of work done is not controlling. *Omnibus R. Co.* v. *Baldwin*, 1 *Am. & Eng. R. Cas.* 316, 57 *Cal.* 160.

IV. CONSTRUCTION AND REPAIR OF TRACK OR STREET.

1. *In General.**

121. Conditions precedent to right to construct road.—The filing of a certificate of incorporation by a horse-railroad company, reciting that fifty per cent. of the capital stock had been paid in, as required by the statute, when in fact it had not and was not until some time thereafter, does not render a contract for building the road and the obligations incurred for that purpose absolutely void. Such contracts and obligations may be ratified by the subsequent action of the stockholders. *Kelley* v. *Newburyport & A. Horse R. Co.*, 24 *Am. & Eng. R. Cas.* 27, 141 *Mass.* 496, 6 *N. E. Rep.* 745.

Under N. Y. Act of 1868, ch. 842, creating defendant company, and under the several amendments thereto, the company was not authorized to begin the construction of its road until it proved to a board of engineer commissioners that the full amount of its stock had been subscribed in good faith, and ten per cent. thereof paid in, and until the board had made a certificate, as required by the original act. *Bailey* v. *New York Arcade R. Co.*, 1 *N. Y. Supp.* 304, 48 *Hun* 621, 16 *N. Y. S. R.* 1007; *affirmed in* 113 *N. Y.* 615, 20 *N. E. Rep.* 594, 22 *N. Y. S. R.* 1. —FOLLOWING Astor *v.* New York Arcade R. Co., 1 N. Y. Supp. 174.

122. Right to construct switches and turnouts.—A charter contained a provision that "said railroad shall be laid out by the mayor and aldermen in like manner as highways are laid out." A single-track railroad was laid out by the mayor and aldermen, without any turnouts, but with a provision in the record of the laying out that "said horse-railroad company may construct such suitable turnouts on either side of said centre line as they may find necessary in the prosecution of the business to be done by said railroad." *Held*, that the company could not construct a turnout, although necessary for its business and required for the public conven-

* Rights, duties, and obligations of street railways with respect to streets, see note, 25 AM. ST. REP. 475.

lence, without a laying out by the mayor and aldermen. *Concord* v. *Concord Horse R. Co.*, 38 *Am. & Eng. R. Cas.* 425, 65 *N. H.* 30, 18 *Atl. Rep.* 87.

The grant of the right to construct a street railway carries with it as an incident the right to construct such turnouts and switches as may be necessary for the successful operation of the road; but until the city council has refused permission to put in additional switches, the district court has no authority to act by injunction. The right of the city to be consulted about the situation and construction of the side tracks is of equal dignity with the right of the railway company to construct them; and until it be shown that the city has waived its privilege or declined to act, the railway company is not entitled to a writ of injunction to control the action of the city in that respect. *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

123. Power to authorize additional tracks.—Mass. Act of 1874, ch. 29, § 11, provides that the board of aldermen of any city, and the selectmen of any town, shall authorize the extension of street railways within the limits of the city or town "whenever it can be done without entering upon or using the tracks of any other street-railway corporation, under such restrictions as they deem the interests of the public may require." *Held*, that one company may be authorized to locate additional tracks, not connected with its existing tracks except by the tracks of another company. *South Boston R. Co.* v. *Middlesex R. Co.*, 121 *Mass.* 485.

The word "extend" as used in the above section and in section 12, in its primary sense, when applied to a railroad track or another line, imports a continuation of the line without a break; but in the above statute it is not used in this restricted sense. The object of the legislature was to delegate to the local authorities of cities and towns the power of authorizing and controlling the location of street railways, and to obviate the necessity of going to the legislature whenever it was desired to establish a new street railway, or an existing company desired to locate additional tracks. *South Boston R. Co.* v. *Middlesex R. Co.*, 121 *Mass.* 485.

124. Conforming to street grade.* —A city ordinance authorized the construction of a street railroad, but provided that the tracks "shall be laid in accordance with the grades of the streets as now or as hereafter may be established"; that whenever a change of grade is made the railroad company, after due notice, "shall, at their own expense, conform and adjust the tracks of the railroad to such changed grades," and that the company "shall keep in good repair and order the space between the tracks or rails." *Held*, that the company, after it had constructed its road in a street, was bound to raise its roadbed to a grade established by the city. *Little Rock* v. *Citizens' St. R. Co.*, 50 *Am. & Eng. R. Cas.* 456, 56 *Ark.* 28, 19 *S. W. Rep.* 17.—REVIEWING District of Columbia *v.* Washington & G. R. Co., 4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361; Ashland St. R. Co. *v.* Ashland, 78 Wis. 271, 47 N. W. Rep. 619.

General authority to a city to "make, grade, repair, and improve streets" includes the power of determining what a grade shall be; and the power is not exhausted, when one grade is fixed on a particular street, by the fact that a street-car line is laid thereon. The power may be exercised, or new grades established, as often as the public good requires it, though the result be to change a previous grade. *Karst* v. *St. Paul, S. & T. F. R. Co.*, 22 *Minn.* 118.

125. Forfeiture for failure to lay or extend tracks as required by charter.—Defendant company, organized in pursuance of N. Y. Act of 1858, ch. 303, and which had constructed and was operating its road in the city of Brooklyn, was, by an amendment passed in 1860, ch. 461, authorized to lay tracks for several distinct routes, some of the routes to be "extended," and others to be laid through certain streets "whenever they shall have been legally opened and graded" (§ 1). Defendant was required to "complete the tracks upon the said several streets and avenues or roads named" on or before October 1, 1861, "or as soon thereafter as the said streets and avenues within said city shall have been opened, graded, and paved, and upon any planked road or roads whenever the consent of the plank-road companies shall have been obtained." Defendant claimed it was not bound to build its road on any one of the routes until all the streets upon it were opened and graded so that the road could be constructed on the whole route. *Held*, untenable; defendant

* See also *post*, **173.**

was required to lay its tracks within the time specified upon such of the streets named as were opened and graded, and upon the other streets as soon as they were opened, graded, and paved; that defendant could not accept the franchises and leave them in abeyance; that the fact that it would not have been profitable to build roads on the routes specified until each route was opened the whole length thereof was no excuse for failure to comply with the requirements of the act; that such failure was a good ground for forfeiture; and that the court had power to declare the franchises forfeited. *People* v. *Broadway R. Co.*, 48 *Am. & Eng. R. Cas.* 692, 126 *N. Y.* 29, 26 *Abb. N. Cas.* 407, 26 *N. E. Rep.* 961, 36 *N. Y. S. R.* 376; *reversing* 56 *Hun* 45, 29 *N. Y. S. R.* 343, 9 *N. Y. Supp.* 6.

Under a requirement in a charter that a company should build upon any plank road whenever the consent of the plank-road company could be obtained, it is the duty of the company to use reasonable diligence to obtain such consent; and, therefore, it is no answer that it did not appear that such consent had been obtained. *People* v. *Broadway R. Co.*, 48 *Am. & Eng. R. Cas.* 692, 126 *N. Y.* 29, 26 *Abb. N. Cas.* 407, 26 *N. E. Rep.* 961, 36 *N. Y. S. R.* 376; *reversing* 56 *Hun* 45, 29 *N. Y. S. R.* 343, 9 *N. Y. Supp.* 6.

It was claimed by the company that as by an act passed in 1867, ch. 905, it was prohibited from building its road on one of the avenues named, this was an answer to its default as to that avenue. *Held*, untenable, as at the time of the passing of said act defendant had been in default for over five years, and so there was good ground for forfeiture. *People* v. *Broadway R. Co.*, 48 *Am. & Eng. R. Cas.* 692, 126 *N. Y.* 29, 26 *Abb. N. Cas.* 407, 26 *N. E. Rep.* 961, 36 *N. Y. S. R.* 376; *reversing* 56 *Hun* 45, 29 *N. Y. S. R.* 343, 9 *N. Y. Supp.* 6.

Defendant was not aided by the acts of 1875, ch. 598, 1879, ch. 350, or 1882, ch. 405, each of which extended for two years the time for the completion of the road of any company which had been unable to construct its road within the time specified in its charter. The act of 1882 did not apply to defendant company, as it did not apply to any corporation which had already commenced the construction of its road; and none of the acts applied, as it did not appear to be unable from any cause to construct the roads it was bound to construct. *People* v. *Broadway R. Co.*, 48 *Am. & Eng. R. Cas.* 692, 126 *N. Y.* 29, 26 *Abb. N. Cas.* 407, 26 *N. E. Rep.* 961, 36 *N. Y. S. R.* 376; *reversing* 56 *Hun* 45, 29 *N. Y. S. R.* 343, 9 *N. Y. Supp.* 6.

The extensions in the various acts were for terms of two years beyond the time previously limited, so that if they did apply to defendant their combined effect, at most, would be to extend the time for six years from October 1, 1861. *People* v. *Broadway R. Co.*, 48 *Am. & Eng. R. Cas.* 692, 126 *N. Y.* 29, 26 *Abb. N. Cas.* 407, 26 *N. E. Rep.* 961, 36 *N. Y. S. R.* 376; *reversing* 56 *Hun* 45, 29 *N. Y. S. R.* 343, 9 *N. Y. Supp.* 6.

126. Right to lay double track.— If a company has the authority to build a line of single or double track, the construction of a single track does not exhaust the power or preclude a later change to a double track when the business demands it. *Ransom* v. *Citizens' R. Co.*, 104 *Mo.* 375, 16 *S. W. Rep.* 416.

A municipal ordinance construed to authorize the substitution by the company of a double track for a single track. *Ransom* v. *Citizens' R. Co.*, 104 *Mo.* 375, 16 *S. W. Rep.* 416.

127. Right to move depot and abandon part of track. — An injunction will not be granted restraining a city railroad company from moving its depot and business to a safer and more convenient place for the traveling public, thereby abandoning a portion of its road, where it appears that no public injury will result. *Moore* v. *Brooklyn City R. Co.*, 36 *Am. & Eng. R. Cas.* 76, 108 *N. Y.* 98, 15 *N. E. Rep.* 191, 13 *N. Y. S. R.* 97; *affirming* 36 *Hun* 642, *mem.*

128. When company may lay tracks where it deems best.— Where a company has permission from the legislature and the city council, it can lay its track in the street wherever, in its opinion, it is to the best interest of the company; but if laying it near the sidewalk of an abutting owner should cause special damage to his property, the company is liable. *Campbell* v. *Metropolitan St. R. Co.*, 82 *Ga.* 320, 9 *S. E. Rep.* 1078.

But in order to recover damages in such case the complaint must allege that the property of the abutting owner was damaged by the location of the track. It is not enough to allege that the track was laid so

near the sidewalk that the horses and mules sometimes got on the sidewalk in front of plaintiff's property, "greatly to the annoyance and disturbance of himself and his family." *Campbell* v. *Metropolitan St. R. Co.*, 82 *Ga.* 320, 9 *S. E. Rep.* 1078.

129. Right of city to impose conditions as to use of streets.—Where a charter authorizes the company to construct its road in the streets of a city, its officers are not liable to indictment for obstructing the streets where there is nothing to show that there was any obstruction other than what necessarily resulted from the prosecution of the work. The city may pass proper rules and regulations respecting the road, but it cannot force the company to enter into a contract respecting the manner of construction and use of the road. *Frayser* v. *State*, 16 *Lea* (*Tenn.*) 671.

In such case a provision in the company's charter that it "may" enter into contracts with the city or other parties cannot be construed that it "must" do so. This is a grant of power which may or may not be exercised, at the election of the company. *Frayser* v. *State*, 16 *Lea* (*Tenn.*) 671.

130. Power of court of equity to compel construction.—A provision in a charter that the company shall have power to construct its road "from" a certain borough line construed as imperative, and does not give the company the power to construct its road from a point some sixty rods from such line. *Com.* v. *Erie & N. E. R. Co.*, 27 *Pa. St.* 339.

And a provision giving a company "power and authority to lay out and construct a railway" is imperative. A court of equity has power to compel a city railroad company to build its road where it has entered into such a contract with the city as obliges it to complete the said road. *Martin* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 316.

131. Duty to fence embankment.—Where a company, in passing a sharp curve in laying its track, leaves the highway and constructs its road on an embankment on private property, it is under no obligation to fence the embankment to prevent persons who walk over it, without the invitation or permission of the company, from falling therefrom into a stream of water below. *Hooper* v. *Johnstown, G. & K. Horse R. Co.*, 13 *N. Y. Supp.* 151, 59 *Hun* 618, *mem.*, 35 *N. Y. S. R.* 503; *affirmed in* 128 *N. Y.* 613, *mem.*, 28 *N. E. Rep.* 252, *mem.*—APPLYING Cusick *v.* Adams, 115 N. Y. 55, 21 N. E. Rep. 673.

132. When road deemed completed.—Where a company is required to complete its road within a stated time, and it is extended for a short distance over a projected street that it is the purpose to construct over the bed of a navigable river, but the street is never opened, whereby it is rendered impossible to lay the track, the road will be deemed completed by laying it as far as the street is constructed. *In re Metropolitan El. R. Co.*, 12 *N. Y. Supp.* 506.

2. *Paving, Repairing, and Restoring Street or Track.*

a. Paving and Repaving.*

133. Generally.—An ordinance requiring a street railroad to grade, pave, macadamize, fill, or plank so much of streets as are covered by their tracks, and exempting the company from assessments therefor, is constitutional. *Parmelee* v. *Chicago*, 60 *Ill.* 267.—FOLLOWING Chicago *v.* Sheldon, 9 Wall. (U. S.) 50. MODIFYING Chicago *v.* Baer, 41 Ill. 306.

A municipal ordinance allowed a street-railway company to double its track throughout a certain street, but stipulated that it should thereafter bear all the expense of repaving so much of the street as was occupied by its tracks, and should relay its tracks in the middle of the street. *Held*, that the ordinance applied to the whole street, and that if the company availed itself of the permission in part, it accepted the conditions in full, and lost the benefit of former exemptions or privileges that were inconsistent with it. *Detroit* v. *Detroit City R. Co.*, 37 *Mich.* 558.

Section 1 of Kansas City ordinance passed June 29, 1880, relating to street railways does not require such railways, or any officer thereof, to pave the streets on which their cars are operated. *Kansas City* v. *Corrigan*, 86 *Mo.* 67.

The consent of the city councils to authorize defendant company to occupy certain streets was given on condition that the company should first comply with the ordinances regulating passenger-railway companies. One of said ordinances required all

* Obligation of street railways to pave streets, see note, 25 AM. ST REP. 481.

such companies to give bond to comply with its provisions, one of which was that they should pave and maintain all streets occupied by them. Defendant, having filed the bond required, is bound to pave all of the streets on which its tracks are laid. *Frankford & S. P. C. Pass. R. Co.* v. *Philadelphia*, (*Pa.*) 25 *Am. & Eng. R. Cas.* 262, 4 *Atl. Rep.* 550.

An ordinance requiring a street-railway company to pave the street at the sides of its rails with cubic blocks of granite is reasonable and will be enforced. *Philadelphia* v. *Empire Pass. R. Co.*, 7 *Phila.* (*Pa.*) 321.

134. What agreement to pave embraces.—To pave a street is not necessarily to change its grade, as a paving may be done in any way that will make a compact, even, hard surface. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

"Macadamizing" is not paving within the meaning of a statute and ordinance requiring street-car companies to pave streets. *Leake* v. *Philadelphia*, (*Pa.*) 24 *Atl. Rep.* 351.

135. Paving "in and about the rails." — Defendant company contracted with a city to pave the streets where its track was laid, "in and about the rails," and to "keep the same in repair." An abutting lot owner had a license from the city to dig a trench across the street and under the track to connect with a sewer. Defendant laid down planks to bridge the excavation, but plaintiff, who was driving on the street, was injured by reason of the planks giving way and one wheel of his truck going into the excavation. *Held*, that the company was bound, under its contract with the city, to keep the street in and about its rails in a safe condition, and was liable for a failure to do so; and the fact that the lot owner had a license to dig the trench did not absolve the company from its obligation to protect the public. (Rapallo, Earl, and Hand, JJ., dissenting.) *McMahon* v. *Second Ave. R. Co.*, 75 *N. Y.* 231; *affirming* 11 *Hun* 347.—FOLLOWED IN Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 26 Am. & Eng. R. Cas. 546, 102 N. Y. 572, 7 N. E. Rep. 905, 2 N. Y. S. R. 526.

The requirement to pave "in and about the rails" included so much of the street surface outside the rails as was disturbed in laying the track, and in the absence of evidence as to how far that space extended, it was a reasonable presumption that it included as much as one foot outside the rails. *McMahon* v. *Second Ave. R. Co.*, 75 *N. Y.* 231; *affirming* 11 *Hun* 347.

Conceding defendant was not bound to repair, it had the right so to do to make the street passable for its own vehicles, and having volunteered to make the passage safe over the excavation, and in attempting to do so having left the space in reality insecure, while giving it an appearance of safety which was delusive and misleading, it was liable. *McMahon* v. *Second Ave. R. Co.*, 75 *N. Y.* 231; *affirming* 11 *Hun* 347.

A street-car company covenanted with a city "to pave the streets in and about the rails of its track in a permanent manner, and to keep the same in repair to the satisfaction of the street commissioner." *Held*, that the obligation thus created extended to the entire space between two tracks. *Mayor, etc., of N. Y.* v. *Second Ave. R. Co.*, 26 *Am. & Eng. R. Cas.* 546, 102 *N. Y.* 572, 7 *N. E. Rep.* 905, 2 *N. Y. S. R.* 526, 55 *Am. Rep.* 839; *affirming* 31 *Hun* 241. — FOLLOWING McMahon *v.* Second Ave. R. Co., 75 N. Y. 231.

136. When obligation to keep street in repair includes paving.—Under an ordinance requiring a street-railway company to keep the portions of streets between its tracks and two feet on each side thereof in as good repair and condition as the city keeps the balance of the streets, and of even grade with the street, it is the duty of the company not only to keep the space between its tracks and two feet on each side of even grade with the balance of the street, and in as good repair as the city keeps the balance of the street, but also to pave the portions of streets between its tracks and two feet on each side thereof when the city paves the balance of the streets. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

If the balance of the street has in fact been paved under the supervision and control of the city, and is kept in this condition, this is sufficient to require the company to pave; and it is immaterial that there may have been irregularity in the procedure, or a departure from prescribed methods for procuring the pavement of streets. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590,

137. When not.—An ordinance authorizing the use of streets for a street railway provided that the company should boulder the space between rails, and pave, boulder, or otherwise improve and keep in repair two feet on the outside of each rail. An amendatory ordinance, passed twelve years later, provided, instead, that the company should keep the space between the rails, together with all bridges and crossings of gutters, and two feet on the outside of each rail, in good repair. Both ordinances were accepted by the company. The amendatory ordinance was passed in consideration that the company should unite its two disconnected systems of railway, charge a fare of five cents for transportation to any part of the city, and construct within a given time certain additional lines. *Held*, that a compliance by the company with the conditions of the ordinance was a sufficient consideration for the amended ordinance, and that when it was accepted by the company and its conditions complied with it became a binding contract. *Western P. & S. Co.* v. *Citizens' St. R. Co.*, 46 *Am. & Eng. R. Cas.* 176, 128 *Ind.* 525, 26 *N. E. Rep.* 188, 28 *N. E. Rep.* 88.—DISTINGUISHING Pennsylvania R. Co. *v.* Miller, 132 U. S. 75; Sioux City St. R. Co. *v.* Sioux City, 138 U. S. 98. FOLLOWING Coast Line R. Co. *v.* Mayor, etc., of Savannah, 30 Fed. Rep. 646; State ex rel. *v.* Corrigan Con. St. R. Co., 85 Mo. 263; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50.—REVIEWED IN Binghamton *v.* Binghamton & P. D. R. Co., 41 N. Y. S. R. 83, 61 Hun 479, 16 N. Y. Supp. 225.

Where an ordinance provides that a company shall keep the space between the rails and a certain space outside each rail in repair, the city cannot, by a subsequent ordinance, impose on such company, without its consent, the obligation of paying a proportionate share of the cost where a street occupied by its railway is improved. *Western P. & S. Co.* v. *Citizens' St. R. Co.*, 46 *Am. & Eng. R. Cas.* 176, 128 *Ind.* 525, 26 *N. E. Rep.* 188, 28 *N. E. Rep.* 88.

Where an ordinance grants to a company the privilege of using its streets, but requires it to keep the portions of the streets used in good repair, the city cannot, by a subsequent ordinance, compel the company to pave with specified materials, or punish any one for operating the cars where the paving is not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. *Kansas City* v. *Corrigan*, 86 *Mo.* 67.—FOLLOWING State ex rel. *v.* Corrigan Con. St. R. Co., 85 Mo. 263.

An ordinance providing that a street-car company shall bear part of the cost of necessary repairs on streets on which its tracks are laid does not apply where the streets are not out of repair, but the municipal authorities desire to change the kind of pavement used. *Norristown* v. *Norristown Pass. R. Co.*, 148 *Pa. St.* 87, 23 *Atl. Rep.* 1060.

Under a provision requiring a company to pave between its rails and twelve inches on each side, so as "to suit the kind of paving used in the streets," the company is only bound to keep its tracks and the specified portion of the roadway in good condition, and to make all necessary repairs thereto; but is not bound to perform work altering the form or nature of the roadway and of the paving of the streets. *Montreal* v. *Montreal St. R. Co.*, 3 *Montr. Super.* 320.

138. Original duty of city as to conditions.—The fact that a street-railroad company has agreed to keep a portion of a street in a city in repair, as one of the conditions upon which it was permitted to lay its tracks, does not deprive the proper city authorities of the power, or absolve them from the duty, to keep such streets in a safe and proper condition; and even if the city fails to require the company to perform its contract, this is not an objection to an assessment being made upon owners of lots upon the streets for necessary repairs. *People ex rel.* v. *Brooklyn*, 65 *N. Y.* 349.—APPLYING Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475.

139. Where improvement is made by city, and company assessed.—Where a company is bound to pave a street between its rails and to a distance of two feet beyond, which is more expensive than the cost of paving the rest of the street, the whole cost of paving that part of the street should be assessed to the railroad, and not the proportion of the cost which the part it is required to pave bears to the whole street. *Washington & G. R. Co.* v. *District of Columbia*, 11 *Am. & Eng. R. Cas.* 38, 108 *U. S.* 522, 2 *Sup. Ct. Rep.* 865.

In such case the cost of supporting the track by underpinning while the paving is being done is chargeable to the railroad. *Washington & G. R. Co.* v. *District of*

Columbia, 11 *Am. & Eng. R. Cas.* 38, 108 *U. S.* 522, 2 *Sup. Ct. Rep.* 865.

A city by a third ordinance sought to compel a company to pay a part of the cost of street improvements. This ordinance was not accepted by the company. Afterwards the city granted to the purchaser of the street railway all its rights, privileges, and franchises, in consideration that the purchaser should assume all the obligations and duties of the street-railway company. *Held*, that it was not competent to prove by parol that the new company, in consideration of the passage of the ordinance ratifying and approving the sale, accepted the ordinance which sought to make the old company liable for street improvements. *Western P. & S. Co.* v. *Citizens' St. R. Co.*, 46 *Am. & Eng. R. Cas.* 176, 128 *Ind.* 525, 26 *N. E. Rep.* 188, 28 *N. E. Rep.* 88.—OVERRULING IN PART Welz *v.* Rhodius, 87 Ind. 1.

Defendant company, under its contract with a city, was to plank a street from specified points. The city caused the contract to pave this street between the specified points to be adjudicated to a paving and improvement company, and defendant submitted propositions, which were acted upon, to pay part of the cost of graveling the street in lieu of the performance of its paving contract. *Held*, that the city must rescind its action in the matter of said adjudication and of cost, if there be cause, before suit can be maintained to enforce the original contract. *State ex rel.* v. *St. Charles St. R. Co.*, 44 *La. Ann.* 562, 10 *So. Rep.* 927.

Under an ordinance of a city a street-car company contracted to pave its track on a certain street, and two feet and four inches on either side, at its own expense "if the city should pave said street contemporaneously with the construction of complainant's railway." The city paved the street, and assessed the company for the cost of excavation and paving of its portion of the street. *Held*, that the company was only liable to pay for its portion of paving, and not for the excavation. *Fort St. & E. R. Co.* v. *Schneider*, 15 *Mich.* 74.—FOLLOWED IN Smith *v.* Fort St. & E. A. R. Co., 17 Mich. 66.

Where a company is under contract with a city "to replace and keep in repair the pavement between and at least two feet in width on each outer side of its tracks," such contract can only be enforced in an action at the instance of the city. *Gilmore* v. *Utica*, 43 *Am. & Eng. R. Cas.* 225, 121 *N. Y.* 561, 24 *N. E. Rep.* 1009, 31 *N. Y. S. R.* 880; *reversing* 55 *Hun* 514, 29 *N. Y. S. R.* 781, 9 *N. Y. Supp.* 912.

Such contract, or the relation created thereby, does not prevent the city from paving the whole street and levying an assessment for the expense thereof upon the abutting proprietors, as provided by the city charter. *Gilmore* v. *Utica*, 43 *Am. & Eng. R. Cas.* 225, 121 *N. Y.* 561, 24 *N. E. Rep.* 1009, 31 *N. Y. S. R.* 880; *reversing* 55 *Hun* 514, 29 *N. Y. S. R.* 781, 9 *N. Y. Supp.* 912.

A provision in a street-car charter that the company shall "keep the surface of the street between its tracks and for one foot outside in good and proper order and repair" does not require it subsequently to pave with asphalt, unless it is clearly shown to be necessary. The mere declaration of the common council that an asphalt pavement shall be laid does not prove the necessity of such pavement; and where the city lays the pavement and assesses the company it cannot recover the cost thereof without showing that such pavement was necessary. *Binghamton* v. *Binghamton & P. D. R. Co.*, 41 *N. Y. S. R.* 83, 61 *Hun* 479, 16 *N. Y. Supp.* 225. — REVIEWING In re Repaving Fulton Street, 29 How. Pr. 429; State ex rel. *v.* Corrigan Con. St. R. Co., 85 Mo. 263; Western P. & S. Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. Rep. 188; Middlesex R. Co. *v.* Wakefield, 103 Mass. 261; People ex rel. *v.* Fort St. & E. R. Co., 41 Mich. 413; Ridge Ave. Pass. R. Co. *v.* Philadelphia, 124 Pa. St. 219; Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 102 N. Y. 572, 2 N. Y. S. R. 526.

A *sci. fa.* on a lien for paving does not lie against a railroad company whose track lies along the street in which the paving was done. *Philadelphia* v. *Philadelphia, W. & B. R. Co.*, 2 *Phila.* (*Pa.*) 37.—REVIEWING Pennock *v.* Hoover, 5 Rawle (Pa.) 291.

A city passed an ordinance providing that defendant company should at all times keep its road in good repair and upon a level with the street, pay all expenses of filling, grading, laying, paving, or otherwise changing, improving, or maintaining the street between its tracks, and failing to do so the city should have the right to do the same and recover of the company the cost of the work. *Held*, that the city cannot recover for filling, grading, and paving a part of the street between defendant's tracks upon which the railway was not built at the time

such improvements were made, merely because the company afterward established its tracks on the street. *Gulf City St. R. & R. E. Co.* v. *Galveston*, 32 *Am. & Eng. R. Cas.* 300, 69 *Tex.* 660, 7 *S. W. Rep.* 520.—DISTINGUISHING Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 10 West. Rep. 436.

140. Dividing cost between company and abutting owners.—An ordinance of a city authorized it to assess two thirds of the cost of paving a street upon the property holders who were especially benefited thereby, after deducting the amount a street-railway company was required to pay. The city paved only the middle portion of a street, not including the portion where the track was laid, and only assessed the property owners five eighths of the required two thirds, and did not assess the street-car company at all. *Held*, that the property owners, under the circumstances, could not complain that the company was not assessed. *Bowditch* v. *New Haven*, 40 *Conn.* 503.

And in such case the fact that the company, by its charter, was required to keep in repair a space two feet wide on each side of its track would not invalidate the assessment against the property owners, because the company was not assessed at all. *Bowditch* v. *New Haven*, 40 *Conn.* 503.

By a city ordinance a company was required to pave its right of way, being sixteen feet, along a street. By another ordinance the paving of the street its entire width was required, and the commissioners appointed for that purpose reported that they had made an estimate of the cost of such improvement. *Held*, that the cost of paving the centre sixteen feet of the street was wrongfully included in the estimate of the cost of the improvement to be charged upon the property benefited, and that judgment of confirmation of the assessment roll was properly denied. *Chicago* v. *Cummings*, 144 *Ill.* 446, 33 *N. E. Rep.* 34.

In such case the ordinance for the improvement of the entire street is not void, if so much is required for the public convenience; but the city having required the company to "fill, grade, pave, and keep in repair during all the time" that it has the privilege of using the street, sixteen feet in width, when a double track is used, "in accordance with such ordinance as the city council may pass respecting such filling, grading, paving, or repairing," and requiring the same to be done by the railway company with like material, in like manner, and at the time as required in respect of the rest of the street, the cost of paving so much of the street should have been excluded from the estimate. *Chicago* v. *Cummings*, 144 *Ill.* 446, 33 *N. E. Rep.* 34.

141. When two companies occupy same street.—Where defendant company is liable for necessary paving upon any street occupied by it, the fact that another company occupies the same street makes no difference. The city may elect to sue one company for all, and drive it to an action against the other for contribution, or it may sue each for one half. No company can be compelled to pay for paving in a street not occupied by it or beyond a line drawn from the corner of curb lines of the street it occupies. *Philadelphia* v. *Second & T. St. Pass. R. Co.*, 2 *Pa. Dist.* 705.

142. When city is to furnish material.—Under an ordinance requiring a company to "keep the surface of the street inside the rails, and for two feet four inches outside thereof, in good order and repair, provided, however, that, upon the paved portion of said streets, the materials for repaving shall be supplied at the expense of the city"—where the city directs the company to "raise and repair" that portion of the pavement which is within the rails, at a time when it has become so worn and dilapidated that a reconstruction with new materials is essential, the city is bound to bear the expense of the materials. Such repairs amount to repaving, within the meaning of the proviso. *Ft. Wayne & E. R. Co.* v. *Detroit*, 34 *Mich.* 78.

A city ordinance required a company to keep the space between its rails in good repair, and to pave where other portions of the street were paved, with materials to be supplied at the expense of the city. *Held*, in an action by the company to recover the cost of materials which it had furnished, that it was not bound to show that the necessity for repairs did not arise from its own previous neglect. Such a fact, if it existed, was matter of defense. *Ft. Wayne & E. St. R. Co.* v. *Detroit*, 39 *Mich.* 543.

In such case the company, being directed to make repairs, asked the city for leave to repave with cobblestones, but the city refused to furnish any kind of material, but made no objection to cobblestones, and offered no suggestions *Held*, that the com-

pany might use any fit material and maintain an action against the city for its value. *Ft. Wayne & E. St. R. Co.* v. *Detroit*, 39 *Mich.* 543.

Where an ordinance required a company to repave, using material for the purpose furnished by the municipal authorities, unless such material be, in fact, furnished, no recovery can be had against the company for repaving which was done by the municipality upon the company's failure to do it on demand. *Norristown* v. *Norristown Pass. R. Co.*, 148 *Pa. St.* 87, 23 *Atl. Rep.* 1060.

143. Municipality may relieve company from cost of.—A provision of a city charter by which "the common council is authorized to require all railroad companies operating street railroads in any streets of the city to repave between their tracks, and at least two feet in width on either side thereof, whenever the common council shall deem such repavement necessary," is not mandatory so as absolutely to bind the city to impose the expense of paving therein specified upon the company, but merely confers a discretionary power upon the city; and an assessment which provides that one third of the expense of repaving a street shall be borne by the city and two thirds by the abutting lot owners is not illegal. *Gilmore* v. *Utica*, 43 *Am. & Eng. R. Cas.* 225, 121 *N. Y.* 561, 24 *N. E. Rep.* 1009, 31 *N. Y. S. R.* 880; *reversing* 55 *Hun* 514, 29 *N. Y. S. R.* 781, 9 *N. Y. Supp.* 912.

A special act, incorporating a street-railway company, subjected it to the provisions of all ordinances of the city then existing or thereafter to be passed, regulating passenger railways. At the time there was in force a city ordinance imposing upon such companies the cost of paving any street, avenue, or alley occupied by them. *Held*, that said act did not impose upon the company a statutory duty of paving streets, in such a sense as to prevent the city council from terminating its obligation to pay for such paving by repealing said ordinance; the duty imposed by the act was not a fixed but a shifting one, subject to regulation or repeal at the will of councils. *Philadelphia* v. *Evans*, 139 *Pa. St.* 483, 21 *Atl. Rep.* 200.

144. In District of Columbia.—The board of public works has no authority to enter into a contract for paving a sidewalk on one of the streets around the capitol which was provided for in the Sundry Civil Appropriation Act of March 3, 1873. *Washington & G. R. Co.* v. *District of Columbia*, 3 *MacArth.* (*D. C.*) 11.

Certain street-car companies in the District of Columbia were required by their charters to keep their tracks and the adjacent parts of the streets well paved and in good order without expense to the United States or the district. The companies failed to keep the streets in proper condition. The district, under its general duty to keep its streets in good condition, did the work, and sued the companies to be reimbursed for the cost. *Held*: (1) that the city might recover the reasonable cost of doing the work in an action at law; (2) that after the acceptance of their charters the companies could not object that the provision requiring them to do the work was illegal and could not be enforced. *District of Columbia* v. *Washington & G. R. Co.*, 4 *Am. & Eng. R. Cas.* 161, 1 *Mackey* (*D. C.*) 361.

Such charters contained a provision that nothing therein should prevent the government from altering the grades or otherwise improving the streets and avenues where the tracks were laid, in which event it should be the duty of the companies to change their roadbeds so as to conform to the street grade and pavement. *Held*, that the companies were bound to do the necessary work on their tracks to conform to a new concrete pavement laid by the district. *District of Columbia* v. *Washington & G. R. Co.*, 4 *Am. & Eng. R. Cas.* 161, 1 *Mackey* (*D. C.*) 361.—REVIEWED IN Little Rock *v.* Citizens' St. R. Co., 56 Ark. 28.

Certain street-car companies in the district were required by their charters to keep their tracks for the space of two feet beyond the outer rail, and the space between the tracks, at all times well paved and in good order. *Held*, that this required the companies to construct a pavement where one did not exist along their roads. *District of Columbia* v. *Washington & G. R. Co.*, 4 *Mackey* (*D. C.*) 214.

The district authorities had the right to prescribe the materials of which such pavement should be composed, and if the pavement had already been constructed, might direct it to be removed, and a pavement of a different character to be laid. *District of Columbia* v. *Washington & G. R. Co.*, 4 *Mackey* (*D. C.*) 214.

Under such charter provisions, whenever the district authorities might direct the

grade of a street or the character of a pavement to be changed, it is the duty of the companies to conform their roads to the change; and this obligation does not depend upon notice to the companies. It was incurred the moment they had knowledge that a change was begun or contemplated. *District of Columbia* v. *Washington & G. R. Co.*, 4 *Mackey* (*D. C.*) 214.

Upon the failure of such companies to do the work, the district did it itself, and issued certificates of indebtedness against the companies for the cost, which certificates were sold to third parties. *Held*, that the district had no authority to issue such certificates, and purchasers thereof had no right of action against the companies, nor did the purchase of the certificates discharge the liability of the companies to the district. *District of Columbia* v. *Washington & G. R. Co.*, 4 *Mackey* (*D. C.*) 214.

145. Tearing up pavement in constructing road not ground for injunction.—The removal of a cobblestone pavement from streets by a company in constructing its road will not be restrained by injunction, the damages being consequential only, and not within the constitutional provision on the subject. *Philadelphia* v. *Empire Pass. R. Co.*, 3 *Brews.* (*Pa.*) 547.

146. Injunction to restrain a paving contract refused.—The refusal of the court to grant a preliminary injunction to restrain a contract for paving in Philadelphia was affirmed in a case where the street was occupied by a condemned macadamized turnpike and by a street railway which had paved the centre of the street, the contract also providing for keeping the street in repair for three years—the court below holding that the macadamizing and voluntary paving by the railway company was not an original paving "by the owners of the property," under the ordinance of April 1, 1859, so as to make property owners liable for the paving ordered by the city. *Leake* v. *Philadelphia*, 150 *Pa. St.* 643, 24 *Atl. Rep.* 351.—DISTINGUISHING Frankford & S. P. C. Pass. R. Co. *v.* Philadelphia, 43 Leg. Int. 338, 4 Atl. Rep. 550.

147. Repaving with more costly material.—The obligation of a company under its charter to keep the street embracing its track and two feet on each side in repair does not require it to repave with a new and different, and perhaps more costly, material. *Mayor, etc., of Baltimore* v. *Scharf*, 10 *Am. & Eng. R. Cas.* 241, 54 *Md.* 499.

A borough ordinance provided that a company should reconstruct the streets upon which its tracks were laid, with the same kind of material used by the borough authorities in the remaining portions of said streets, between its tracks and at least one foot additional on the outside of the rails, and keep the same in good order and repair. *Held*, that the company was obliged, after laying its tracks, to "reconstruct" the street once, and thereafter to keep it in good order, but was not obliged to put down a new and improved pavement on demand of the borough authorities. *Norristown* v. *Norristown Pass. R. Co.*, 148 *Pa. St.* 87, 23 *Atl. Rep.* 1060.

A company was authorized to lay its track upon a street which had been macadamized at the expense of the property owners. The ordinance provided that the company should keep in repair that portion of the streets and avenues traversed between the tracks and a space of one foot on each side, and that in case of a change of grade the railway should be changed to conform to the new grade at the expense of the company. The borough subsequently resolved to pave the street with Belgian blocks, and notified the company to pave with blocks. The company refused to do the paving as requested and merely sunk its rails to the new grade. The improvement was accordingly made by the borough. There was evidence that the space between the tracks and for one foot outside was in bad repair before the improvement was made. *Held*, that the question of the company's liability for the paving was for the jury, and that a verdict and judgment for the borough should be sustained. *McKeesport* v. *McKeesport Pass. R. Co.*, 158 *Pa. St.* 447, 27 *Atl. Rep.* 1006.

A city ordinance, to be valid, must not conflict with any statute, and must be reasonable. So where the charter of a company only requires it to bear the cost and expense that may be necessary upon any street on account of laying the track, an ordinance requiring it to pave between its rails with "Nicholson or other wooden or concrete pavement," which would exceed the original cost of the road, is unreasonable, and will not be enforced. *Philadelphia* v. *Empire Pass. R. Co.*, 3 *Brews.* (*Pa.*) 570, 7 *Phila.* 321.

148. Impairing obligation of contract.—An act of the legislature passed after the making of a contract between a city and a company authorizing the construction of a city railway, and the paving of the portion between the rails by the company at its own expense, which act authorizes the mayor and aldermen of the city to compel the railway company to pave, not only between its tracks, but three feet on each side of the track, impairs the obligation of the contract, and is therefore invalid. *Coast Line R. Co.* v. *Mayor, etc., of Savannah*, 30 *Fed. Rep.* 646.

A company was chartered when a general law was in force reserving the right to the legislature to regulate charters or franchises, and built its track under an ordinance requiring it to pave only between its rails. Subsequently the legislature passed a law which required it to pave not only between the rails, but one foot outside. *Held*, that the act of the legislature imposing the additional burden did not violate any valid contract between the company and the city. *Sioux City St. R. Co.* v. *Sioux City*, 78 *Iowa* 742, 39 *N. W. Rep.* 498.—DISTINGUISHING Des Moines *v.* Chicago, R. I. & P. R. Co., 41 Iowa 569.

149. Voluntary paving does not create obligation to repave or repair.—Where a company is not otherwise bound to pay the cost of paving streets on which its track is laid, the voluntary paving of the middle portion of the street will not impose upon the company the cost of thereafter repairing and repaving the same. *Leake* v. *Philadelphia*, 150 *Pa. St.* 643, 24 *Atl. Rep.* 351.

150. When duty to pave or repair extends to whole street. — By the Girard company's incorporating act of April 15, 1858 (P. L. 300), the ordinance of July 7 1857, was read into the act and became as much a part of the law of the company's being as any part of the act itself; and by the merger and consolidation of the two railway companies it also became an integral part of the defendant company's charter. *Philadelphia* v. *Ridge Ave. Pass. R. Co.*, 143 *Pa. St.* 444, 22 *Atl. Rep.* 695.

An ordinance of the city of Philadelphia of July 7, 1857, provided that all street-railway companies should be at the "entire cost and expense of maintaining, paving, repairing, and repaving that may be necessary upon any road, street, avenue, or alley occupied by them," with other provisions subordinating such companies to the general authority and power of the municipality over its streets; and that "any passenger railroad which is now or may hereafter be incorporated * * * shall * * * file in the office of the city solicitor a written obligation to comply with the provisions of this ordinance." Pa. Act of April 15, 1858, §§ 7, 8, incorporating the Girard College Pass. R. Co., provided that the councils might establish regulations "for the paving, repaving," etc., of streets occupied after consent of councils obtained; that the company should keep said streets in "perpetual good repair at the proper expense of said company," and should be subject to the ordinance of July 7, 1857. An ordinance was enacted May 5, 1858, refusing the assent of the city to the occupancy of its streets by said company, unless within ninety days it should "file in the office of the city solicitor a written obligation to observe and be subject to all ordinances of the city in reference to passenger railways then in force or thereafter to be passed," which obligation was executed and filed on July 29, 1858. Said company and another consolidated into the Ridge Ave. Pass. R. Co. on January 23, 1872, and this action was confirmed by the legislature March 8, 1872, with a provision that "all the provisions in the charters of the two companies so consolidated, not included in this act, are repealed." An ordinance of December 12, 1881, provided that thereafter it should be unlawful to pave with cobble or rubble pavement any street in the city, or to pave the gutters of any street with bricks; the ordinance not to apply to that portion of any street between the tracks of a passenger-railway company, and not to affect existing contracts. In 1886 the city repaved with Belgian blocks a street occupied by the Ridge Ave. R. Co.—by the Girard College R. Co. prior to said merger—after notice directed by resolution of councils, and a disregard thereof, and subsequently brought suit against the Ridge Ave. company to recover from it the expense incurred. *Held*, not error to admit an offer of the ordinances subsequent to that of July 7, 1857, and the "written obligation" of July 29, 1858, in connection with the other evidence, no condition being imposed not in harmony, or conflicting, with the Girard company's incorporating act. *Philadelphia* v. *Ridge Ave. Pass. R. Co.*, 143 *Pa. St.* 444,

22 *Atl. Rep.* 695.—DISTINGUISHING Pittsburgh's Appeal, 115 Pa. St. 4. FOLLOWING Pittsburgh & B. Pass. R. Co. *v.* Birmingham, 51 Pa. St. 41; Pittsburgh & B. Pass. R. Co. *v.* Birmingham, 80 Pa. St. 72.—QUOTED IN Detroit *v.* Ft. Wayne & E. R. Co., 90 Mich. 646; Reeves *v.* Philadelphia Traction Co., 152 Pa. St. 153.

Section 3 of the above ordinance declaring in unequivocal language that the company should be at the entire cost and expense of maintaining, paving, repairing, and repaving that may be necessary upon any street occupied by it, the duty of the company to repair or repave, when either is adjudged necessary, extends to the entire roadway from curb to curb. *Philadelphia* v. *Ridge Ave. Pass. R. Co.*, 143 *Pa. St.* 444, 22 *Atl. Rep.* 695.—FOLLOWING Passenger R. Co. *v.* Philadelphia, 2 W. N. C. 639.

The necessity for repairing or repaving is to be determined, not by the company, but by the municipal authorities; and it is the special province of the latter to determine how it is to be done, whether with the same kind of material as before, cobblestones in this instance, or with a different and better material, in this instance Belgian blocks; and, in this case, the plaintiff was entitled to recover. *Philadelphia* v. *Ridge Ave. Pass. R. Co.*, 143 *Pa. St.* 444, 22 *Atl. Rep.* 695.

151. Right to stop cars while repaving.—Contractors to repave a street will be enjoined from interfering with the operation of a street railway thereon, where the work can be done without such interference, though at a slight increase of expense, and where the city has not attempted to exercise or to delegate to the contractors the power to stop the running of cars while the work is being done. *Milwaukee St. R. Co.* v. *Adlam*, 85 *Wis.* 142, 55 *N. W. Rep.* 181.—QUOTING Hamilton *v.* Vicksburg, S. & P. R. Co., 119 U. S. 280.

152. When not bound to pave but to repair.—A city granted to a street-railway company the right to lay its tracks on the streets, imposing as a condition that the company, "as respects the grading, paving, macadamizing, filling, or planking of the streets," should keep a designated number of feet "in good repair and condition." *Held*, not to require the company to grade and pave, only to keep in repair after grading and paving. *Chicago* v. *Sheldon*, 9 *Wall.* (*U. S.*) 50. — FOLLOWED IN Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 34 Fed. Rep. 254; Parmelee *v.* Chicago, 60 Ill. 267; Western P. & S. Co. *v.* Citizens' St. R. Co., 46 Am. & Eng. R. Cas. 176, 128 Ind. 525.

A city ordinance required street-railway companies to bear the entire cost of paving streets on which their tracks were placed. Subsequently the ordinance was amended so as to require the company to keep in order all streets unpaved at the time of the laying of its rails, until the same should be paved by the adjoining property owners; and thereafter the company was required to keep the pavement in order. So much of the original ordinance as required the railroad company to pave was repealed. *Held*, that thereafter the company was not required to bear the cost of the original pavement, but only that of keeping it in repair. *Leake* v. *Philadelphia*, 150 *Pa. St.* 643, 24 *Atl. Rep.* 351.

153. Failure to pave or repair—Damages.—A contract between a city and a company provided that the latter should keep the portion of the streets occupied by it in repair, "under the direction of such competent authority as the common council may designate"; but both parties acted for a long time without any such person being designated. *Held*, that the failure to designate such person is no defense, where the company is sued for failing to keep the streets in repair. *Brooklyn* v. *Brooklyn City R. Co.*, 57 *Barb.* (*N. Y.*) 497, 8 *Abb. Pr. N. S.* 356; *affirmed in* 47 *N. Y.* 475.—DISTINGUISHING Coombe *v.* Greene, 11 M. & W. 480.

And the cost of making such repairs by the city, where the company fails, is not necessarily the measure of damages. Where an individual has recovered damages against the city by reason of the company's failing to repair, the judgment against the city is the measure of damages in its action against the company. *Brooklyn* v. *Brooklyn City R. Co.*, 57 *Barb.* (*N. Y.*) 497, 8 *Abb. Pr. N. S.* 356; *affirmed in* 47 *N. Y.* 475.

b. Repairs.*

154. Duty to repair outside the rails.—A requirement in a charter of a company that it should "keep the surface of the street inside the rails, and for two feet

* Duty of street railways to keep tracks in repair, see note, 25 AM. ST. REP 480.

four inches outside thereof, in good order and repair" construed to mean the full width of two feet four inches on each side of the track. *People* v. *Fort St. & E. R. Co.*, 41 *Mich.* 413. — REVIEWED IN Binghamton *v.* Binghamton & P. D. R. Co., 41 N. Y. S. R. 83, 61 Hun 479, 16 N. Y. Supp. 225.

A street-railroad company is bound to keep its tracks in good order and repair, and if it carelessly or negligently fails to do so, and an injury occurs in consequence thereof, it will be liable in damages; and its general duty to keep its tracks in good order extends not only to the track itself, but to contiguous portions as well, so as to make it safe for those who have a right to drive across it. *Conroy* v. *Twenty-third St. R. Co.*, 52 *How. Pr.* (*N. Y.*) 49.

155. When extends to whole street.—By the charter of a company, it was not to occupy any of the streets of the cities or boroughs without the consent of the councils of said cities or boroughs, and was required to keep so much of the streets as it should use in perpetual good repair. A borough, in the ordinance giving consent to lay the road, required that a street in which the road was laid should be kept in "perpetual good order and repair from curb to curb, its whole length." *Held*, that the company was bound to keep the street cleansed from the dirt and filth necessarily or casually accumulating thereon from its ordinary use as a public thoroughfare. *Pittsburgh & B. Pass. R. Co.* v. *Birmingham*, 51 *Pa. St.* 41.—FOLLOWED IN Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444.

The charter of a street railway provided that it should keep streets used and occupied by it "in perpetual good repair" from "curb to curb." *Held*, to be the duty of the company to remove from a street an unusual deposit of dirt and rock washed down by a heavy rain. *Pittsburg & B. Pass. R. Co.* v. *Pittsburg*, 80 *Pa. St.* 72. — FOLLOWED IN Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444.

A street-railway company is under obligation to keep in repair the whole width of streets used and occupied by them. *Thirteenth & F. St. Pass. R. Co.* v. *Philadelphia*, 16 *Phila.* (*Pa.*) 164. — FOLLOWING Philadelphia & G. F. Pass. R. Co. *v.* Philadelphia, 11 Phila. 358.

156. Duty to repair two feet outside rails—Lessees.—The general powers conferred upon municipal bodies by Fla. Act, ch. 1688, as amended by the act of 1877, ch. 3024, to regulate, improve, alter, extend, and open streets, and to regulate and control the construction, grading, and repairs of streets, pavements, and sidewalks, invested such bodies with authority to impose by ordinance upon street railways operated by horses, thereafter to be constructed, the duty to keep the portions of the streets between the tracks of said railways and two feet on each side in as good repair and condition as the city keeps the balance of the street and of even grade with the street. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

Although a street-railroad company be organized under a statute which provides that such companies shall whenever and as required, and under the supervision of the proper local authorities, have and keep in permanent repair the portion of every street and avenue between its tracks and a space two feet in width outside thereof, yet where such company operates the railroad as the lessee of another company under a lease by which it succeeds to all the rights of the lessor and operates the road in the right of the lessor, and the lessor is organized under a statute which simply requires it to restore the street or highway to its former state, or to such state as not necessarily to have impaired its usefulness, the provision of the act under which the lessee is organized is not applicable, the liability of the lessee being governed by the statute which governs the liability of the lessor. *Gilmore* v. *Utica*, 43 *Am. & Eng. R. Cas.* 225, 121 *N. Y.* 561, 24 *N. E. Rep.* 1009, 31 *N. Y. S. R.* 880; *reversing* 55 *Hun* 514, 29 *N. Y. S. R.* 781, 9 *N. Y. Supp.* 912.

157. Duty to repair does not include reconstructing or paving.—An ordinance of a city giving the privilege of using its street for a horse railway, and requiring the company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line, in good repair, does not impose on such company an obligation to reconstruct the street. *State ex rel.* v. *Corrigan Con. St. R. Co.*, 29 *Am. & Eng. R. Cas.* 591, 85 *Mo.* 263, 55 *Am. Rep.* 361.—DISTINGUISHED IN Detroit *v.* Detroit City R. Co., 56 Fed. Rep. 867. FOLLOWED IN Western P. & S. Co. *v.* Citizens' St. R.

Co., 46 Am. & Eng. R. Cas. 176, 128 Ind. 525; Kansas *v.* Corrigan, 86 Mo. 67.

An obligation to repair a street is not an obligation to construct thereon a new pavement. *State ex rel.* v. *Corrigan Con. St. R. Co.*, 29 *Am. & Eng. R. Cas.* 591, 85 *Mo.* 263, 55 *Am. Rep.* 361.—REVIEWING Farrar *v.* St. Louis, 80 Mo. 379.

Nor could the city, by a subsequent ordinance, impose on the company, without its consent, such additional obligation to pave the street. Such subsequent ordinance cannot be sustained on the ground that it is a proper exercise of the police power of the city. *State ex rel.* v. *Corrigan Con. St. R. Co.*, 29 *Am. & Eng. R. Cas.* 591, 85 *Mo.* 263, 55 *Am. Rep.* 361.—REVIEWED IN Binghamton *v.* Binghamton & P. D. R. Co., 41 N. Y. S. R. 83, 61 Hun 479, 16 N. Y. Supp. 225.

Nor is an ordinance of the city requiring a company to repair the street between the rails and on the sides of such railway invalid as being a surrender by the city of its corporate power over its streets. *State ex rel.* v. *Corrigan Con. St. R. Co.*, 29 *Am. & Eng. R. Cas.* 591, 85 *Mo.* 263, 55 *Am. Rep.* 361.

158. —— nor grading or filling.—An obligation by a company that it "shall at all times keep the roadbed of said railroad in good repair, and shall keep said roadbed up to the level of the streets; in no case shall said roadbed be above or below the city grade of the streets, after said streets shall have been graded by the city"—does not oblige the company to fill up the streets beneath its track, so as to keep its roadbed on a level with the street on each side of the track. *Galveston* v. *Galveston City R. Co.*, 46 *Tex.* 435, 13 *Am. Ry. Rep.* 274. — REVIEWED IN Galveston City R. Co. *v.* Nolan, 3 Am. & Eng. R. Cas. 387. 53 Tex. 139.

Such obligation merely requires the roadbed to be kept in good repair, and does not bind the company to contribute to the expense of grading the streets, but merely to conform to and keep the level of the roadbed to that of the streets when graded. *Galveston* v. *Galveston City R. Co.*, 46 *Tex.* 435, 13 *Am. Ry. Rep.* 274.

159. Switches.—Plaintiff was driving on a highway, and defendant's cars were turned aside by a defective switch that connected defendant's track with that of another company, and ran against plaintiff and injured him. Defendant contended that it was not liable, because the other company ought to have made the repairs on the switch. *Held*, that this was not material as to plaintiff, a third person. The switch was so much a part of defendant's road that defendant was liable for a defect. The principle *sic utere tuo ut alienum non lædas* applies to defendant's track as well as to its cars. *McKenna* v. *Metropolitan R. Co.*, 112 *Mass.* 55.

A company owning a track in a city gave to defendant company a license to connect therewith at a crosswalk, the latter to make all necessary switches, the company owning the track agreeing to keep the pavement within the tracks and three feet on each side thereof in repair. *Held*, that this did not bind defendant to keep in repair a switch on the crosswalk. *Lowery* v. *Brooklyn City & N. R. Co.*, 76 *N. Y.* 28; *reversing* 4 *Abb. N. Cas.* 32.—DISTINGUISHING Carpenter *v.* Central Park & E. R. R. Co., 11 Abb. N. S. 416; Fash *v.* Third Ave. R. Co., 1 Daly 150.—DISTINGUISHED IN Wooley *v.* Grand St. & N. R. Co., 3 Am. & Eng. R. Cas. 398, 83 N. Y. 121.

160. Bridges.—A street-railway corporation whose charter requires it to repair such portions of all bridges in a city as are occupied by its tracks is bound to repair that portion of a bridge which the owner of a canal has built over the canal, and which, as against the city, he is bound to repair: and if on his refusal the city makes the repairs, and recovers judgment against him for the expense thereof and costs, he can recover from the corporation the amount of the damages recovered by the city against him, but not the costs, unless he defended the suit at the request of the corporation, or for its benefit, or after notice to it to come in and defend. *Prop'rs of Locks, etc.*, v. *Lowell Horse R. Corp.*, 109 *Mass.* 221.

161. Between double tracks.—Cal. Act of April 2, 1866, § 2, requiring certain railroads to keep the space between the rails in thorough repair by paving, etc., refers to the space between its rails on which the cars run and between which the horses travel, and not to the space between double tracks. *Robbins* v. *Omnibus R. Co.*, 32 *Cal.* 472.

The definition of the word "track" as used in a former act will be considered in determining its true meaning in a later act which is in effect an amendment of the first. *Robbins* v. *Omnibus R. Co.*, 32 *Cal.* 472.

Under Mo. Act of March 3, 1869, § 3, relating to the amount of taxes to be paid to

the city of St. Louis by street-car companies in that city, and providing that it shall be in lieu of all taxes, burdens, and expenditures, and repairs of streets outside of their tracks, a company having parallel tracks on the same street is not liable for the expense of repairing the street between the tracks. *St. Louis* v. *St. Louis R. Co.*, 50 *Mo.* 94, 3 *Am. Ry. Rep.* 237.

162. Duty to repair after notice. —A horse-railroad company was required by its charter to grade and keep in repair the surface of the street for a space not less than two feet in width on each side of each rail. *Held*, that where an injury was caused by the defective condition of such part of the street, the company was entitled, before being liable to a suit, to written notice of the injury, under the Connecticut statute of 1883, p. 283, which provides that no action for an injury from a defective highway shall be maintained against any town, city, corporation, or borough unless written notice of such injury, and of its nature, and of the place of its occurrence, shall be given within sixty days. *Fields* v. *Hartford & W. Horse R. Co.*, 54 *Conn.* 9, 4 *Atl. Rep.* 105.

163. Duty of Missouri railway in St. Louis.—Defendant, the Missouri railway company, a street railroad in the city of St. Louis, is bound, under the charter and ordinances of said city, to keep its streets in repair to the extent of twelve inches outside of the rails, along an extension of defendant's road from its former terminus to Tower Grove Park. *St. Louis* v. *Missouri R. Co.*, 87 *Mo.* 151; *affirming* 13 *Mo. App.* 524.

164. What streets company must keep in repair.—Under a contract by a city with a company, giving a right of way, that the latter should keep in good order and condition, from curb to curb, the streets, intersections, bridges, etc., through which its tracks pass, it cannot be claimed that the company is under obligation to keep in such condition streets on which its tracks do not pass, and which extend alongside of, and border on, middle or neutral grounds, dividing them, comprised between curbs or external lines, and which do not form part of thoroughfares on which vehicles usually circulate. The obligation exists only as to such streets and spots on which the tracks actually pass. *State* v. *New Orleans, C. & L. R. Co.*, 43 *Am. & Eng. R. Cas.* 276, 42 *La. Ann.* 550, 7 *So. Rep.* 606.

165. Right of city to stop cars while repairing. — Street-railroad companies are, in general, authorized to use the streets in which their tracks may be laid, in a manner in some respects differing from the ordinary public use, and to some extent modifying the rights of other travelers over those streets. But the use of the streets is granted to them only in common with others. Their franchise does not give them the control of the highways. That control remains in the local municipal authorities, who have the power and duty to regulate the manner in which the franchise of the railway corporation is to be exercised; to protect the rights and promote the convenience of the whole public; to make needful repairs or improvements of highways, etc., even though a serious interruption to the use of the railway may thereby be rendered unavoidable. On such occasions the owners of street railways must submit to a temporary stopping of their cars. *Middlesex R. Co.* v. *Wakefield*, 103 *Mass.* 261.—REVIEWED IN Binghamton *v.* Binghamton & P. D. R. Co., 41 N. Y. S. R. 83, 61 Hun 479, 16 N. Y. Supp. 225.

Where a company fails to keep a street in repair, as it is required to do by its charter, and fails to repair after notice, the city, through its officers, may make the repairs, and in doing so may stop the running of cars when necessary; and neither the company nor individuals residing on the line of the road, and inconvenienced by the stopping of the cars, can interfere by injunction to prevent the necessary stopping of the cars. *Philadelphia & G. F. Pass. R. Co.* v. *Philadelphia*, 11 *Phila.* (*Pa.*) 358.— FOLLOWED IN Thirteenth & F. St. Pass. R. Co. *v.* Philadelphia, 16 Phila. 164.

166. Recovery over by city of damages paid third persons. — Where a company contracts with a city to keep a portion of its streets in repair, in consideration of a license to use them for the purpose of its road, it in effect contracts to perform that duty to the public in the place and stead of the city, which is under a general duty to keep its streets safe; and where the company allows a street to become defective, and injury results to an individual, who recovers damages of the city, the latter may recover over against the company. As between the city and the company, the city is not *in pari delicto*. *Brooklyn* v. *Brooklyn City R. Co.*, 47 *N. Y.* 475;

affirming 57 *Barb.* 497, 8 *Abb. Pr. N. S.* 356. —DISTINGUISHING Coombe *v.* Greene, 11 M. & W. 480. — APPLIED IN People *v.* Brooklyn, 65 N. Y. 349. FOLLOWED IN McMahon *v.* Second Ave. R. Co., 75 N. Y. 231. QUOTED IN Oceanic Steam Nav. Co. *v.* Compania Tr. Espanola, 47 N. Y. S. R. 743.

A provision in the license of a street railway that, upon its failure to keep the street in good repair for eighteen inches on each side of its track, the council may terminate the license is a forfeiture which may be enforced for an omission of duty, but does not prevent the city recovering the amount with interest of a verdict for damages sustained by it in favor of a person injured through the failure of the company to keep the street in repair. *Mayor, etc., of Troy* v. *Troy & L. R. Co.*, 3 *Lans.* (*N. Y.*) 270; *affirmed in* 49 *N. Y.* 657, *mem.*

Where a company agrees to indemnify a city from all claims or damages for which it may become liable by reason of the construction or operation of its railway, a judgment recovered against the city by a person injured through the failure of the company to keep a street in repair is competent evidence in an action by the city to recover the amount of the judgment from the company. *Mayor, etc., of Troy* v. *Troy & L. R. Co.*, 3 *Lans.* (*N. Y.*) 270; *affirmed in* 49 *N. Y.* 657, *mem.*

And the company cannot claim that the city officers negligently omitted their duty in keeping the street in condition and thereby contributed to the injury. *Mayor, etc., of Troy* v. *Troy & L. R. Co.*, 3 *Lans.* (*N. Y.*) 270; *affirmed in* 49 *N. Y.* 657, *mem.*

An agreement between a company and a city by which the former is to keep the streets occupied by it in good repair and be liable to any one injured through its failure to do so, and also agrees to indemnify the city for all liability in respect to such damage, will not relieve the city from liability to a person injured, though it will have an action over against the company. *Carty* v. *London*, 43 *Am. & Eng. R. Cas.* 279, 18 *Ont.* 122.

After action brought, and more than six months after the occurrence of the accident, the company was made a defendant on the application of the city. *Held*, that the six months' limitation clause in the Railway Act did not apply, the right of the city against the street-railway company being one of contract *Carty* v. *London*, 43 *Am. & Eng. R. Cas.* 279, 18 *Ont.* 122.—FOLLOWING Anderson *v.* Canadian Pac. R. Co., 17 Ont. 747.

167. Injured party may sue company.—Where a company contracts with a municipality to perform in its stead the duty resting upon it of keeping its streets in repair and safe for the passage of the public, and where a cause of action arises against the municipality because of its neglect to perform that duty, the action may be brought by the injured party against the company. *McMahon* v. *Second Ave. R. Co.*, 75 *N. Y.* 231; *affirming* 11 *Hun* 347.—FOLLOWING Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475.

168. Recovery by city of cost of repairs. — A city passed an ordinance granting to a company the right to construct and operate a street railroad, with a provision that the company should construct and keep in order and repair the portion of the streets included between the rails and switches, in the same manner as the other portion of the street should be constructed and repaired, and any failure to do so should render the company liable to the city in an action for damages. *Held*, that such ordinance did not divest the city of its control of the streets, or abridge its right to improve the same, and it might cause new improvements to be made, including the part occupied by the railway, and determine the kind of improvements to be made. *Columbus* v. *Columbus St. R. Co.*, 32 *Am. & Eng. R. Cas.* 292, 45 *Ohio St.* 98, 12 *N. E. Rep.* 651.—FOLLOWING New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422.

And if the company should fail to do the work so required of it, after notice, and the city then causes it to be done, it may recover the reasonable cost thereof against the company; and it is not essential to the liability of the company that the notice to make the improvements precede the letting of the contract by the city. It is sufficient if such notice be given before the work is done, and while the company might still perform it. *Columbus* v. *Columbus St. R. Co.*, 32 *Am. & Eng. R. Cas.* 292, 45 *Ohio St.* 98, 12 *N. E. Rep.* 651.

In such case where the company, after such notice, permits the city to commence and complete the work, without attempting to perform it itself, and without objection, and with knowledge that the city expected the company to pay for the same, and re-

ceives all the benefits from the improvement, the city may recover the reasonable cost of the work done, although the notice given does not conform strictly to the requirements of the ordinance. *Columbus* v. *Columbus St. R. Co.*, 32 *Am. & Eng. R. Cas.* 292, 45 *Ohio St.* 98, 12 *N. E. Rep.* 651.

169. Procedure—Enjoining road as a nuisance.—An injunction was granted restraining a street-railway company, on the ground of nuisance, from using its railway unless by a day named it should put the same in good repair, to the satisfaction of an engineer named, who, on the day appointed, reported the railway in such a state of repair as the decree in the cause required. Two years afterwards said railway, as also other lines laid in the meantime by the same company, had, as was alleged, been allowed to go into such a state of disrepair as to become again a nuisance, whereupon a petition was filed by the relators, alleging these facts and claiming the benefit of the decree. *Held*, that as the decree had already been complied with, a new information must be filed to obtain the relief now asked. *Attorney-General* v. *Keily*, 22 *Grant's Ch.* (*U. C.*) 458.

c. Restoration of Street.

170. Duty to restore street or highway, generally.*—Although a statutory provision that a railroad company may construct its road "along or upon * * * any street or highway," but that the "company shall restore the street or highway * * * to its former state, or to such state as not necessarily to have impaired its usefulness," requires a company not only to restore a street to its former state so as not unnecessarily to impair its usefulness, but also to keep the portion of the street used by it in a reasonable state of repair, it does not bind the company to conform its repairs to the absolute directions and requirements of the municipality whenever the municipality shall resolve to pave or repave a street. *Gilmore* v. *Utica*, 43 *Am. & Eng. R. Cas.* 225, 121 *N. Y.* 561, 24 *N. E. Rep.* 1009, 31 *N. Y. S. R.* 880; *reversing* 55 *Hun* 514, 29 *N. Y. S. R.* 781, 9 *N. Y. Supp.* 912.

171. Duty to "reconstruct" street not a continuing one.—A borough ordinance provided that a street-car company should "reconstruct" the streets, between tracks and for one foot outside of the rails, with the same materials used for macadamizing the rest of the street. *Held*, that when the street was once "reconstructed" as required, the duty of the company was ended, and it could not be compelled to put down new material subsequently adopted by the borough for other parts of the streets. *Norristown* v. *Norristown Pass. R. Co.*, 148 *Pa. St.* 87, 23 *Atl. Rep.* 1060.

172. Power of city to order changes to insure greater safety.—How. Mich. St. § 3554 empowers a city council to prescribe such rules and regulations regarding street railways as may be required for the grading and paving of the streets occupied by them; and in the exercise of the power thus conferred, as well as that conferred by the charter respecting the determination of the character of all improvements, the council has the undoubted authority to determine what is necessary or required, and whether any particular method of construction of their roadways interferes with the durability or preservation of a proposed pavement, and to prescribe such reasonable changes in the mode of construction as, in the judgment of the council, will preserve and protect the proposed improvement. *Detroit* v. *Ft. Wayne & E. R. Co.*, 50 *Am. & Eng. R. Cas.* 447, 90 *Mich.* 646, 51 *N. W. Rep.* 688.—QUOTING Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. Rep. 695.

Defendant corporation, in pursuance of a statute, acquired land for the purpose of a highway, and constructed a turnpike thereon, but subsequently constructed a street railway on the road, so near one side of the road that vehicles could not pass on one side of the track, and with the rails so raised as to interfere with driving across the track. Plaintiff city condemned a portion of the road for a public street, and the company accepted the compensation awarded, and the city council passed an ordinance requiring the company to lay its rails flush with the grade of the street. *Held*, that the company was estopped from objecting to the condemnation proceedings. If they were invalid, it should have appealed. *Albany* v. *Watervliet T. & R. Co.*, 108 *N. Y.* 14, 13 *N. Y. S. R.* 525, 15 *N. E. Rep.* 370, 11 *Cent. Rep.* 85; *affirming* 45 *Hun* 442, 12 *N. Y. S. R.* 443.

* Duty of street railways to pave, repair, and reconstruct streets occupied by tracks, see note, 50 AM. & ENG. R. CAS. 454.

173. Conforming to street grade.* —A municipal ordinance granting a franchise for a street railway provided that "the roadbed shall at all times correspond with the actual grade of the streets"; that the railway shall be operated "on such streets as have heretofore been or hereafter may be established by the city"; and that in case of change by the common council in the actual grade of any of the streets the company "shall relay the track of said railway to correspond to such grade, at its own expense." *Held*, that the company must bear all the expense of raising the grade of its roadbed and track to correspond with a change made in the grade of a street. *Ashland St. R. Co.* v. *Ashland*, 78 *Wis.* 271, 47 *N. W. Rep.* 619.—REVIEWED IN Little Rock *v.* Citizens' St. R. Co., 56 Ark. 28.

174. Obstructing street by throwing snow from track.—Plaintiff company is not authorized by its charter (N. Y. Laws 1860, ch. 513), providing that it shall run as often as the convenience of passengers shall require and that the mayor and common council shall do no act to hinder, delay, or obstruct the operation of said railroad, to throw the snow from its track, for the purpose of keeping it open, upon the street along its line so as to impede or prevent public travel thereon. *Broadway & S. A. R. Co.* v. *Mayor, etc., of N. Y.*, 49 *Hun* 126, 16 *N. Y. S. R.* 950, 1 *N. Y. Supp.* 646.

If it had been the intention of the legislature to confer upon the company the rights claimed by it, and the immunity from interference, the statute would be invalid. The police power of the state cannot be alienated, surrendered, or abridged by the legislature by any grant, contract, or delegated power. *Broadway & S. A. R. Co.* v. *Mayor, etc., of N. Y.*, 49 *Hun* 126, 16 *N. Y. S. R.* 950, 1 *N. Y. Supp.* 646.

175. Failure of company does not relieve city of liability.—The charter of a horse-car company in a city provided that "said corporation shall put all streets and highways, and every portion thereof, over or through which they shall lay any rails, in as good condition as they were before the same were laid; and they shall keep and maintain in repair such portions of the streets and highways as shall be occupied by their tracks, and shall be liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect, or misconduct of its agents and servants in the management, construction, or use of said tracks or streets; and in case any damage shall be recovered against said towns or the said city, by reason of any such misconduct, defect, or want of repairs, said corporation shall be liable to pay to such towns and city respectively any sums thus recovered against them, together with all costs and reasonable expenditures incurred by them respectively in the defense of any such suit or suits, in which recovery may be had; and said corporation shall not incumber any portion of the streets or highways not occupied by said tracks." In an action against the city to recover damages for injuries caused by a defective highway, which was made unsafe by work done by the company on its track—*held:* (1) that the city was liable for neglecting to keep its streets safe and convenient for public travel; (2) that the duty resting upon a town or city to keep its highways safe and convenient is a public duty, and that it has no power, unless authorized by statute, to divest itself, either by contract or ordinance, of its capacity to discharge this duty. *Watson* v. *Tripp*, 11 *R. I.* 98.

The liability of the company, as above stated, is a matter which may be considered by the jury in determining whether or not the city has been guilty of any culpable neglect or want of reasonable care. *Watson* v. *Tripp*, 11 *R. I.* 98.

3. *Liability for Defective Construction.*

176. Liability, generally.—In case the defective condition of a public street is caused by the fault or neglect of a street-car company in the manner in which its track is laid, or by its failure to keep the streets traversed by its track in good repair and safe for use by the public, such corporation must answer for the consequences. *Cline* v. *Crescent City R. Co.*, 41 *La. Ann.* 1031, 6 *So. Rep.* 851; *further appeal* 43 *La. Ann.* 327, 9 *So. Rep.* 122.

Where a wagon is driven from a street-railway track, and the occupant is thrown from it by the jolt of the wagon, incident only to the turning off the track, the company is not liable in damages. *Nivette* v. *New Orleans & L. S. R. Co.*, 42 *La. Ann.* 1153, 8 *So. Rep.* 581.

* See also *ante*, **124.**

Proof of the general bad condition of the street alone is not sufficient to enable plaintiff to recover. The proof must be specific that the accident was caused by the defect in the street specially alleged and referred to in the petition as the immediate cause of the accident. *Nivette* v. *New Orleans & L. S. R. Co.*, 42 *La. Ann.* 1153, 8 *So. Rep.* 581.

A street-railroad company which has contracted with a city, as a consideration for its franchise, to keep a portion of its streets in good order and repair is responsible in direct action by any person who suffers special damage resulting from its unlawful failure to do so. *Ober* v. *Crescent City R. Co.*, 52 *Am. & Eng. R. Cas.* 576, 44 *La. Ann.* 1059, 11 *So. Rep.* 818.

The right of a company to lay its tracks in a street or public highway carries with it the obligation to lay them in a proper manner and to keep them in repair; and if an injury occurs, by reason of a neglect in either of these respects, it is liable. *Worster* v. *Forty-second St. & G. S. F. R. Co.*, 50 *N. Y.* 203, 3 *Am. Ry. Rep.* 537; *affirming* 3 *Daly* 278.—FOLLOWING Fash *v.* Third Ave. R. Co., 1 Daly 148.—DISTINGUISHED IN Egan *v.* Forty-second St., M. & St. N. A. R. Co., 4 N. Y. Supp. 530.

If the defect be visible, notice to the company of such defect is not necessary. An omission to know of such a defect is *prima facie* negligence, as much as an omission to repair after notice. And the presumption of negligence is complete when it appears that the defects existed, and an injury was caused thereby. *Rockwell* v. *Third Ave. R. Co.*, 64 *Barb.* (*N. Y.*) 438; *affirmed in* 53 *N. Y.* 625, *mem.*

A company using a public street by permission of the city council must so construct its track as not unnecessarily to impede travel, nor to render travel over and across the street more dangerous to persons exercising ordinary prudence and skill than it would be but for such track being there in the condition it was. *Houston City St. R. Co.* v. *Delesdernier*, 84 *Tex.* 82, 19 *S. W. Rep.* 366.

177. Leaving track above street grade.— Plaintiff's sleigh was upset by striking against a switch that had been laid down by defendant to connect its tracks with those of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable; that defendant had put salt on its tracks, which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. *Held*, in an action to recover damages, that the evidence justified the submission of defendant's negligence to a jury. *Wooley* v. *Grand St. & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 398, 83 *N. Y.* 121.

A contract between a city and a company required the latter to build its track so as not to impede travel on the streets after the streets should be graded, and required the company to keep its roadbed in good repair, up to the level of the streets, and that in no case should it be below the city grade of the streets after they were graded. *Held*, that the company was under no obligation to fill up the streets beneath its track so as to have its roadbed on a level with the street, but was bound to keep the level of the roadbed up to that of the street when graded. The company incurred no liability for failing to conform its track to irregularities in the street when once it had been constructed in accordance with an established grade. And it did not follow that carriage travel was impeded because persons could not cross with reasonable safety at all points. *Galveston City R. Co.* v. *Nolan*, 3 *Am. & Eng. R. Cas.* 387, 53 *Tex.* 139.—REVIEWING Galveston *v.* Galveston City R. Co., 46 Tex. 435.

Defendant's charter compelled it to lay its rails flush with the street, and to make the track conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the street. *Held*, that having so laid the rails, it was not bound to alter and adapt them from time to time to changes in the level of the street; and therefore that it was not liable for an accident arising from the street having become worn down by traffic so as to leave the rail, which remained as originally laid several inches above the level. *Eddy* v. *Ottawa City Pass. R. Co.*, 31 *U. C. Q. B.* 569.

A company was bound by its charter to keep its rails on a level with the roadway. The rails were not so kept, and damage resulted to plaintiffs using the streets with their horses and carriages. *Held*, that a right of action was not defeated, although the course adopted for avoiding the damage might not be the best, provided the efforts to escape injury were earnest and sincere

and not grossly inappropriate. *Conlon* v. *City R. Co.*, 8 *Nov. Sc.* 209.

178. Leaving spikes or splinters projecting from rail. — A company which neglects to keep its road and tracks in good condition is liable to a party injured by a fall on a loose rail and protruding spike, in consequence of which his skull is fractured or perforated. *Cline* v. *Crescent City R. Co.*, 43 *La. Ann.* 327, 9 *So. Rep.* 122.

Where plaintiff shows that, while lawfully on the street, he was injured by a splinter projecting from a rail upon defendant's railroad, and that defendant was in the habit of allowing such defective rails to remain after knowledge of their condition, notice to the company of the defect was unnecessary. *Rockwell* v. *Third Ave. R. Co.*, 64 *Barb.* (*N. Y.*) 438; *affirmed in* 53 *N. Y.* 625, *mem.*

The right to lay a street-car track on a highway implies the duty to lay it properly and to keep it in proper condition. So where a pavement sinks, which leaves a spike in a rail so exposed as to interfere with a passing carriage and throw the occupant out and injure him, the company is guilty of such negligence as to render it liable. *Fash* v. *Third Ave. R. Co.*, 1 *Daly* (*N. Y.*) 148. — FOLLOWED IN Worster *v.* Forty-second St. & G. S. F. R. Co., 50 N. Y. 203; Worster *v.* Forty-second St. & G. S. F. R. Co., 3 Daly 278.

In such case it is wholly immaterial that the projecting spike was caused by the failure of the city to repair the street, where the evidence shows that the accident would not have happened if the company had not permitted the spike to project. *Fash* v. *Third Ave. R. Co.*, 1 *Daly* (*N. Y.*) 148.

179. Leaving holes in or about track.—A company undertaking to lay a track along a public road is bound to lay it properly and keep it in a safe condition, and it is a question for the jury whether it has done so or not. So where a company is sued for injuries to a horse, caused by stepping into a hole between the rails, it is error to take the case from the jury on the ground of defendant's want of notice of the defect. *Worster* v. *Forty-second St. & G. S. F. R. Co.*, 3 *Daly* (*N. Y.*) 278; *affirmed in* 50 *N. Y.* 203, 3 *Am. Ry. Rep.* 537.— FOLLOWING Fash *v.* Third Ave. R. Co., 1 Daly 148.

Plaintiff sued for an injury received in slipping into a hole between the rails of defendant's horse-car track, on a street; but there was no evidence that it was the duty of the company to keep the place in repair, it appearing that the city, and not the company, had control of the place; nor that the construction of the track was defective; nor that there was any statute requiring it to keep the space between its rails in repair. *Held*, that the complaint was properly dismissed. *Egan* v. *Forty-second St., M. & St. N. A. R. Co.*, 4 *N. Y. Supp.* 530, 19 *N. Y. S. R.* 676.— DISTINGUISHING Worster *v.* Forty-second St. & G. S. F. R. Co., 50 N. Y. 203; Wasmer *v.* Delaware, L. & W. R. Co., 80 N. Y. 212; Gale *v.* New York C. & H. R. R. Co., 76 N. Y. 594.

A street-car company was sued for injuries to a horse, caused by its slipping into a depression between the tracks. A statute required the company to keep that portion of the street in repair, but it appeared that the depression in question was constructed by the city several years before the accident, and was in the same condition as when constructed. *Held*, that the company was not liable, as it was only bound to make repairs. The city alone was liable. *Snell* v. *Rochester R. Co.*, 64 *Hun* 476, 46 *N. Y. S. R.* 441, 19 *N. Y. Supp.* 496.

180. Constructing drain under directions of city.—Plaintiff, while crossing a street at night, stepped into a depression in the paving, extending under the track of a passenger-railway company. Her foot thus getting under one of the rails, she was tripped up thereby, fell, and was injured. *Held*, that it was the duty of the company to keep the paving in repair, but as the depression in question was maintained under the direction of the city, as a means of draining the street, and was kept in the condition in which the city required it to be kept, the company, being subject to the city's control as to the maintenance and repair of the street, was not chargeable with negligence in maintaining the drain as directed by the city, and was not responsible for plaintiff's injury, if its sole cause was the existence of the drain. *Campbell* v. *Frankford & S. C. R. Co.*, 139 *Pa. St.* 522, 21 *Atl. Rep.* 92.

The company would be liable for the injury, if caused by its negligence in failing to keep the drain in repair; but the condition in which it maintained the drain as prescribed by the city cannot be evidence of such negligence, nor can the occurrence

there of other accidents while so maintained. *Campbell* v. *Frankford & S. C. R. Co.*, 139 *Pa. St.* 522, 21 *Atl. Rep.* 92

Nor is an alteration in the size of the drain, after the accident to plaintiff, made by the city or under its direction in connection with repairs rendered necessary by the tearing up of the street for purposes not connected with the railway, evidence of such negligence. *Campbell* v. *Frankford & S. C. R. Co.*, 139 *Pa. St.* 522, 21 *Atl. Rep.* 92.

181. Right to throw dirt on street.—A company is not guilty of negligence in excavating and throwing up earth in the street while engaged in repairing and laying its track; and a declaration, in which plaintiff claims to recover damages for injuries to his carriage by reason of its being driven onto such an obstruction and capsized, which fails to aver that the earth was allowed to remain in the street for an unreasonable time, or in the night-time, or without lights or barriers as warnings, and which fails to aver that the driver was exercising due care, fails to set forth a cause of action. *Cowan* v. *Muskegon R. Co.*, 84 *Mich.* 583, 48 *N. W. Rep.* 166.

A company is not guilty of negligence in allowing material taken from between its rails while repairing its track to remain in the street alongside its track for five or six hours, in the daytime. *Zanger* v. *Detroit City R. Co.*, 87 *Mich.* 646, 49 *N. W. Rep.* 879.

182. Right to throw snow from track to street.—Plaintiff was driving on a narrow street, and in turning out to let another team pass was forced on a ridge of snow that a street-car company had thrown from its track, and his sleigh overturned, injuring him. *Held*, that the act of the company in thus throwing snow on the street was extreme carelessness, justifying a verdict for plaintiff. *Somerville* v. *City R. Co.*, 43 *N. Y. S. R.* 425, 63 *Hun* 628, 17 *N. Y. Supp.* 719.

183. Liability where manner of laying track has been directed or approved by city.—Where the common council of a city specifies by ordinance the general character and extent of work to be done by railroad companies where streets are crossed, in order that the tracks may be crossed with more safety and convenience to the public, and provides that the work shall be done to the satisfaction of a specified agent of the city, but no detailed specifications are furnished, the fact that it is done to the satisfaction of such agent will not relieve the company of liability to one who is injured by reason of the work having been done in an unskilful and improper manner. *Delzell* v. *Indianapolis & C. R. Co.*, 32 *Ind.* 45.—DISTINGUISHING Young *v.* Yarmouth, 9 Gray (Mass.) 386.

Under Mass. St. 1871, ch. 381, § 21, providing that street-railway corporations "shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants in the construction, management, and use of its tracks," a husband may maintain suit against such a corporation for loss of services and society of, and expense of curing, his wife, who is injured by a defective construction of its tracks, even though they are constructed to the satisfaction of the superintendent of streets. *Osgood* v. *Lynn & B. R. Co.*, 3 *Am. & Eng. R. Cas.* 395, 130 *Mass.* 492.

If a track upon a public street becomes unsafe by negligent construction or otherwise, it is no defense that by contract with the city and the railway there should be no liability, nor that the track had been laid as directed by the city authorities. The city cannot contract so as to justify negligence, to the injury or impairment of the safety of the public. If the city joins in the unlawful act it also will be liable. *Houston City St. R. Co.* v. *Delesdernier*, 84 *Tex.* 82, 19 *S. W. Rep.* 366.

Authority given to a city council to supervise and direct the repairs of a railroad are merely directory, and not of such a character as to affect the right of action of injured individuals against the company. *Conlon* v. *City R. Co.*, 8 *Nov. Sc.* 209.—APPLYING Evens *v.* Halifax, 5 Nov. Sc. 111; Lackland *v.* North Mo. R. Co., 31 Mo. 180; Tate *v.* Ohio & M. R. Co., 7 Ind. 479. DISTINGUISHING Currier *v.* Lowell, 16 Pick. (Mass.) 174. QUOTING Parker *v.* Great Western R. Co., 7 M. & G. 253.

The provisions of the act respecting the Halifax Street Ry. requiring the company to keep the roadway level with the rails, between them, and two feet outside, under the supervision of the city engineer, are not complied with merely by virtue of the engineer approving of what has been done if the roadway is not actually level as required. *Joyce* v. *Halifax St. R. Co.*, 24 *Nov. Sc.* 113; *affirming* 21 *Nov. Sc.* 531.

184. Company not liable for negligence of third person.—It is the right of a company, bound by its charter to keep in repair the streets occupied by it, to show that a defect in a street, causing an injury, was the result of the negligence of persons other than themselves; and to require the court to charge distinctly that if the jury so find the facts the verdict should be for the defendant. *Citizens' Pass. R. Co.* v. *Ketcham*, 122 *Pa. St.* 228, 15 *Atl. Rep.* 733.

To a point that "If the jury believe that the injury was occasioned by the negligence of the plumber who was engaged in putting in pipes under license from the city, there can be no recovery from the railway company," the answer was "I affirm that point; but if, after his negligence ceased to operate, the railway company are negligent, they may be answerable." *Held*, that the point should have been affirmed without the qualification. *Citizens' Pass. R. Co.* v. *Ketcham*, 122 *Pa. St.* 228, 15 *Atl. Rep.* 733.

185. —— but not relieved by joint negligence of city.—Where a company lays a rail improperly, which causes an accident, the fact that the city was also negligent in the manner of paving the street, which negligence may have contributed to the injury, will not relieve the company from liability. *Carpenter* v. *Central Park, N. & E. R. R. Co.*, 11 *Abb. Pr. N. S.* (*N. Y.*) 416, 4 *Daly* 550, *mem.*

In all such cases, if its negligence co-operated in producing the injury, it is sufficient to hold the defendant. *Lockhart* v. *Lichtenthaler*, 46 *Pa. St.* 151. *Colegrove* v. *New York & N. H. R. Co.*, 20 *N. Y.* 492.

186. Proof of notice of defects.—A street-car company is not entitled to notice of a defect in its track, in order to hold it liable for a resulting injury, where the defect is patent. If it appears that such a defect existed, and an injury was caused thereby, the presumption of negligence is complete. If the defect is of such short duration as to destroy the presumption of knowledge on the part of the company, that is matter of defense. *Worster* v. *Forty-second St. & G. S. F. R. Co.*, 50 *N. Y.* 203, 3 *Am. Ry. Rep.* 537; *affirming* 3 *Daly* 278.—REVIEWED IN Bell *v.* New York C. & H. R. R. Co., 29 Hun (N. Y.) 560.

187. Contributory negligence.—One who knows that a street-railway track is being repaired, and sees an obstruction in the street by reason of such repairs, and drives over the same on a trot, without any consideration that a high, loose box upon which he is sitting may be thereby thrown out of the wagon, is guilty of such contributory negligence as will bar a recovery for injuries thereby sustained. *Zanger* v. *Detroit City R. Co.*, 87 *Mich.* 646, 49 *N. W. Rep.* 879.

Plaintiff knew that there was a switch in the locality, but it did not appear that he had in mind its precise location; he was not thinking particularly of the switch at the moment of the accident; but, thinking the place was one dangerous to cross without care, was going slowly and using great caution. *Held*, that he was not, as matter of law, chargeable with contributory negligence; but that the question was one for the jury. *Wooley* v. *Grand St. & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 398, 83 *N. Y.* 121.

188. Liability of municipality.—A city is liable for injuries caused to private property by a diversion of surface water thereon by the construction of a street railway which it has authorized to be built. *Damour* v. *Lyons City*, 44 *Iowa* 276.

A company was incorporated by an act under which the city had power to refuse to permit rails to be laid, or to consent on such terms as it thought fit. The company discontinued operations, leaving rails in many places protruding above the level of the streets, and above a year after it had ceased to operate its road plaintiff's carriage and horses were injured. Defendant city pleaded that the rails were in the exclusive possession of the company, that the accident was caused by the passage of a heavy cannon disturbing the rails shortly previous, and that it had no notice of the defect. The verdict was for plaintiff. *Held*, that under the justification pleaded it was necessary for defendant to disclose the permission given to the company to lay rails, and that the question as to the immediate cause of the accident and the want of notice had been disposed of by the verdict. *Adams* v. *Halifax*, 13 *Nov. Sc.* 344.

189. Joint liability of municipality and company.—A city and street-car companies therein may both become liable for a neglect to repair streets on which the tracks are laid. *Philadelphia* v. *Weller*, 4 *Brews.* (*Pa.*) 24.

190. Enforcing duty by complaint by attorney-general—Necessary parties.—An act authorizing the construction

of a street railway, and confirming a covenant entered into for the purpose with the municipal corporation, provided that the rails should be laid flush with the streets. *Held:* (1) that the rails must not only be flush when laid, but must be kept so; (2) that to enforce the contract against the company, a suit by the municipal corporation, the other party to the contract, was necessary; (3) that an information by attorney-general to enforce the statutory restrictions was proper; that unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the statute, the attorney-general was entitled to a decree for the removal of the rails as a nuisance; but that the municipal corporation was a necessary party to the information. *Attorney-General* v. *Toronto St. R. Co.*, 14 *Grant's Ch.* (*U. C.*) 673.

In such case the rails were found not to conform to the requirements of the statute authorizing the railway, and the court granted a decree for the removal of the rails, but directed that the decree should not go into effect for a specified period, so as to afford time to the company, by proper alterations and repairs, to comply with the statute. *Attorney-General* v. *Toronto St. R. Co.*, 15 *Grant's Ch.* (*U. C.*) 187.

V. RIGHTS OF ABUTTING OWNERS.*

191. A street railway imposes no new burden or servitude on the land.—A horse railway on the streets of a city is not an additional burden upon the soil of the street so as to entitle the abutting land owners to compensation. *Randall* v. *Jacksonville St. R. Co.*, 17 *Am. & Eng. R. Cas.* 184, 19 *Fla.* 409. *Elliot* v. *Fair Haven & W. R. Co.*, 32 *Conn.* 579.—DISTINGUISHING Imlay *v.* Union Branch R. Co., 26 Conn. 249.—*Floyd County* v. *Rome St. R. Co.*, 77 *Ga.* 614, 3 *S. E. Rep.* 3. *Briggs* v. *Lewiston & A. Horse R. Co.*, 32 *Am. & Eng. R. Cas.* 167, 79 *Me.* 363, 10 *Atl. Rep.* 47.—FOLLOWED IN Williams *v.* City Elec. St. R. Co., 43 Am. & Eng. R. Cas. 215, 41 Fed. Rep. 556.—*Hiss* v. *Baltimore & H. Pass. R. Co.*, 4 *Am. & Eng. R. Cas.* 201, 52 *Md.* 242, 36 *Am Rep.* 371.—APPLIED IN Eichels *v.* Evansville St. R. Co., 5 Am. & Eng. R. Cas. 274, 78 Ind. 261, 41 Am. Rep. 561.—*Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603. *Attorney-General* v. *Metropolitan R. Co.*, 125 *Mass.* 515. *Detroit City R. Co.* v. *Mills*, 46 *Am. & Eng. R. Cas.* 608, 85 *Mich.* 634, 48 *N. W. Rep.* 1007. *People ex rel.* v. *Ft. Wayne & E. R. Co.*, 92 *Mich.* 522, 52 *N. W. Rep.* 1010.—FOLLOWED IN Dean *v.* Ann Arbor St. R. Co., 93 Mich. 330.—*Elfelt* v. *Stillwater St. R. Co.*, 53 *Minn.* 68, 55 *N. W. Rep.* 116. *Van Horne* v. *Newark Pass. R. Co.*, 50 *Am. & Eng. R. Cas.* 235, 48 *N. J. Eq.* 332, 21 *Atl. Rep.* 1034. *Brooklyn C. & J. R. Co.* v. *Brooklyn City R. Co.*, 33 *Barb.* (*N. Y.*) 420.—DISTINGUISHING Williams *v.* New York C. R. Co., 16 N. Y. 97.—APPROVED IN Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75. FOLLOWED IN Brooklyn City & N. R. Co. *v.* Coney Island & B. R. Co., 35 Barb. 364.—*Smith* v. *East End St. R. Co.*, 38 *Am. & Eng. R. Cas.* 470, 87 *Tenn.* 626, 11 *S. W. Rep.* 709.—DISTINGUISHED IN East End St. R. Co. *v.* Doyle, 88 Tenn. 747, 9 L. R. A. 100, 13 S. W. Rep. 936.—*Texas & P. R. Co.* v. *Rosedale St. R. Co.*, 22 *Am. & Eng. R. Cas.* 160, 64 *Tex.* 80.—DISAPPROVING Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404.—*Belt Line St. R. Co.* v. *Crabtree*, 2 *Tex. App.* (*Civ. Cas.*) 579.

And the same doctrine is held applicable to electric railways. *Central Pa. Tel. Co.* v. *Wilkes-Barre & W. S. R. Co.*, 1 *Pa. Dist.* 628.

A street railway properly constructed and lawfully authorized does not impose such a new burden as to entitle an adjacent owner of property to compensation therefor. *Ransom* v. *Citizens' R. Co.*, 104 *Mo.* 375, 16 *S. W. Rep.* 416.

Unless he can show that he will suffer some private and peculiar injury by being deprived of free access to his premises, which otherwise he would enjoy. *Hobart* v. *Milwaukee City R. Co.*, 27 *Wis.* 194, 2 *Am. Ry. Rep.* 35.—DISAPPROVING Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404. FOLLOWING People *v.* Kerr, 27 N. Y. 204.—QUOTED AND APPROVED IN Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078.

The use is the criterion by which a street railway is judged. *Briggs* v. *Lewiston & A. Horse R. Co.*, 32 *Am. & Eng. R. Cas.* 167, 79 *Me.* 363, 10 *Atl. Rep.* 47.

* Operations of horse railway in street; rights of abutters, see notes, 5 AM. & ENG. R. CAS. 284; 1 L. R. A. 493.

Street railways as additional burden on land. Right of abutting owners to compensation, see 56 AM. & ENG. R. CAS. 523, *abstr.*; 46 *Id.* 90, *abstr.*

The street railway is included among the usual modes of conveyance along the streets of the city, and the inconveniences thereby occasioned must be acquiesced in as being in the interest of the general public. *Texas & P. R. Co.* v. *Rosedale St. R. Co.*, 22 *Am. & Eng. R. Cas.* 160, 64 *Tex.* 80.

The right to use the streets of a city for a horse railway rests on the ground that such a use is neither inconsistent with, nor does it in any manner supersede, the ordinary uses for which the street was dedicated as a highway; that the easement thereby acquired was the right to use the streets not only according to the then existing modes of travel and transportation, but all such other modes as might arise in the ordinary course of improvement; and that a horse railway is but one of the legitimate contingencies within the object and purpose for which the street was dedicated to the public, and which it is therefore to be presumed was within the contemplation of the parties at the time damages were assessed to abutting owners. *Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603.

Md. Act of 1831, ch. 252, which authorizes the mayor and city council of Baltimore, on the application of a majority of lot owners fronting on any street, to pass such ordinances as may be necessary for the construction of railway tracks, etc., has no application or reference whatever to horse railways for passengers. *Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603.

If the contemplated use of a street by a street-railway company is authorized by statute, an abutting owner's rights therein are subservient, unless such use imposes an additional servitude upon the land taken by the street or on the abutting land; but when a public use authorized by law takes no property of the individual, merely affecting him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use furnishes no basis for damages. *Paterson R. Co.* v. *Grundy*, 56 *Am. & Eng. R. Cas.* 486, 51 *N. J. Eq.* 213, 26 *Atl. Rep.* 788.

A privilege granted to a corporation of a partial use of a street, which threatens if it does not encroach upon the property rights of an adjacent owner, should be so exercised by the company as to minimize the inconvenience and danger to the enjoyment of such rights. *Paterson R. Co.* v. *Grundy*, 56 *Am. & Eng. R. Cas.* 486, 51 *N. J. Eq.* 213, 26 *Atl. Rep.* 788.

192. —— not when cable, electricity, or other mechanical power is used.*—The operation of a street railroad by mechanical power, when authorized by law, on a public street, is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use only of the street as a public highway, and affords to the owner of the abutting property, though he may own the fee of the street, no legal ground of complaint. *Williams* v. *City Elec. St. R. Co.*, 43 *Am. & Eng. R. Cas.* 215, 41 *Fed. Rep.* 556. —FOLLOWING Briggs *v.* Lewiston & A. Horse R. Co., 79 Me. 363, 10 Atl. Rep. 47; Newell *v.* Minneapolis, L. & M. R. Co., 35 Minn. 112, 27 N. W. Rep. 839; People *v.* Kerr, 27 N. Y. 204.

The operation of a street railway by horse-car, cable, or electricity, when authorized by law, on a public street, is not an additional servitude or burden on the land which will entitle the owner of property abutting on the street to compensation under Pa. Const. art. 16, § 8. *Rafferty* v. *Central Traction Co.*, 50 *Am. & Eng. R. Cas.* 239, 147 *Pa. St.* 579, 23 *Atl. Rep.* 884.

193. Authorities holding that such road is an additional servitude.—The establishing and running a horse railroad in the public streets of a city held to be the imposition of an additional burden upon the land of an adjoining proprietor covered by such street; and that such proprietor could maintain a suit to enjoin perpetually the railroad company from laying down such track in the street, and from running their cars over the same. (Woodruff, Mason, and Dwight, JJ., dissenting.) *Craig* v. *Rochester City & B. R. Co.*, 39 *N. Y.* 404; *affirming* 39 *Barb.* 494.—REVIEWING Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill 567; Fletcher *v.* Auburn & S. R. Co., 25 Wend. 462; Williams *v.* New York C. R. Co., 16 N. Y. 97; Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506.—APPROVED IN Thayer *v.* Rochester City & B. R. Co., 15 Abb. N. Cas. (N. Y.) 52. CRITICISED IN Eichels *v.* Evansville St. R. Co., 5 Am. & Eng. R. Cas.

* As to whether a steam or street railway is a new servitude on street, so as to entitle abutting owners to damages, see note, 28 AM. REP. 267.

274, 78 Ind. 261, 41 Am. Rep. 561. DISAPPROVED IN Texas & P. R. Co. *v.* Rosedale St. R. Co., 22 Am. & Eng. R. Cas. 160, 64 Tex. 80; Hobart *v.* Milwaukee City R. Co., 27 Wis. 194. DISTINGUISHED IN Kellinger *v.* Forty-second St. & G. S. F. R. Co., 50 N. Y. 206; Fobes *v.* Rome, W. & O. R. Co., 43 Am. & Eng. R. Cas. 137, 121 N. Y. 505, 24 N. E. Rep. 919, 31 N. Y. S. R. 828. FOLLOWED IN Harrington *v.* St. Paul & S. C. R. Co., 17 Minn. 215 (Gil. 188). REVIEWED IN Bloomfield & R. N. Gas-light Co. *v.* Calkins, 62 N. Y. 386; Spofford *v.* Southern Boulevard R. Co., 15 Daly 162, 4 N. Y. Supp. 388, 22 N. Y. S. R. 246.

The rule that a street surface railroad is an additional burden upon the street, which will entitle abutting owners to damages where they own the fee of the street, is not affected by N. Y. Const. of 1874, art. 3, § 18, that no law shall be passed authorizing the construction of such railroads without the consent of a majority of the adjoining owners, or if such consent cannot be obtained, then by the direction of the supreme court. *McCruden* v. *Rochester R. Co.*, 25 *N. Y. Supp.* 114, 5 *Misc.* 59; *affirmed in* 77 *Hun* 609.—FOLLOWING Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404.

194. Street railways distinguished from ordinary railroads. — While it may be said that bridges, culverts, and even street railways are matters contemplated by the lot owner when he purchases, no such presumption applies to the use of the street by an ordinary railroad. *Denver* v. *Bayer*, 7 *Colo.* 113, 2 *Pac. Rep.* 6.

The difference between railroads for general traffic and street railroads consists in their use, and not in their motive power. A railroad the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers—is a street railroad, whether the cars are propelled by animal or mechanical power. *Williams* v. *City Elec. St. R. Co.*, 43 *Am. & Eng. R. Cas.* 215, 41 *Fed. Rep.* 556.—FOLLOWED IN Koch *v.* North Ave. R. Co., 75 Md. 222.

It is competent for the legislature to authorize the construction of a street railway, operated by horse power, as distinguished from one operated by steam, in the public streets, without providing any compensation to abutting property holders along the street through which such road may be constructed. This is upon the theory that such roads are not additional burdens upon the soil of the street, but are legitimate uses of the highway, in furtherance of the purposes for which they were originally dedicated. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

Iowa Code, § 464, makes a distinction between railways proper and street railways, the former being such as are operated by steam, and the latter those operated by horses; and under that section it is only when a railway operated by steam is built along a street that an abutting lot owner is entitled to damages. Such right does not arise upon the construction of a road operated by horses. *Sears* v. *Marshalltown St. R. Co.*, 20 *Am. & Eng. R. Cas.* 36, 65 *Iowa* 742, 23 *N. W. Rep.* 150.

In the use of a public street, in respect to the rights of adjacent owners, a difference is recognized between an ordinary horse railway and a steam railroad. *Theobold* v. *Louisville, N. O. & T. R. Co.*, 38 *Am. & Eng. R. Cas.* 462, 66 *Miss.* 279, 4 *L. R. A.* 735, 6 *So. Rep.* 230.

195. When not a "taking of private property for public use." — Building and operating a horse railroad in the streets of a city, by authority of the legislature and the city, is not a taking of private property for public use within the provision of the Constitution of New Jersey. *Hinchman* v. *Paterson Horse R. Co.*, 17 *N. J. Eq.* 75.—DISAPPROVING Wager *v.* Troy Union R. Co., 25 N. Y. 533; Craig *v.* Rochester City & B. R. Co., 39 Barb. (N. Y.) 494.—FOLLOWED IN Jersey City & B. R. Co. *v.* Jersey City & H. Horse R. Co., 20 N. J. Eq. 61; West Jersey R. Co. *v.* Cape May & S. L. R. Co., 34 N. J. Eq. 164.—*Jersey City & B. R. Co.* v. *Jersey City & H. Horse R. Co.*, 20 *N. J. Eq.* 61; *reversed on other grounds in* 21 *N. J. Eq.* 550.—CRITICISING Craig *v.* Rochester City R. Co., 39 Barb. 494. FOLLOWING Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75.—*West Jersey R. Co.* v. *Cape May*

& *S. L. R. Co.*, 34 *N. J. Eq.* 164.—FOLLOWING Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 76.

Though an abutting owner has title to the land in the street, the use of the street by a street railway will not be a use of his property for any purposes other than to pursue privileges previously acquired by the public, and he is not entitled to any compensation, nor of course to any injunction, for the reason that no compensation has been awarded to him. *Wetmore* v. *Story*, 3 *Abb. Pr.* (*N. Y.*) 262.

196. Taking or damaging private property for public use.*—Under the provision of the Georgia Constitution that private property "shall not be taken or damaged for public purposes without just compensation," an abutting owner may recover damages caused by the operation of a street-car, though no part of his property be taken. *Campbell* v. *Metropolitan St. R. Co.*, 82 *Ga.* 320, 9 *S. E. Rep.* 1078.

Under the provision of the Illinois Constitution that "private property shall not be taken or damaged for public use without just compensation," only damages for an actual taking need be paid in advance. Other special damages may be recovered in a suit at law. *Lorie* v. *North Chicago City R. Co.*, 32 *Fed. Rep.* 270.

In Ohio and Wisconsin it is held, in the absence of a constitutional provision relating to damages for merely injuring property, that an abutting owner is entitled to damages, if a street-car line materially impairs his free access to the street. *Cincinnati & S. G. A. St. R. Co.* v. *Cumminsville*, 14 *Ohio St.* 523. *Hobart* v. *Milwaukee City R. Co.*, 27 *Wis.* 200.

197. What is private property.—The footway of a public street or highway is not private property any more than the portion of a street appropriated as a cartway. *Clark* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 259.

198. Extent to which street may be used by tracks.—The legislature of a state has not such plenary power over all public ways and streets that it may, in the absence of constitutional restrictions, authorize municipalities to devote the entire width of a street to railway use, regardless of the property rights of abutting owners and without compensation for injury to their property. *Dooly Block* v. *Salt Lake Rapid Transit Co.*, 56 *Am. & Eng. R. Cas.* 513, 9 *Utah* 31, 33 *Pac. Rep.* 229.

The statutes of Utah authorizing a certain city "to exclusively control, regulate, repair, amend, and clear the streets," and to "open, widen, straighten, or vacate streets," and to "prevent the encumbering of the streets in any manner, and protect the same from any encroachment and injury," and also conferring upon the city power "to direct and control the location of railroad tracks and depot grounds within the city," will not be construed as authorizing the city council to grant a railway franchise, if the construction of the road will injure and materially depreciate the value of the property of the abutters. The city has no power "to direct and control" the location of the railway tracks in cases where the streets are already burdened to the extent that natural justice will allow, until a right of way has been condemned by the railway company. *Dooly Block* v. *Salt Lake Rapid Transit Co.*, 56 *Am. & Eng. R. Cas.* 513, 9 *Utah* 31, 33 *Pac. Rep.* 229.

Where, at the date of granting to a street-railway company a franchise to occupy a certain street, there were in operation upon that street two railway tracks, with a line of poles between them, and also many electric-light and telegraph poles on each side of the street, the abutting owners may enjoin the construction of a third track, authorized by the city council, where it appears that the tracks already upon the said street afford ample facilities for running all cars necessary for public convenience, and the construction of a third track would be a serious impediment to the ordinary mode of travel. *Dooly Block* v. *Salt Lake Rapid Transit Co.*, 56 *Am. & Eng. R. Cas.* 513, 9 *Utah* 31, 33 *Pac. Rep.* 229.

199. Enjoining road, generally.*—A horse railway on the streets of a city, which is authorized by the legislature and the city, is not a nuisance, if it be laid down according to the most improved mode of construction, and cannot be enjoined as such. *Randall* v. *Jacksonville St. R. Co.*, 17 *Am. & Eng. R. Cas.* 184, 19 *Fla.* 409.

An injunction having been sought to prevent a street-railroad company from

* See also *post*, **208, 209.**

* Use of street by company in violation of a contract with abutting owners. Right of such owners to enjoin, see 46 AM. & ENG. R. CAS. 111, *abstr.*

building its track and operating in a street of a city, on the ground that this would damage the plaintiff's property, and it appearing that the company did not seek to take any of plaintiff's property, and it being doubtful whether the same would be damaged or not, it is not an abuse of discretion to allow defendant to dissolve a temporary injunction against it by filing a bond, with good security, conditioned to pay plaintiff all damages that might be recovered by him or assessed by reason of building and operating the road. *Fouché* v. *Rome St. R. Co.*, 84 *Ga.* 233, 10 *S. E. Rep.* 726.

In the city of Chicago the fee to the streets is in the city; and a property owner cannot enjoin a road in the streets unless he has been disturbed in the enjoyment of his property, for which he does not have an adequate remedy at law. If he has suffered some special injury not peculiar to the public at large, his remedy is by an action at law for damages. *Lorie* v. *North Chicago City R. Co.*, 32 *Fed. Rep.* 270.

The Iowa general statute relating to rights of way speaks of "any railroad corporation heretofore organized, or that may hereafter be organized, under the laws of this state," and there is nothing on its face to show an intention to limit it to ordinary railroads. *Held*, that it embraces a street railway operated by horse power. So a street railroad connecting two cities, and authorized by ordinance, exists by virtue of the general statute, and cannot be enjoined as a nuisance on a repeal of the ordinance. *Clinton* v. *Clinton & L. Horse R. Co.*, 37 *Iowa* 61.

A street railroad in the city of New Orleans which has been authorized by the city to change its track cannot be enjoined from doing so by an individual property owner, on the ground that such change will likely prove detrimental to the public health, and will therefore work an irreparable injury to him. *Hoyle* v. *New Orleans City R. Co.*, 23 *La. Ann.* 535.

The acts of a corporation can be assailed for abuse or excess of its corporate powers only in a direct proceeding by the state. Hence, where a company chartered to build a horse railroad between certain points in a city accepts from the common council a right of way over streets not lying between those points, and its successor in title is proceeding to construct a road over those streets, conceding that this is an abuse or excess of the powers of the corporation, a private citizen whose interests are affected cannot claim an injunction on that ground. *Hovelman* v. *Kansas City Horse R. Co.*, 20 *Am. & Eng. R. Cas* 17, 79 *Mo.* 632.

Owners of property on a public highway have a right to the interposition of a court of equity to prevent apprehended injury from a public nuisance such as the erection of a passenger railway in the street, in front of their property, contrary to law. *Faust* v. *Passenger R. Co.*, 3 *Phila.* (*Pa*) 164.—FOLLOWED IN Hestonville, M. & F. R. Co. *v.* Schuylkill River Pass. R. Co., 6 Phila. (Pa.) 141. QUOTED IN Philadelphia *v.* Thirteenth & F. St. Pass. R. Co., 8 Phila. (Pa.) 648.

But the legislature has a paramount right to control the use of highways, and when a company is duly chartered, with power to lay rails in the streets of a city, it cannot be deemed a nuisance. *Faust* v. *Passenger R. Co.*, 3 *Phila.* (*Pa.*) 164.—FOLLOWING Case of Philadelphia & T. R. Co., 6 Whart. (Pa.) 25.

200. Complainant must show special damage.* — Mere consequential disadvantages of a street railroad to a particular locality, by reason of the depreciation in value of adjoining property, cannot be the subject of a private action. *Carson* v. *Central R. Co.*, 35 *Cal.* 325.

The construction and operation of a horse railway in the public streets of a city do not entitle a private individual to compensation unless his property is specially damaged. He is entitled to recover the damages which his property has actually sustained. *Campbell* v. *Metropolitan St. R. Co.*, 82 *Ga.* 320, 9 *S. E. Rep.* 1078.—QUOTING AND APPROVING Cincinnati & S. G. A. St. R. Co. *v.* Cumminsville, 14 Ohio St. 523; Hobart *v.* Milwaukee City R. Co., 27 Wis. 200.

Upon a bill for injunction, an allegation that the location of a street railroad will inconvenience the complainant's business and diminish the value of his property is material and significant only where the road is constructed without authority, and the evil complained of is a public nuisance, as showing that the complainant has sustained special injury. *Hogencamp* v. *Paterson Horse R. Co.*, 17 *N. J. Eq.* 83.

But where the laying of the track and the use of the road are authorized by the municipal authorities, its location rests in

* Horse railways in streets. Compensation and damages, see note, 36 AM. & ENG. R. CAS. 18.

the discretion of the corporation or of those having the control and regulation of the streets. It cannot affect the question of right. *Hogencamp* v. *Paterson Horse R. Co.*, 17 *N. J. Eq.* 83.

When a street railway is constructed in a public highway without authority of law it is a public nuisance, because it is an invasion of the public easement. *Van Horne* v. *Newark Pass. R. Co.*, 50 *Am. & Eng. R. Cas.* 235, 48 *N. J. Eq.* 332, 21 *Atl. Rep.* 1034.

In the latter case there is no invasion of the property rights of the owner of the fee of the land in the highway, and a court of equity will not interfere by injunction, at his instance, unless he suffers some special and serious injury from the existence of the railway there, distinct from that which is suffered by the public at large. *Van Horne* v. *Newark Pass. R. Co.*, 50 *Am. & Eng. R. Cas.* 235, 48 *N. J. Eq.* 332, 21 *Atl. Rep.* 1034. —DISTINGUISHING Broome *v.* New York & N. J. Telep. Co., 42 N. J. Eq. 143.

The construction of a railroad track laid on wooden ties imbedded in the soil, the rails being raised from six to eight inches above the general level of the street, does not cause a special and peculiar injury to the owners of property abutting upon the street, which is irreparable in its nature and different in kind from that sustained by the general public, and such owners cannot enjoin the same as a nuisance when the street is eighty feet wide, the track is in the centre thereof, and ample room for foot passengers and vehicles to pass each other is left on both sides of the track. *Fogg* v. *Nevada C. O. R. Co.*, 43 *Am. & Eng. R. Cas.* 105, 20 *Nev.* 429, 23 *Pac. Rep.* 840.—REVIEWING Atchison St. R. Co. *v.* Nave, 38 Kan. 752; Neitzey *v.* Baltimore & P. R. Co., 5 Mackey (D. C.) 34.

Although the unauthorized occupation of a public street by a railway track may be regarded as a nuisance, *per se*, which will be enjoined, an injunction against it will not be granted at the suit of a private citizen or a corporation, unless the plaintiff can make out a case of special damage. *Larimer & L. St. R. Co.* v. *Larimer St. R. Co.*, 137 *Pa. St.* 533, 20 *Atl. Rep.* 570.—FOLLOWED IN Watkin *v.* West Phila. Pass. R. Co., 1 Pa. Dist. 463.—*Shipley* v. *Continental R. Co.*, 13 *Phila.* (*Pa.*) 128.—REVIEWED IN Gyger *v.* Philadelphia City Pass. R. Co., 17 Phila. 86.—*Watkin* v. *West Phila. Pass. R. Co.*, 1 *Pa. Dist.* 463.

201. For heaping up snow on street.*—An abutting owner and resident may enjoin a street-railroad company from throwing snow from its track and leaving it on the street beyond a reasonable time, so as to cut off the use of the street or access to plaintiff's property. *Prime* v. *Twenty-third St. R. Co.*, 1 *Abb. N. Cas.* (*N. Y.*) 63. —REVIEWING In re Boston & A. R. Co., 53 N. Y. 574.

In exercising its franchise to operate its road the company has the right to remove snow from its track, but it has no right to encroach unnecessarily upon the portion of the street not covered by its track; and while it may have the right of selection as to where it will throw the snow, this right must be exercised so as not to infringe upon public or private rights. *Prime* v. *Twenty-third St. R. Co.*, 1 *Abb. N. Cas.* (*N. Y.*) 63.

And the fact that there was no other place to which the snow could be carried without ruinous expense to the company will not justify the latter in leaving it upon the street an unnecessary length of time; neither will the fact that the snowfall is so great that, even if the company threw none from its track, access to the sidewalk would be cut off, justify such interference with the street. *Prime* v. *Twenty-third St. R. Co.*, 1 *Abb. N. Cas.* (*N. Y.*) 63.

And in such case the company will not be justified in persistently throwing snow from its track and heaping it up on the street, because plaintiff contributed to the obstruction by throwing the snow from the sidewalk, some of which at times was thrown on defendant's track. *Prime* v. *Twenty-third St. R. Co.*, 1 *Abb. N. Cas.* (*N. Y.*) 63.

202. Owner of unimproved lot cannot enjoin.—The location of a railroad through a public street, in a line not warranted by law, will not be enjoined at the instance of the owner of an unimproved building lot, suffering no present detriment. *Zabriskie* v. *Jersey City & B. R. Co.*, 13 *N. J. Eq.* 314.

203. Road for private use may be enjoined.—Where a person or corporation attempts to construct a purely private railroad upon the public streets of a city, any abutting lot owner whose property is or may be injured may enjoin such use of the streets. *Mikesell* v. *Durkee*, 34 *Kan.* 509, 9

*See also *post*, **273.**

Pac. Rep. 278; *further appeal* 36 *Kan.* 97, 12 *Pac. Rep.* 351. — QUOTING Smith *v.* Leavenworth, 15 Kan. 81.

204. Enjoining use of steam. — Where a company which operates a horse railroad is authorized to use steam as a motive power on a portion of its line, it is liable for a nuisance if it uses a part of its track upon which it is not authorized to use steam for the purpose of switching cars, interfering with the use and occupation of the premises abutting upon such street, shaking the buildings, and discharging cinders, smoke, and dust upon the premises. *Hussner* v. *Brooklyn City R. Co.*, 43 *Am. & Eng. R. Cas.* 219, 114 *N. Y.* 433, 21 *N. E. Rep.* 1002, 23 *N. Y. S. R.* 856; *affirming* 41 *Hun* 643, 1 *N. Y. S. R.* 772, *mem.* — DISTINGUISHED IN Fobes *v.* Rome, W. & O. R. Co., 43 Am. & Eng. R. Cas. 137, 121 N. Y. 505, 24 N. E. Rep. 919, 31 N. Y. S. R. 828.]

Whether any substantial injury resulted to the premises and their use from such causes is a question of fact for the jury, when the evidence is conflicting in that respect. *Hussner* v. *Brooklyn City R. Co.*, 43 *Am. & Eng. R. Cas.* 219, 114 *N. Y.* 433, 21 *N. E. Rep.* 1002, 23 *N. Y. S. R.* 856; *affirming* 41 *Hun* 643, 1 *N. Y. S. R.* 772, *mem.*

205. For want of consent of lot owners—Variance.—The rule that the evidence must follow and conform to the allegations of the pleadings, and tend to establish the cause of action or defense alleged, has never been abolished in New York. So where an abutting property owner seeks to enjoin a street railroad on the sole ground that the company has not obtained the consent of the owners of one half of the property bounded on the street, as required by the statute, but offers no evidence to prove such averment, he cannot maintain the action by offering evidence to prove that he owned the fee of the street where the track was laid, and that he had not consented. *Benedict* v. *Seventh Ward R. Co.*, 51 *Hun* (*N. Y.*) 111. — FOLLOWING Vail *v.* Long Island R. Co., 106 N. Y. 283; Southwick *v.* First Nat. Bank, 84 N. Y. 420.

Although it is necessary that the consent of a majority of the property holders on a street be obtained to laying a track, yet it will not be presumed that the city council acted without such consent, if its proceedings purport to be predicated upon it. And where an application for an injunction has been made on the part of a minority of the owners of property on a street, and a restraining order allowed, the order will be vacated, the court retaining the petition and leaving the parties to apply under the law for appropriating property for public use, or to have damages assessed by a jury, but requiring defendants to give security for any damages which may be sustained by laying the track. *Cincinnati College* v. *Nesmith*, 2 *Cin. Super. Ct.* 24. — REVIEWING Roberts *v.* Easton, 19 Ohio St. 79.

206. Injunction not defeated by acquiescence for over a month. — Where only one month and eight days elapsed between the time at which a franchise was sold and the institution by abutting owners of a suit for injunction to restrain the alleged owner of the franchise from entering upon the street, and such abutting owners have entered a public protest against the granting of the franchise by the city council, and the attempted invasion of the street took place after the commencement of the suit, there is no acquiescence on the part of the abutting owners which will estop them from maintaining their legal rights. *Hart* v. *Buckner*, 56 *Am. & Eng. R. Cas.* 430, 54 *Fed. Rep.* 925, 2 *U. S. App.* 488, 5 *C. C. A.* 1; *affirming* 52 *Fed. Rep.* 835.

207. Proper parties. — Where there is an unauthorized obstruction in a street, all the adjacent owners who sustain any special injury can maintain a suit for injunction against the party making the obstruction, and the alleged trespasser is the only necessary party defendant. *Hart* v. *Buckner*, 56 *Am. & Eng. R. Cas.* 430, 54 *Fed. Rep.* 925, 2 *U. S. App.* 488, 5 *C. C. A.* 1; *affirming* 52 *Fed. Rep.* 835.

Two or more persons, each owning distinct though adjoining lots and buildings on the street of a city where it is proposed, without authority from the city, to build a street railroad which, when built, will obstruct the use of the properties and cause a common injury to such proprietors, independent and different from what the general public suffers, may unite as plaintiffs and maintain an action to restrain the threatened obstruction and nuisance. *Atchison St. R. Co.* v. *Nave*, 36 *Am. & Eng. R. Cas.* 29, 38 *Kan.* 744, 17 *Pac. Rep.* 587. — FOLLOWING Palmer *v.* Waddell, 22 Kan. 352. — REVIEWED IN Fogg *v.* Nevada C. O. R. Co., 43 Am. & Eng. R. Cas. 105, 20 Nev. 429.

Both the city and owners of property on a street, who may be injured by the unlawful

laying of a street-railway track, are proper parties to a bill to enjoin such use of the street. *Philadelphia* v. *Thirteenth & F. St. Pass. R. Co.*, 8 *Phila.* (*Pa.*) 648.—DISTINGUISHING Peterson *v.* Navy Yard, B. S. & F. R. Co., 5 Phila. 199. QUOTING Faust *v.* Second & T. St. Pass. R. Co., 3 Phila. 164; Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 357.

208. Laying track so as to interfere with free access to or use of street.*—Owners of lots abutting on or adjacent to a public street of a city, though not owners of a fee in the street, have the right of access and of quiet enjoyment, such rights being property which may be protected by injunction when invaded without legal authority. *Hart* v. *Buckner*, 56 *Am. & Eng. R. Cas.* 430, 54 *Fed Rep.* 925, 2 *U. S. App.* 488, 5 *C. C. A.* 1; *affirming* 52 *Fed. Rep.* 835.

Though the fee to the streets in New York be in the city, still, abutting property owners have an easement in the streets to pass and repass, and convenient access to and from their premises, which they may protect; but they cannot maintain an action for the mere inconvenience occasioned by the lawful use of the street for a street surface railway. *Kellinger* v. *Forty-second St. & G. S. F. R. Co.*, 50 *N. Y.* 206, 3 *Am. Ry. Rep.* 77.—APPLYING People *v.* Kerr, 27 N. Y. 188. DISTINGUISHING Williams *v.* New York C. R. Co., 16 N. Y. 97; Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404; Fletcher *v.* Auburn & S. R. Co., 25 Wend. 462. REVIEWING Drake *v.* Hudson River R. Co., 7 Barb. 508.—DISTINGUISHED IN Selden *v.* Jacksonville, 28 Fla. 558. FOLLOWED IN Clark *v.* Rochester City & B. R. Co., 18 N. Y. S. R. 903, 50 Hun 600, 2 N. Y. Supp. 563.

When the public authorities have taken possession of a street or highway, and regularly defined the interests and improvements necessary for the use of the public by establishing grades, etc., lot owners have the right to make their improvements in reference thereto, and no subsequent change which obstructs or impairs access to such improvements can lawfully be made without compensating for the injury. A finding of the court that such injury will result from laying a street-railroad track near the sidewalk, in front of the owner's house, shop, etc., is in no way qualified or affected by the further fact, also found, that when the interests of the company and of the general traveling public are also taken into the account, the location would be as little injurious as in any other part of the highway. *Cincinnati & S. G. A. St. R. Co.* v. *Cumminsville*, 14 *Ohio St.* 523.—CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 38 Alb. L. J. 388. FOLLOWED IN Scioto Valley R. Co. *v.* Lawrence, 7 Am. & Eng. R. Cas. 93, 38 Ohio St. 41, 43 Am. Rep. 419. QUOTED IN Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504. QUOTED AND APPROVED IN Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078.

Inconvenience or annoyance to property owners, or interference with business or travel along a highway which a street passenger railway proposes to occupy, is no ground to prevent the construction of a railway, under Pa. Act of May 14, 1889. *Hain* v. *Lebanon & A. St. R. Co.*, 1 *Pa. Dist.* 452.

Street-railway companies have no right of eminent domain; and can acquire no right by contract with a city to obstruct, for purposes of its construction, the right of ingress and egress appurtenant to the abutting lots, even where the owners thereof have no fee in the street. But construction of a road upon the city's established grade of the streets, under a lawful contract with the city authorities, and in a lawful manner, exonerates the company from liability, in this particular, to the abutting owners. *Smith* v. *East End St. R. Co.*, 38 *Am. & Eng. R. Cas.* 470, 87 *Tenn.* 626, 11 *S. W. Rep.* 709.

When land is platted by the owner of the soil, and lots bounded by a street designated and marked on the plat are sold, the grantee acquires a right to the street in front of the premises as a means of access; and lot owners cannot be denied the right of access, light, and air, although the fee to the street may be in the city, in trust for the use of the public, instead of in the abutting owners, for street uses. *Dooly Block* v. *Salt Lake Rapid Transit Co.*, 56 *Am. & Eng. R. Cas.* 513, 9 *Utah* 31, 33 *Pac. Rep.* 229.

209. —— or with plaintiff's business.—Plaintiff had a retail dry-goods store on a narrow street on which there was already one street-car track, and the company was unlawfully proceeding to lay another

*See also *ante*, **196.**

track in the street up to the building but not in front of it, but which would obstruct the street so as to divert business from his store and consequently injure both plaintiff, who leased the building, and the owner. *Held*, that an injunction to restrain the laying of the track was the proper remedy. *Heer Dry Goods Co.* v. *Citizens' R. Co.*, 41 *Mo. App.* 63.

210. Right to obstruct track by teams.*—Where a city ordinance gives street-cars precedence over other vehicles, and provides that if any person "shall unnecessarily obstruct or impede the running of the cars" he shall be liable to a fine for such offense, it is the duty of a teamster who has obstructed the track by backing his team across the same, for the purpose of unloading goods, to remove at once on the approach of the cars; and a delay on his part, even for a short time, for the purpose of removing a box which is the last of his load, thereby causing a stopping of the cars during such delay, is an unnecessary obstruction within the meaning of the ordinance, and will render him liable to the penalty. *State* v. *Foley*, 31 *Iowa* 527.—QUOTING Com. *v.* Temple, 14 Gray (Mass.) 69; Wilbrand *v.* Eighth Ave. R. Co., 3 Bosw. (N. Y.) 314.

If at any time the owner of property abutting on a street has occasion for the presence of vehicles on the street in front of his property, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes; and if, in such exercise of the right, the passage of street-cars is impeded, the street-cars must wait. *Rafferty* v. *Central Traction Co.*, 50 *Am. & Eng. R. Cas.* 239, 147 *Pa. St.* 579, 23 *Atl. Rep.* 884.

The owner of a store has no right to allow his teams to stand transversely on the street in front of his store in discharging goods which will entitle him to recover against a street-car company which has lawfully constructed its track so as to interfere with such use of the street; and if the public convenience requires it, he may be required to drive his teams lengthwise of the street, so as not to interfere with the road. *Hobart* v. *Milwaukee City R. Co.*, 27 *Wis.* 194, 2 *Am. Ry. Rep.* 35.

211. Power of city to authorize without compensation.†—Under Iowa Code, § 464, empowering cities to authorize or forbid the laying of tracks for street railways, but empowering them to authorize such roads only upon payment of damages to the property owners, a city cannot authorize such a road without compensation to the adjoining property owners. *Stange* v. *Dubuque*, 14 *Am. & Eng. R. Cas.* 107, 62 *Iowa* 303, 17 *N. W. Rep.* 518.

A horse railway may be placed and operated on a street without compensation to abutting lot owners. *Eichels* v. *Evansville St. R. Co.*, 5 *Am. & Eng. R. Cas.* 274, 78 *Ind.* 261, 41 *Am. Rep.* 561.—APPROVING Hiss *v.* Baltimore & H. Pass. R. Co., 52 Md. 242, 36 Am. Rep. 371; Stanley *v.* Davenport, 54 Iowa 463. CRITICISING Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404.

The city of New Orleans has authority to grant a right of way through her streets and other property. *Tilton* v. *New Orleans City R. Co.*, 35 *La. Ann.* 1062.

212. Legislative power over.—The legislature and a city council can lawfully empower a company to locate and maintain its railroad in the streets of the city, without providing for additional compensation to the owner of the land. *Briggs* v. *Lewiston & A. Horse R. Co.*, 32 *Am. & Eng. R. Cas.* 167, 79 *Me.* 363, 10 *Atl. Rep.* 47.

A street-railway company, which receives its franchise from a village whose charter does not expressly confer upon the municipality power to authorize the use of its streets for street-railway purposes without compensating adjoining owners, and which power is neither necessary, essential, nor indispensable to enable the municipality to carry out the objects and purposes for which it was created, accepts such franchise subject to the right of the legislature to prescribe such compensation as a condition precedent to the use of such streets for the construction of new lines of road. *Taylor* v. *Bay City St. R. Co.*, 43 *Am. & Eng. R. Cas.* 335, 80 *Mich.* 77, 45 *N. W. Rep.* 335.—DISTINGUISHED IN Detroit City R. Co. *v.* Mills, 85 Mich. 634.

213. Only owner of real estate can object—Adding attorney-general as plaintiff.—Ordinarily only those resident on a street where a street railway is to be laid can interfere to prevent its construction. So where plaintiff alleges that he owns lots on the street, but this is put in issue, and the affirmative is not found to be true, and there is no proof of special injury,

* See also *post*, **237.**

† Right to construct street railway without compensation to abutting owners, see note, 25 AM. ST. REP 478.

the action cannot be maintained. *Davis* v. *Mayor, etc., of N. Y.*, 14 *N. Y.* 506; *reversing* 3 *Duer* 119.—REVIEWING Fletcher *v.* Auburn & S. R. Co., 25 Wend. (N. Y.) 462; Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill (N. Y.) 567.—EXPLAINED IN Milburn *v.* Cedar Rapids, 12 Iowa 246. FOLLOWED IN Forty second St. & G. S. F. R. Co. *v.* Thirty-fourth St. R. Co., 20 J. & S. (N. Y.) 252. NOT FOLLOWED IN Kucheman *v.* Chicago, C. & D. R. Co., 6 Iowa 366. REVIEWED IN Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404.

N. Y. Code of Pro. § 173, relating to amendments, authorizes the court to add or strike out the names of parties, or correct a mistake in any respect, when the amendment does not change substantially the claim or defense. Therefore, where persons claiming to be abutting owners sue to prevent the unauthorized use of the street by a street-railway company, and the court finds at the trial that they have no such interest as will enable them to maintain the action, the provision of the statute is not broad enough to enable the court to substitute the attorney-general as plaintiff. *Davis* v. *Mayor, etc., of N. Y.*, 14 *N. Y.* 506; *reversing* 3 *Duer* 119.

214. Constructing road along country highway.—Mich. Street Railway Act of 1855, as amended (How. St. ch. 94), confers no power upon a company organized under it to construct, maintain, and operate a railroad along the side of the traveled portion of a public country highway, with the consent of the township authorities, upon a roadbed not conforming to its grade, but made by means of cuts and fills, without compensation to abutting landowners, at whose suit equity will perpetually enjoin the maintenance and operation of such a road. *Nichols* v. *Ann Arbor & Y. St. R. Co.*, 50 *Am. & Eng. R. Cas.* 250, 87 *Mich.* 361, 49 *N. W. Rep.* 538.

215. —— or on street at seaside resort. — The use and operation for passenger and freight purposes by the Onset street-railway company, under the agreement made by it with the Onset Bay Grove association, of the railroad already built by that association along an avenue at its seaside resort, rendered such street-railway company liable under its charter (ch. 285 of 1886) to settle, in the manner provided by Mass. Pub. St. ch. 112, all damages caused to the abutting lot owners by the use of the avenue for the building of such railroad. *Onset St. R. Co.* v. *Plymouth County Com'rs*, 154 *Mass.* 395, 28 *N. E. Rep.* 286.

If a company, whose charter requires it to settle all damages caused by the taking of streets at a seaside resort for the building of its road, constructs the same, and transports both freight and passengers thereon, the abutting lot owners who are seized in fee of easements in such streets, and who are injured by their obstruction or change of grade, are entitled to damages, although not owning to the centre of the streets. *Onset St. R. Co.* v. *Plymouth County Com'rs*, 154 *Mass.* 395, 28 *N. E. Rep.* 286.

216. Right to cut down street.—Where a company is permitted by a city to construct its road in a street and upon the established grade thereof, such company, with permission of the city, may cut down or grade the street so as to bring it to the established grade. In doing so the company acts for the city, and in bringing the street, or any part thereof, to an established grade it is not liable to adjoining lot owners on account of cutting down or grading the street, if the grading is done in a good and workmanlike manner, and confined wholly within the street. *Inter-State Con. R. T. R. Co.* v. *Early*, 46 *Kan.* 197, 26 *Pac. Rep.* 422.—DISTINGUISHING Central Branch U. P. R. Co. *v.* Twine, 23 Kan. 585.

217. Assessing lot owner for improvements of whole street.—Though the statute certainly contemplates that the tracks of street railroads and a space of two feet on either side thereof should be paved or macadamized by the companies at their own expense, and abutting owners cannot be required to contribute to the cost thereof, yet a broad street may well admit of general improvement as a system separate and distinct from the macadamizing or paving of the street railroads located thereon. Where this is so, abutting owners may be required to contribute their proper part to defray the cost of general improvement, whether the special improvement required of railroad companies be made or not. *Bacon* v. *Mayor, etc., of Savannah*, 86 *Ga.* 301, 12 *S. E. Rep.* 580.

218. Using street for storing or switching.—A horse railroad constructed under legislative authority on the surface of the street is not an unlawful interference with the rights of the abutting owner, but is a street use consistent with such rights.

An unreasonable use of the street, however, by the railroad company, such as using a switch or siding thereon for the storing and deposit of its cars to the injury of an adjoining owner, gives to the latter a right of action for the special injury. *Mahady* v. *Bushwick R. Co.*, 14 *Am. & Eng. R. Cas.* 142, 91 *N. Y.* 148, 43 *Am. Rep.* 661.—FOLLOWING Story *v.* New York El. R. Co., 90 N. Y. 122; People *v.* Kerr, 27 N. Y. 188.—APPLIED IN Falker *v.* New York, W. S. & B. R. Co., 17 Abb. N. Cas. (N. Y.) 279. FOLLOWED IN Clark *v.* Rochester City & B. R. Co., 18 N. Y. S. R. 903, 50 Hun 600, 2 N. Y. Supp. 563. QUOTED IN Hine *v.* New York El. R. Co., 27 N. Y. S. R. 303, 54 Hun 425, 7 N. Y. Supp. 464; Abendroth *v.* New York El. R. Co., 33 N. Y. S. R. 475.

219. Right of one purchasing after road is built to object.—Leave was asked to file an information against a horse railway, requiring it to show its right to extend its road and to use steam power over a part of the same. It did not appear that the relator was specially injured by the construction and operation of the road, but it was shown that relator acquired his land, abutting upon the road, after the construction of the latter, and that it was the almost universal desire of the people that the road be operated by steam, and the facts tended to show that the application was not for the public good. *Held*, that leave was properly refused. *People ex rel.* v. *North Chicago R. Co.*, 88 *Ill.* 537, 21 *Am. Ry. Rep.* 359.—QUOTED IN People *v.* Wabash, St. L. & P. R. Co., 12 Ill. App. 263.

220. Laying track on one side of street.—Tracks should be laid as nearly as practicable in the middle of a street. If the franchise does not indicate the precise position of the track, and it is not as nearly as practicable in the middle of the street, the track is an unauthorized obstruction, and the owner of the fee of the street may maintain ejectment against the company. *Finch* v. *Riverside & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 107, 87 *Cal.* 597, 25 *Pac. Rep.* 765.

The mere fact that it is more convenient to the traveling public to have the track on the side of the street, and that it obstructs travel a little less than it would do in the centre of the street, is not a sufficient reason for not complying with the law. *Finch* v. *Riverside & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 107, 87 *Cal.* 597, 25 *Pac. Rep.* 765.

221. Liability of lessees under unauthorized lease.—A company which has without authority of law leased the property and franchises of another company is responsible to the commonwealth, but not to a private citizen who has sustained no special injury for which he is entitled to redress. *Rafferty* v. *Central Traction Co.*, 50 *Am. & Eng. R. Cas.* 239, 147 *Pa. St.* 579, 23 *Atl. Rep.* 884.

222. Conforming to city ordinances.—A street railway cannot escape liability for damages to an abutting lot owner, caused by constructing its track so as to flow the lot, on the ground that by its charter it is required to construct its road as required by city ordinances, and that said road was so constructed. *Alton & U. A. Horse R. & C. Co.* v. *Deitz*, 50 *Ill.* 210.—QUOTED IN Houston City St. R. Co. *v.* Delesdernier, 84 Tex. 82.

Where a company changes the grade of a street, under authority of the city council, it does not thereby commit a trespass against the adjoining land owners. *Briggs* v. *Lewiston & A. Horse R. Co.*, 32 *Am. & Eng. R. Cas.* 167, 79 *Me.* 363, 10 *Atl. Rep.* 47.

223. Silence of abutting owner, effect of. — Where adjoining property owners remain silent when a street-car track is being laid, their silence will be taken as acquiescence. *Tilton* v. *New Orleans City R. Co.*, 35 *La. Ann.* 1062.—QUOTING French *v.* New Orleans & C. R. Co., 2 La. Ann. 87.

Where land has been opened as a public street, and has been accepted by the public and used for many years as a public thoroughfare, and the adjoining lots have been sold as bordering upon the street, the owners of the soil are estopped from denying that it is a street or a highway for all purposes for which it might be fairly inferred that the dedication was intended. *Hiss* v. *Baltimore & H. Pass. R. Co.*, 4 *Am. & Eng. R. Cas.* 201, 52 *Md.* 242, 36 *Am. Rep.* 371.

224. Separate owners may join in one petition. — Separate lot owners abutting on a street, the grade of which was changed for the purpose of operating a railway thereon, have the right, under the Massachusetts statutes, to join in one petition to the county commissioners for the assessment of joint or several damages; and the question whether such lot owners had suffered any legal damage from the

construction and operation of a railroad is a question of fact to be determined by the county commissioners, whose findings will not be revised on *certiorari*. *Onset St. R. Co.* v. *Plymouth County Com'rs*, 56 *Am. & Eng. R. Cas.* 524, 154 *Mass.* 395, 28 *N. E. Rep.* 286.

Where separate lot owners join in one petition for damages, separate distress warrants may issue to enforce the damages awarded to each of them. *Onset St. R. Co.* v. *Plymouth County Com'rs*, 56 *Am. & Eng. R. Cas.* 524, 154 *Mass.* 395, 28 *N. E. Rep.* 286.

225. Measure of damages, generally.—For injuries resulting from laying a railroad track in a street a single recovery can be had for the whole damage resulting from the act. The measure of compensation is the actual diminution in the market value of the premises, for any use to which they may reasonably be put, occasioned by the construction and operation of the railroad through the adjacent street. *Denver* v. *Bayer*, 7 *Colo.* 113, 2 *Pac. Rep.* 6.—FOLLOWED IN Denver & R. G. R. Co. *v.* Bourne, 32 Am. & Eng. R. Cas. 227, 11 Colo. 59.

226. —— for changing grade and using steam.—The owners of lots abutting on a platted street have such easements in fee therein that they are entitled to damages for any obstruction of the street, even though the soil is owned by another; and where a land company changes the grade of a street and builds and operates a steam-motor railway therein, without legislative authority, and subsequently a railway company is incorporated and authorized to acquire the track already laid, on condition that compensation be made to the lot owners for all damages incurred by the building and operation of the road, the use of the track by the railway company makes it liable for such damages, without any formal taking or seizure of the property. *Onset St. R. Co.* v. *Plymouth County Com'rs*, 56 *Am. & Eng. R. Cas.* 524, 154 *Mass.* 395, 28 *N. E. Rep.* 286.

227. —— for laying track. — The charter of a company provided that "whenever any estate abutting upon a street or highway, upon or over which the rails of said corporation shall be laid, shall be injured thereby, the said corporation shall be liable to pay the owner or owners thereof the damages thereby occasioned to said estate." *Held*, that an owner of abutting property was only entitled to recover damages for injuries resulting from the laying of the rails, as distinguished from those resulting from the use of them as laid. *Vose* v. *Newport St. R. Co.*, 46 *Am. & Eng. R. Cas.* 91, 17 *R. I.* 134, 20 *Atl. Rep.* 267.

228. —— for unlawful use of track. —Legislative authority to a company to lay its tracks and erect shops and engine houses within the limits of a city does not confer the power to exercise the authority so as to maintain a nuisance; and if a nuisance is maintained, so that adjoining property is injured, the measure of damages is not simply the depreciation of the property. The jury may consider any personal discomfort which may have been caused by the nuisance. *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 *U. S.* 317, 2 *Sup. Ct. Rep.* 719.

Though a company be authorized to operate its road on a street, still abutting property owners who do not own the fee of the street may recover such damages as may result to them from the unlawful and improper use of the street. *Iron Mountain R. Co.* v. *Bingham*, 87 *Tenn.* 522, 11 *S. W. Rep.* 705.

After a street railroad has been lawfully constructed the company is liable to abutting owners for any damages resulting to them from the unlawful or excessive use of the road. *Smith* v. *East End St. R. Co.*, 38 *Am. & Eng. R. Cas.* 470, 87 *Tenn.* 626, 11 *S. W. Rep.* 709.

229. Track may be laid before damages ascertained. — Iowa Code, § 464, provides that cities shall have the power to authorize or forbid the location and laying down of tracks "for railways and street railways on all streets, alleys, and public places; but no railway track can thus be located and laid down until after the injury to the property abutting on the street" has been ascertained and paid. *Held*, that this shows a distinction between ordinary railways and street railways, and it is only where an ordinary railway operated by steam is to be built that the damages must be ascertained and paid before the road is authorized. *Sears* v. *Marshalltown St. R. Co.*, 20 *Am. & Eng. R. Cas.* 36, 65 *Iowa* 742, 23 *N. W. Rep.* 150.

VI. JOINT USE OF TRACKS.

1. *Between Company and the Public.*

230. Extent to which public may use track.—Arising from the legislative requirement that the rails shall be laid on

the level of the highway, and of a width corresponding to the wagon track established by law, there is an implied permission, on the part of a horse-railroad company, to the use of the track by other vehicles to some extent. Such permission does not emanate from the company so as to be revocable by it. It results from the nature of the grant, and is in the form of a condition resulting from the grant and its acceptance. The use, however, thus impliedly permitted is only such as is consistent with the grant to the company, and not destructive of its purpose. Any use inconsistent with the grant, and destructive of its purpose, is excluded. *Citizens' Coach Co.* v. *Camden Horse R. Co.*, 1 *Am. & Eng. R. Cas.* 190, 33 *N. J. Eq.* 267, 36 *Am. Rep.* 542; *affirming* 31 *N. J. Eq.* 525.

The public have the right to drive upon and across street-car tracks; but not so as to interfere with the proper business of the company. *Wilbrand* v. *Eighth Ave. R. Co.*, 3 *Bosw.* (*N. Y.*) 314.—DISTINGUISHED IN Louisville, N. A. & C. R. Co. *v.* Phillips, 31 Am. & Eng. R. Cas. 432, 112 Ind. 59. QUOTED IN State *v.* Foley, 31 Iowa 527.

When a railroad has been lawfully laid in a public street, it does not become a part of the street so as to authorize the public at large and other railroad corporations, with the consent of the common council, to use the road with the appropriate cars or carriages for the transit of passengers, in common with the owners of the track. *Brooklyn C. R. Co.* v. *Brooklyn City R. Co.*, 32 *Barb.* (*N. Y.*) 358.—QUOTING Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506.

231. Company's right paramount but not exclusive.*—A surface-railroad company has a paramount right to use its tracks, but not an exclusive right. *Hennessy* v. *Brooklyn City R. Co.*, 73 *Hun* 569, 56 *N. Y. S. R.* 151, 26 *N. Y. Supp.* 321.—FOLLOWING Fleckenstein *v.* Dry Dock, E. B. & B. R. Co., 105 N. Y. 655.—*Cambeis* v. *Third Ave. R. Co.*, 48 *N. Y. S. R.* 709, 1 *Misc.* 158, 20 *N. Y. Supp.* 633.—QUOTING Adolph *v.* Central Park, N. & E. R. R. Co., 65 N. Y. 554; Fleckenstein *v.* Dry Dock, E. B. & B. R. Co., 105 N. Y. 655, 8 N. Y. S. R. 32; Winters *v.* Kansas City Cable R. Co., 99 Mo. 509.

A street-railroad company has not the exclusive right to the use of its tracks, but simply a paramount right, and while a person lawfully driving on the tracks may not recklessly, carelessly, or wilfully obstruct the passage of its cars, he is not absolutely bound to keep off or get off the tracks, and if he fairly and in a reasonable manner respects the paramount right of the corporation, and is, without fault on his part, injured by carelessness or fault chargeable to it, he may maintain an action for his damages. *Fleckenstein* v. *Dry Dock, E. B. & B. R. Co.*, 105 *N. Y.* 655, 11 *N. E. Rep.* 951, 1 *Silv. App.* 447, 8 *N. Y. S. R.* 32.—QUOTED IN Cambeis *v.* Third Ave. R. Co., 48 N. Y. S. R. 709.

The streets of a city are destined for public use, but not for a particular mode of public use. *Brown* v. *Duplessis*, 14 *La. Ann.* 854.

Travelers on the streets have a right to use the tracks of the company and are not trespassers. A party using due care and diligence when using such street and tracks has a right to recover from the railroad company for injury inflicted by its gross fault and negligence, where the cause is proximate. *Cline* v. *Crescent City R. Co.*, 43 *La. Ann.* 327, 9 *So. Rep.* 122.

A street railway carrying passengers only is a public highway. *St. Louis R. Co.* v. *Southern R. Co.*, 105 *Mo.* 577, 15 *S. W. Rep.* 1013.

232. Rights of persons driving across the track.—One traveling upon a city street has a right to drive his wagon upon or across the track of a street railroad, and this right is not confined to occasions where the other portions of the street are crowded or obstructed. The only limitation of the right is that he must not unnecessarily interfere with the passage of the cars, which have the preference in the use of the track. *Adolph* v. *Central Park, N. & E. R. R. Co.*, 65 *N. Y.* 554, *mem.*; *reversing* 1 *J. & S.* 186.—DISTINGUISHED IN Louisville, N. A. & C. R. Co. *v.* Phillips, 31 Am. & Eng. R. Cas. 432, 112 Ind. 59. QUOTED IN Cambeis *v.* Third Ave. R. Co., 48 N. Y. S. R. 709.

A person about to drive across a street-car track is not bound to wait until the company's cars pass, if a prudent, careful person would deem it safe to cross the track; and where a person drives a heavily loaded team onto a track, at a street crossing, before he sees an approaching car which is from sixty to eighty feet distant, he has a right to proceed, and the car must

* Street-cars have preferential right to use track, see note, 19 AM. & ENG. R. CAS. 131.

be stopped, if necessary to avoid a collision. *Witzel* v. *Third Ave. R. Co.*, 23 *N. Y. Supp.* 317, 3 *Misc.* 561; *reversed in* 6 *Misc.* 635, *mem.*

233. —— or along the track.—The cars on a horse railroad have, when in motion, the right of way upon the track, both as against those whom they meet and those who go in the same direction at a speed that would delay the cars. *Jersey City & B. R. Co.* v. *Jersey City & H. Horse R. Co.*, 20 *N. J. Eq.* 61; *reversed on other grounds in* 21 *N. J. Eq.* 550.

Street-cars have a right to pass upon a track without hindrance; but when the track is not used for the passage of cars, other vehicles may use it in traveling along the street; and when the driver of such a vehicle meets an approaching car, he is bound to remove his vehicle from the track in time to give free passage to the car. But what will be deemed due diligence in so removing his vehicle is a question for the jury, to be determined upon the circumstances of each particular case. *North Hudson County R. Co.* v. *Isley*, 34 *Am. & Eng. R. Cas.* 94, 49 *N. J. L.* 468, 10 *Atl. Rep.* 665, 9 *Cent. Rep.* 122.

A person has a right to drive on any part of a street which is a public highway, notwithstanding the fact that a street-car track be laid on a part of the street; and neither the company nor any of its employés has a right forcibly to run a person, with his horse and wagon, off the track; and if in doing so the horse is injured and the wagon broken, the owner has a right of action against the company for damages. *Fettrich* v. *Dickenson*, 22 *How. Pr.* (*N. Y.*) 248.

A person has a right to drive upon the tracks of a street-car company, subject to a careful regard for the rights of the company; but he is bound to be vigilant to discover an approaching train, and quick to leave the tracks when such train is discovered. *Hennessy* v. *Brooklyn City R. Co.*, 73 *Hun* 569, 56 *N. Y. S. R.* 151, 26 *N. Y. Supp.* 321.

Street-railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks. The public have a right to use these tracks in common with the companies, and, therefore, while the rights of the latter are in some respects superior to those of the former, it is not negligence *per se* for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down. *Gibbons* v. *Wilkes-Barre & S. St. R. Co.*, 155 *Pa. St.* 279, 26 *Atl. Rep.* 417.—QUOTING AND FOLLOWING Gilmore *v.* Federal St. & P. V. Pass. R. Co., 153 Pa. St. 31.

234. —— and at street crossings.—To a certain degree street-cars have a right of way along their tracks in preference to other vehicles passing along the tracks, but they have not an exclusive right to their tracks over other vehicles merely crossing. *Buhrens* v. *Dry Dock, E. B. & B. R. Co.*, 53 *Hun* 571, 25 *N. Y. S. R.* 191, 6 *N. Y. Supp.* 224; *affirmed in* 125 *N. Y.* 702, *mem.*, 34 *N. Y. S. R.* 1012, *mem.*, 26 *N. E. Rep.* 752.

At the intersection of streets, street-cars, as to their right of way, have the same rights as other vehicles; and whichever is first on a crossing has the right of way, and the right to assume that the other will stop, or give to the one first reaching the crossing the right of way to which he is entitled. *Buhrens* v. *Dry Dock, E. B. & B. R. Co.*, 53 *Hun* 571, 25 *N. Y. S. R.* 191, 6 *N. Y. Supp.* 224; *affirmed* 125 *N. Y.* 702, *mem.*, 34 *N. Y. S. R.* 1012, *mem.*, 26 *N. E. Rep.* 752.

A street-car and a vehicle have equal rights at a crossing, and the right of each should be exercised in a reasonable and careful manner so as not unreasonably to abridge or interfere with the right of the other. *Bernhard* v. *Rochester R. Co.*, 51 *N. Y. S. R.* 880, 22 *N. Y. Supp.* 821, 68 *Hun* 369.

235. Persons driving on track assume risk and are charged with greater care.—The primary purpose of a street-car track is not travel by the general public, but use by the company, and a person driving upon it must be deemed to have assumed the ordinary risks attending such use, one of which is held to be the dropping of a wheel into a rut outside the rail, worn by such frequent dropping of wheels. *Kornetzski* v. *Detroit City R. Co.*, 94 *Mich.* 341, 53 *N. W. Rep.* 1106.

If an individual sees fit to run his carriage or wagon upon the rails, he is bound to exercise more care and diligence to avoid a collision than he would be if he were upon other parts of the street. *Wilbrand* v. *Eighth Ave. R. Co.*, 3 *Bosw.* (*N. Y.*) 314.

The company is entitled to the unrestricted use of its rails for the progress of its cars, within the limit of speed which the law allows; and the driver of any other vehicle, being unnecessarily on the track, is bound to exercise greater care than if upon the common pavement, to see that an approaching car is not impeded, and if through negligence or wilfulness in this respect a collision ensues, he should not have damages against the company, even if it is also in fault. *Wilbrand* v. *Eighth Ave. R. Co.*, 3 *Bosw.* (*N. Y.*) 314.

236. Rule as to turning to right not applicable to street-car. — As street-cars can only run upon the rails, they cannot turn to the right or left to avoid teams. They are, therefore, given a paramount right to the use of the tracks, but not an exclusive right. *Bernhard* v. *Rochester R. Co.*, 68 *Hun* 369, 51 *N. Y. S. R.* 880, 22 *N. Y. Supp.* 821.

Wash. Code 1881, § 3030, requiring persons driving vehicles who shall meet on a public highway to turn to the right of the centre of the road, has no application to vehicles meeting a street-car, as it is the duty of the driver of a vehicle in such case to turn to either side so as best to avoid a collision. *Spurrier* v. *Front St. Cable R. Co.*, 3 *Wash.* 659, 29 *Pac. Rep.* 346.

As the driver of a vehicle has a right to travel upon any part of a street, it is proper to refuse to charge the jury that "as plaintiff was on the wrong side of the street at the time of the accident, the presumption arises that the collision was due to her fault." *Spurrier* v. *Front St. Cable R. Co.*, 3 *Wash.* 659, 29 *Pac. Rep.* 346.

237. Obstructing cars by business in street.*—A street-car company applied for an injunction to prevent the proprietors of a foundry from hauling large boilers on a street, which would so occupy it as to prevent the running of cars. The evidence showed that the hauling would not injure the street, and that the plan proposed involved less inconvenience to the public than any other. The court refused a preliminary injunction, without prejudice to the company to renew the application if the hauling of the first boiler should show cause for it to do so. *Second & T. St. R. Co.* v. *Morris*, 8 *Phila.* (*Pa.*) 304.

Both the owner of a frame building and one whom he hires to remove it to a distant place, which requires it to pass along a street where a street-car line runs, are liable to the company where the building breaks down and prevents the running of cars for two days, the removal having been begun without a permit from the city officers, as required by an ordinance. *Toronto St. R. Co.* v. *Dollery*, 12 *Ont. App.* 679. — REVIEWING Ellis *v.* Sheffield Gas Consumers' Co., 2 El. & Bl. 769; Hole *v.* Sittingbourne & S. R. Co., 6 H. & N. 488.

As the company had, by its charter, the superior right of user and occupation of the street, a duty was cast upon the owner to see that proper precautions were taken to prevent injury arising from obstructing the railway by the building, which could not, from its size, be removed along the street without obstructing the traffic. *Toronto St. R. Co.* v. *Dollery*, 12 *Ont. App.* 679.

238. Right of persons in rival business to use tracks. — A railroad track is clearly private property, and cannot fairly be considered, in any just sense, to be devoted by the makers to public uses. No person, therefore, natural or corporate, can, at his mere will, appropriate the track of a horse-railroad company to his own private use and convenience by adapting his carriage to such use for that purpose. *Jersey City & B. R. Co.* v. *Jersey City & H. Horse R. Co.*, 20 *N. J. Eq.* 61; *reversed in* 21 *N. J. Eq.* 550.

The public right to use a horse-railroad track in the streets of a city for vehicles, incidentally, in traveling through the streets, does not authorize a transportation company to use it in competition with the railroad company. *Camden Horse R. Co.* v. *Citizens' Coach Co.*, 28 *N. J. Eq.* 145; *reversed on another point in* 29 *N. J. Eq.* 299. *Citizens' Coach Co.* v. *Camden Horse R. Co.*, 1 *Am. & Eng. R. Cas.* 190, 33 *N. J. Eq.* 267, 36 *Am. Rep.* 542; *affirming* 31 *N. J. Eq.* 525.— FOLLOWING Raritan & D. B. R. Co. *v.* Delaware & R. Canal Co., 18 N. J. Eq. 546.

239. Right to construct track on street used by plank road. — An injunction restraining a street-railway company from entering upon a street occu-

* See also *ante*, **210.**

pied by a plank-road company for the purpose of constructing an electric railway track or incumbrance of any kind upon said street, or in any way preparing to lay such track, cannot be said to cover the operation or repair of a track theretofore built and used, although repairs in paving the street had required the temporary removal of a portion of the track. *Detroit & B. Plank Road Co.* v. *Detroit Citizens' St. R. Co.*, 97 *Mich.* 583, 56 *N. W. Rep.* 940.

2. *Between Rival Companies.*

240. Exclusive franchise or use.—Where a city, with power to do so, has bound itself to a company not to grant a second privilege to another company to run cars on the same street, but a second company is subsequently chartered with the right to run cars on the same street, its charter will be deemed subject to the obligation of the city to the first company, and the second company can only obtain the right to use the track of the first company by contract with the city. *Louisville City R. Co.* v. *Central Pass. R. Co.*, 36 *Am. & Eng. R. Cas.* 463, 87 *Ky.* 223, 8 *S. W. Rep.* 329.

An ordinance that authorizes a street-railway company to use the tracks of another company on a certain avenue, but which declares that nothing therein shall be construed to grant any right or privilege to lay any additional tracks on a bridge erected and maintained for public use by the city, and forming a part of said avenue, is not intended to secure to the company whose tracks are already on the bridge a monopoly of the right of way over the bridge, but simply to avoid incumbering the bridge with unnecessary tracks; and from the fact that the bridge is to be torn down and reconstructed, and a temporary bridge has been erected by the city to accommodate the public until the new bridge is completed, and in the ordinance providing for the erection of such temporary bridge it is declared to be lawful for any railway company authorized to lay and maintain tracks on the old bridge to lay and maintain its tracks on the temporary bridge, it does not follow that the company whose tracks were on the old bridge, and to whom license was given by the ordinance to lay tracks on the temporary bridge, has an exclusive right of trackway over said bridge, it being within the power of the mayor and city council to allow any other street-railway company to place its tracks upon such temporary bridge. *North Baltimore Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 75 *Md.* 247, 23 *Atl. Rep.* 470.

The control of the streets and highways of the city must be retained in the power of the municipality, and cannot be granted away or surrendered to other agencies not authorized by the state to assume control of the streets or highways of the city. *North Baltimore Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 75 *Md.* 247, 23 *Atl. Rep.* 470.

Under a grant or license of the municipality to a company to use the streets for its tracks, it is only that portion of the street that is actually occupied that can be claimed to be exclusive of other tracks; and other parts of the street may be granted to a competing line or lines. *North Baltimore Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 75 *Md.* 247, 23 *Atl. Rep.* 470.

Plaintiff corporation obtained from a city council the right to construct its road through certain streets, upon certain terms and conditions, and such other terms and conditions as the council might thereafter prescribe. Among the conditions expressed was one that a certain other company should be allowed to run its cars upon a portion of plaintiff's road, upon the payment of such reasonable compensation as the council should prescribe, if the parties were unable to agree. Afterwards a third company was organized, to which was granted a right of way upon a portion of the route already occupied by plaintiff, and upon its track, upon the payment to plaintiff of a reasonable compensation. These companies failing to agree upon the amount to be paid, the council prescribed a certain sum, which was tendered, but refused. Thereupon plaintiff brought suit against the third company to enjoin it from using any portion of its track, alleging, among other things, that the compensation so prescribed and tendered was inadequate, which allegation was negatived by defendant. *Held:* (1) that plaintiff did not acquire an exclusive right to use the route upon which its road was constructed; (2) that the property of plaintiff in its track was subject to be taken for a like public use in common, upon compensation being first made; (3) that the council stipulated for the right, in such case, to prescribe a reasonable compensation; (4) that, without proof that the

amount of compensation so prescribed and tendered was inadequate, plaintiff was not entitled to an injunction. *Kinsman St. R. Co.* v. *Broadway & N. St. R. Co.*, 5 *Am. & Eng. R. Cas.* 327, 36 *Ohio St.* 239.—APPROVED IN Canal & C. R. Co. *v.* Orleans R. Co., 44 La. Ann. 54

241. Joint use authorized upon making compensation.*—The material in place is the private property of the company occupying the street, and in the absence of any agreement it must be expropriated to public uses like any other private property. *Canal & C. R. Co.* v. *Orleans R. Co.*, 50 *Am. & Eng. R. Cas.* 369, 44 *La. Ann.* 54, 10 *So. Rep.* 389.—APPROVING Kinsman St. R. Co. *v.* Broadway & N. St. R. Co., 36 Ohio St. 252; Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 291.

A company desiring to use the roadbed and material in place of another company must first make compensation. But where an injunction is granted, without the prayer for compensation before using the track, but a prohibition for the use of the track for any and all cars, it will be dissolved. *Canal & C. R. Co.* v. *Crescent City R. Co.*, 50 *Am. & Eng. R. Cas.* 374, 44 *La. Ann.* 485, 10 *So. Rep.* 888.—FOLLOWING Canal & C. R. Co. *v.* Orleans R. Co., 44 La. Ann. 54.

One street-railway company has no right to use the tracks of another, without authority from the legislature or an agreement with the company owning the tracks. *Metropolitan R. Co.* v. *Quincy R. Co.*, 12 *Allen* (*Mass.*) 262. — DISTINGUISHED IN Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290.

Where the legislature has reserved the power to alter, amend, or repeal a street-car charter, it may lawfully, whenever it deems it necessary for the better accommodation of the public, authorize another company to lay a similar track through the same streets, or to use the track of the first company, upon making compensation for the use and wear of the track, without making any compensation for the diminution of its profits or of the value of its franchise. *Metropolitan R. Co.* v. *Highland St. R. Co.*, 118 *Mass.* 290.

A company authorized to operate a railway on the streets of a city holds the streets for the higher use of the public, and if public necessity requires it, the legislature may authorize another company to use its tracks upon making just compensation. *St. Louis R. Co.* v. *Southern R. Co.*, 105 *Mo.* 577, 15 *S. W. Rep.* 1013.

The iron rails laid by a company in a public street are the property of the company, and another company, authorized to lay a railroad of like character in the same direction for part of the route, has no right to run cars on such rails without compensation. *Jersey City & B. R. Co.* v. *Jersey City & H. Horse R. Co.*, 20 *N. J. Eq.* 61; *reversed in* 21 *N. J. Eq.* 550.—FOLLOWED IN Market St. Pass. R. Co. *v.* Union Pass. R. Co., 10 Phila. (Pa.) 43.

242. Second company cannot condemn.—One horse-railway company has no right, by proceedings of condemnation, to take for its joint use a part of a previously constructed railway of another company in successful operation, and if such an attempt is made a court of equity will enjoin the same. *Central City Horse R. Co.* v. *Ft. Clark Horse R. Co.*, 81 *Ill.* 523.—DISTINGUISHED IN Metropolitan City R. Co. *v.* Chicago W. D. R. Co., 87 Ill. 317; Illinois C. R. Co. *v.* Chicago, 138 Ill. 453; East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265.

243. Joint use limited in California.—Under Cal. Civ. Code, § 499, providing that "two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks," the same street cannot be occupied by two railroads, whether they belong to corporations or private persons, for a greater distance than five blocks. *People* v. *Rich*, 54 *Cal.* 74.

Under the above statute an attempt to grant to a second company a right of way over the same street for a distance of more than five blocks, and without paying one half of the cost of constructing the track, is absolutely void. *Omnibus R. Co.* v. *Baldwin*, 57 *Cal.* 160.

The above statute is controlling as to the amount of compensation to be given, and must prevail, in reference to street railroads, over the general provisions of the Code respecting the assessment of compensation and damages in case of the intersection of one railroad by another. *Pacific R. Co.* v.

* Right of one street-railway company to use track of another, see note, 25 AM. ST. REP. 477.

Wade, 50 *Am. & Eng. R. Cas.* 362, 91 *Cal.* 449, 27 *Pac. Rep.* 768.

244. Joint use not prohibited by statute against leasing. — The proviso contained in the New York Laws of 1884, ch. 252, § 15, to the effect that the section shall not be construed to authorize companies organized thereunder to lease their rights or franchises to any other company owning and operating a parallel road, is not intended to preclude such companies from making traffic contracts for the partial use of their respective roads beyond the line of parallelism. *People* v. *O'Brien*, 36 *Am. & Eng. R. Cas.* 78, 111 *N. Y.* 1, 18 *N. E. Rep.* 692, 19 *N. Y. S. R.* 173; *reversing* 10 *N. Y. S. R.* 596, 45 *Hun* 519.

245. When determined by statute. —The fact that a company is chartered "subject to all the duties, restrictions, and liabilities set forth in all general laws which are, or may be hereafter, in force, applicable to street-railway corporations; provided, however, that said city or town is hereby authorized or empowered to contract with said railway corporation concerning the construction, maintenance, and operation of said railway, upon such terms as it may agree with said railway corporation, any laws now existing to the contrary notwithstanding," does not authorize the city to contract so as to exclude another company from the use of the tracks, under Mass. St. of 1874, ch. 29. *New Bedford & F. H. St. R. Co.* v. *Acushnet St. R. Co.*, 143 *Mass.* 200, 9 *N. E. Rep.* 536.

Where the track of a company extends from a city into an adjoining town, and the city grants a license to another company to use a portion of the tracks lying within the city, it is not necessary to make application to the selectmen of the town to use the portion beyond the city. The manner of acquiring such use is regulated by Mass. Pub. St. ch. 113, § 49. *New Bedford & F. H. St. R. Co.* v. *Acushnet St. R. Co.*, 143 *Mass.* 200, 9 *N. E. Rep.* 536.

246. When determined by ordinance. — After a street railway had been chartered, a city charter was altered so as to allow one street-car company to run its cars upon the track of another by paying compensation, but a proper ordinance by the city was necessary to carry this provision into effect. The company afterwards accepted additional privileges or franchises from the city, agreeing at the same time to conform to any city ordinance then existing or which might thereafter be passed. *Held*, that the company thereby became subject to an ordinance subsequently passed, requiring it to allow another company to use its track upon making just compensation. *St. Louis R. Co.* v. *Southern R. Co.*, 105 *Mo.* 577, 15 *S. W. Rep.* 1013. — DISTINGUISHING Covington St. R. Co. *v.* Covington & C. St. R. Co., 19 Am. Law Reg. (N. S.) 765. QUOTING Kinsman St. R. Co. *v.* Broadway & N. St. R. Co., 36 Ohio St. 239; State ex rel. *v.* Southern R. Co., 100 Mo. 61, 13 S. W. Rep. 398.

Such acceptance creates a contract between the city and the company, and is binding on the latter. Nor is it necessary in order for such right of user to be acquired by another company that it resort to condemnation proceedings. *Union Depot R. Co.* v. *Southern R. Co.*, 50 *Am. & Eng. R. Cas.* 354, 105 *Mo.* 562, 16 *S. W. Rep.* 920. — FOLLOWED IN St. Louis R. Co. *v.* Southern R. Co., 105 Mo. 577; Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 602.

Where a company has an undoubted legal right to lay its tracks upon certain streets in Philadelphia, it is the duty of the board of surveyors to approve of some plan by which that right can be enjoyed. The board is not at liberty to compel the adoption of a plan of its own which involves the necessity of using the tracks of another company already laid upon the street, when the consent of the latter does not appear to have been obtained, or when such user would be attended with inconvenience and delay in the running of the cars. *Com. ex rel.* v. *Smedley*, 17 *Phila.* (*Pa.*) 18.

247. In city of New Orleans. — The city, by delegated power from the legislature, has the paramount control and regulation of its streets, and can grant the use of a street railway already constructed to another authorized road; and the council cannot grant the exclusive use to one company so as to deprive a succeeding council of the power of regulating the use as it may deem best. *Canal & C. St. R. Co.* v. *Crescent City R. Co.*, 41 *La. Ann.* 561, 6 *So. Rep.* 849.

A company which is authorized by the city to enter upon the tracks of another, must, before doing so, make compensation to that company. *Canal & C. R. Co.* v. *Orleans R. Co.*, 50 *Am. & Eng. R. Cas.* 369, 44 *La. Ann.* 54, 10 *So. Rep.* 389. — FOLLOWED

IN Canal & C. R. Co. *v.* Crescent City R. Co., 44 La. Ann. 485.

There is no limitation in the ordinances of the city which prevents street-railway companies from contracting with reference to the amount due for the use of tracks. *Canal & C. R. Co.* v. *Orleans R. Co.*, 50 *Am. & Eng. R. Cas.* 369, 44 *La. Ann.* 54, 10 *So. Rep.* 389.

The city government has the right to grant the privilege of the use of a part of the tracks of a street railway to another company. It can continue the use of a different car, propelled by a different motor than the one in use on the track. *Canal & C. R. Co.* v. *Crescent City R. Co.*, 50 *Am. & Eng. R. Cas.* 374, 44 *La. Ann.* 485, 10 *So. Rep.* 888.

Two corporations organized under the general laws of the state, each holding assignable street-railway franchises, entered into a contract (each acting for itself, its successors, and assigns) by which the first agreed to pay to the second, as a consideration for authorizing it to run its cars over its track, four cents per mile for each and every mile traveled by each and every car run over its tracks, said agreement to last during the term of the charters granted to the said respective corporations, or of any extension of said charters; provided that, in case the first company should cease to use the privileges granted to it in the contract, then and in that case the agreement should be ended. *Held:* (1) that where the first company is in undisturbed possession of the right, exercising and enjoying it every day, it cannot release itself from its contract obligations on the claim that the agreement was *ultra vires* of the powers of its officers; if there be any legal objections to the contract, they must be set up under other conditions, and in a different manner; (2) where, under such a contract, the second company conveys all its rights, property, and franchises, specially including therein its rights under the agreement mentioned, to a third company, which assumes all the obligations of the former under the agreement, there is nothing in the assignment of which the first company can complain; (3) the third company having been organized by the stockholders of the second company, and for the express purpose of acquiring all the rights, property, and franchises of the old company, and assuming all its obligations, and the old company having postponed its dissolution until after such transfer and assumpsit should have been made, the new company, for the purpose of the contract declared on in this case, is merely the old company reorganized under a new name. *Canal & C. R. Co.* v. *St. Charles St. R. Co.*, 56 *Am. & Eng. R. Cas.* 555, 44 *La. Ann.* 1069, 11 *So. Rep.* 702.

The city has at all times recognized the right of the Canal & C. Street R. Co. to remuneration for the use of its tracks by other companies, and the right of the companies *inter se* to fix the value of that right, and the dealings between the city and the St. Charles Street R. Co. have all been subordinated to that right. *Canal & C. R. Co.* v. *St. Charles St. R. Co.*, 56 *Am. & Eng. R. Cas.* 555, 44 *La. Ann.* 1069, 11 *So. Rep.* 702.

248. In city of St. Louis.—St. Louis city charter, art. 10, § 6, confers upon the city the power to make rules and regulations for determining the compensation to be paid by one company for the user of another's tracks. *Union Depot R. Co.* v. *Southern R. Co.*, 50 *Am. & Eng. R. Cas.* 354, 105 *Mo.* 562, 16 *S. W. Rep.* 920.—QUOTING Joy *v.* St. Louis, 138 U. S. 1.—FOLLOWED IN St. Louis R. Co. *v.* Southern R. Co., 105 Mo. 577; Union R. Co. *v.* Southern R. Co., 105 Mo. 602.

The above section also confers the power on the city council to make the award of the commissioners as to the amount of compensation reviewable by the circuit court. *Union Depot R. Co.* v. *Southern R. Co.*, 50 *Am. & Eng. R. Cas.* 354, 105 *Mo.* 562, 16 *S. W. Rep.* 920.—FOLLOWED IN St. Louis R. Co. *v.* Southern R. Co., 105 Mo. 577; Union R. Co. *v.* Southern R. Co., 105 Mo. 602.

249. In city of Philadelphia.—Under their respective charters the complainants were entitled, in reversing the direction of the running of their cars, to connect with the defendants' north track on Columbia avenue and run westward on it to Ridge avenue; to construct and build a separate track on the south side of Master street, to be operated eastward; and to remove and relay the joint track in use upon Master street to and upon the north side of said street, they paying the costs and expenses of the construction and connections. *Appeal of Union Pass. R. Co.*, 2 *Pennyp.* (*Pa.*) 434.—DISTINGUISHING North Branch Pass. R. Co. *v.* Philadelphia City Pass. R. Co., 38 Pa. St. 361.

The fact that complainant originally elected to run its cars in certain directions

does not, at the suggestion of another corporation, bar it from diametrically reversing the order of running. *Appeal of Union Pass. R. Co.*, 2 *Pennyp.* (*Pa.*) 434.

Nor is the fact that complainant did not construct its branch track for eleven years after the date of its charter to be considered an abandonment by non-user. *Appeal of Union Pass. R. Co.*, 2 *Pennyp.* (*Pa.*) 434.

A passenger-railway company, authorized by its charter to connect with the tracks of another railway company on a street of the city, before making such connection must have the terms and compensation settled by due course of law. *Union Pass. R. Co.* v. *Continental R. Co.*, 11 *Phila.* (*Pa.*) 321.

Such new railway company has no right to straddle the old road if by so doing the business of that road is impeded. *Union Pass. R. Co.* v. *Continental R. Co.*, 11 *Phila.* (*Pa.*) 321.—FOLLOWED IN Thirteenth & F. St. Pass. R. Co. *v.* Union Pass. R. Co., 15 Phila. 275.

250. Enjoining road seeking to cross or parallel track.—One street-railway company cannot enjoin another from crossing its track, where the passage of its cars is not thereby impeded, and no injury will be done to its business; and such a crossing is not an appropriation of the property of the former for the use of the latter, but a mere mode of exercising the public right of transit over the highway. *Brooklyn C. & J. R. Co.* v. *Brooklyn City R. Co.*, 33 *Barb.* (*N. Y.*) 420.

Plaintiff company sought to restrain defendant company, which had secured a charter and obtained consent of the city, from laying rails on a certain avenue, on the ground that the acts of 1869 and 1870 authorizing it to extend its lines on any street west of Twenty-third street gave it vested and exclusive rights in such avenue, it being west of Twenty-third street. *Held*, that the right of plaintiff to raise questions is doubtful, as its use of the street is not interfered with, it never having exercised any right conferred by the legislature. *Philadelphia & G. F. R. Co.* v. *Catharine & B. St. R. Co.*, 20 *Phila.* (*Pa.*) 233.

251. Extent of compensation allowed.—An exclusive right to run street-cars on a certain street only extends to the use of the track; and where a second company is chartered to run cars on the same street and track, it is only required to make compensation to the first company for the use of the track, and not for the value of the franchise. *Louisville City R. Co.* v. *Central Pass. R. Co.*, 36 *Am. & Eng. R. Cas.* 463, 87 *Ky.* 223, 8 *S. W. Rep.* 329.

Where a contract between a city and a street-railway company, relating to the compensation that the company shall make for the use of the streets, shall be determined by arbitrators "upon an equitable consideration," in the event the parties cannot agree, and a second company desires to use the portion of the street, and the matter is referred to arbitrators, the compensation may not be confined merely to the value of the use of the rails and ties, but may have some reference to the profits resulting from the franchise. *Louisville City R. Co.* v. *Central Pass. R. Co.*, 36 *Am. & Eng. R. Cas.* 463, 87 *Ky.* 223, 8 *S. W. Rep.* 329.

252. Determining compensation under Massachusetts statutes.—In determining the compensation for the joint use of a track by two companies, under Mass. Act of 1864, ch. 229, the commissioners may prescribe a rate of compensation founded upon the amount of business that the second company does over the tracks of the first, and may require it so to keep its accounts as to show the amount of business, and to keep them open for inspection. *Metropolitan R. Co.* v. *Quincy R. Co.*, 12 *Allen* (*Mass.*) 262.—FOLLOWING Boston & W. R. Corp. *v.* Western R. Corp., 14 Gray (Mass.) 253; Lexington & W. C. R. Co. *v.* Fitchburg R. Co., 14 Gray 266.

It is not necessary to the validity of the award of commissioners under the above statute, to estimate the rate of compensation due from one street railway to another for using its track by authority of law, to require the corporation whose tracks are so used to keep the same in repair, that being a requirement of the statute. *Metropolitan R. Co.* v. *Quincy R. Co.*, 12 *Allen* (*Mass.*) 262.

An award of commissioners appointed under Mass. St. of 1864, ch. 229, § 29, to revise a previous award of commissioners determining the compensation to be paid by one street-railway company for using the tracks of another, does not take effect until returned to and approved by the court; and until then the former award remains in force. *Metropolitan R. Co.* v. *Broadway R. Co.*, 99 *Mass.* 238.

Mass. Act of 1871, ch. 238, §§ 38, 39, vests a large discrimination in the commissioners in determining the rate of compensation to

be paid by one street-railway company for the use of the tracks of another; and it is within their discretion to establish rules regulating the modes of apportioning expenses and estimating compensation between the companies; and where no question of law is involved, no exception lies. *Metropolitan R. Co.* v. *Highland St. R. Co.*, 118 *Mass.* 290, 9 *Am. Ry. Rep.* 285.

The railroad commissioners, in determining, under Mass. Pub. St. ch. 113, §§ 50, 51, the rate of compensation to be paid by one company for the use of the tracks of another company, adopted as an element the interest on the cost of construction of the latter company's railroad, and included in the cost of such construction a sum which the latter company paid to a bridge corporation, over whose bridge its tracks were laid, "in full compensation or toll" for the right of using the bridge. The bridge was made a free bridge before the tracks upon it were used by the company required to make compensation. *Held*, that, whether the sum paid to the bridge corporation could legally be regarded as part of the cost of construction of the road or not, the company required to make compensation showed no ground of objection to the acceptance of the award. *Cambridge R. Co.* v. *Charles River St. R. Co.*, 23 *Am. & Eng. R. Cas.* 62, 139 *Mass.* 454, 1 *N. E. Rep.* 925.

253. When court may determine compensation.—A court which, through its receiver, has the custody and control of an insolvent company's property has the power to determine what is the amount of one half of the cost of the construction of the tracks and appurtenances which would be occasioned by its track being intersected and used by another company. *Pacific R. Co.* v. *Wade*, 50 *Am. & Eng. R. Cas.* 362, 91 *Cal.* 449, 27 *Pac. Rep.* 768.

There is no occasion to exercise the right of eminent domain to determine the amount of such cost, and there is no private property to be taken for public use. The company has no proprietary interest in the street, and no exclusive right to its use; and its franchise having been taken with the understanding that another company might be authorized to use the track jointly with itself as fully as if that condition had been expressly stated in the grant, it is estopped from claiming that the taking is without its consent, and must be made under the right of eminent domain. *Pacific R. Co.* v. *Wade*, 50 *Am. & Eng. R. Cas.* 362, 91 *Cal.* 449, 27 *Pac. Rep.* 768.

254. Fixing mode of compensation by ordinance.—When city ordinances provide the mode of compensation, and the two corporations are within the limits of the same franchise, the ordinances will control the mode to be pursued in reference to fixing the compensation, as the corporations accept their franchises with reference to said ordinances. *Canal & C. R. Co.* v. *Orleans R. Co.*, 50 *Am. & Eng. R. Cas.* 369, 44 *La. Ann.* 54, 10 *So. Rep.* 389.

Where a city, under a general statute authorizing it to pass ordinances for the regulation of street railways, provides a method of ascertaining compensation where one company uses the tracks of another, the company may, if not satisfied with the compensation allowed, appeal to the circuit court, or it may apply to the circuit court in the first instance under its general jurisdiction. *St. Louis R. Co.* v. *Southern R. Co.*, 105 *Mo.* 577, 15 *S. W. Rep.* 1013.

A general statute or ordinance without negative words will not repeal the particular provisions of a former statute or ordinance, unless the two are clearly inconsistent. Six ordinances of a city allowed six horse-railroad companies to use the streets of the city, two of the ordinances requiring payments therefor from two of the companies. The six companies afterwards consolidated. Three ordinances allowed three steam-railroad companies to use the streets of the city, one of the ordinances requiring payments therefor from one of the companies. Subsequently the ordinances of the city were revised, and in the revision the chapter on railroads contained general rules and regulations, continued permission to the use of the streets, and prescribed certain conditions, mostly taken from the original ordinances, but said nothing about any payments. The revising ordinance contained a list of ordinances repealed, among which those requiring payments were not placed. *Held*, that the special ordinances requiring payments were not repealed by the revising ordinance. *Providence* v. *Union R. Co.*, 12 *R. I.* 473

VII. REGULATION BY PUBLIC AUTHORITY.

1. *By Statute.*

255. Statute to regulate fares does not apply to street railways.—New York Act of March 27, 1857, entitled

"An act to prevent extortion by railroad companies," does not apply to city or street railroad companies. The object of the statute was to prevent companies from receiving more than a fixed rate of fare per mile, and it does not apply to street-car companies, where a uniform fare is charged, without reference to the distance. *Moneypenny* v. *Sixth Ave. R. Co.*, 7 *Robt.* (*N. Y.*) 328, 4 *Abb. Pr. N. S.* 357, 35 *How. Pr.* 452.—QUOTING Chase *v.* New York C. R. Co., 26 N. Y. 526.

256. Constitutionality of Pennsylvania act as to motive power.—The act of May 8, 1876, providing for use under certain conditions of power other than animal by street railways, in cities of the first class, is unconstitutional, as violating Pa. Const. art. 3, § 7, which forbids the passage of any local or special law creating corporations, or amending, renewing, or extending the charters thereof. *Watkin* v. *West Phila. Pass. R. Co.*, 1 *Pa. Dist.* 463.

257. Right to increase fare after issue of paper currency. — Where a street-car company is chartered at a time when specie is the lawful currency, with the right to charge a five-cent fare, and subsequently the general government issues paper currency, which is depreciated, the company is justified in charging more than five cents. *Moneypenny* v. *Sixth Ave. R. Co.*, 7 *Robt.* (*N. Y.*) 328, 4 *Abb. Pr. N. S.* 357, 35 *How. Pr.* 452.

The Act of Congress of 1865, ch. 75, amending the Revenue Act of 1864, and, among other things, imposing a tax on street railways according to the number of passengers carried, and allowing the companies to add one cent to each fare, is constitutional. *Moneypenny* v. *Sixth Ave. R. Co.*, 7 *Robt.* (*N. Y.*) 328, 4 *Abb. Pr. N. S.* 357, 35 *How. Pr.* 452.

The Act of Congress of 1864, relating to revenue, imposed a tax of two and a half cents upon gross receipts of all railroad companies, and gave to the companies the right to add it to their fares. This tax amounted to one eighth of one cent on each passenger carried on defendant's road, but one cent was added to each fare. *Held*, that the statute did not authorize the addition of more than the amount of the tax, and as there was no coin in which less than one cent could be collected, the company must lose the amount of the tax, or devise some other means of collecting it. *Black* v. *Sixth Ave. R. Co.*, 1 *Daly* (*N. Y.*) 536.

258. Manner of constructing tracks across streets and highways.—Me. Act of 1853, ch. 41, § 3 (Rev. St. 1857, ch. 51, § 15), relating to the construction of railroads across highways and streets, is remedial, and applies to railroad corporations previously, as well as those subsequently, chartered unless they had, at the time of the passage of the act, completed or actually entered upon the construction of their roads. *Veazie* v. *Mayo*, 45 *Me.* 560.

That act was designed to afford greater security to the public having occasion to use highways and streets across which railroads were to be made; and it was but the exercise of that police power which is always necessarily retained by the people, in their sovereign capacity, for the public safety, and of which they cannot be divested by prior legislative enactments nor by chartered immunities. *Veazie* v. *Mayo*, 45 *Me.* 560.

2. *By Ordinance.*

259. Generally.*—A street railway is subject to proper police regulations and equitable control. *Clinton* v. *Clinton & L. Horse R. Co.*, 37 *Iowa* 61.—FOLLOWING Chicago, N. & S. W. R. Co. *v.* Mayor, etc., of Newton, 36 Iowa 299.

A provision in a franchise granted by a city to a street-car company providing how and when the road should be constructed, and the manner in which it should be maintained, does not exempt the company from reasonable regulation by the city in the operation of the road. *Wyandotte* v. *Corrigan*, 35 *Kan.* 21, 10 *Pac. Rep.* 99.

The permission given to a street-railway company to use a street is in subordination to the general power of the municipality over its streets. *Detroit* v. *Ft. Wayne & E. R. Co.*, 50 *Am. & Eng. R. Cas.* 447, 90 *Mich.* 646, 51 *N. W. Rep.* 688.

A city council, by granting to a company the privilege of constructing its road over its street and public squares, does not lose

* Municipal regulation of street railways, see notes, 26 AM. & ENG. R. CAS. 537; 13 *Id.* 637; 56 *Id.* 412, *abstr.*

Police power, see note, 50 AM. & ENG. R. CAS. 437.

Street railways subject to municipal regulation, see note, 25 AM. ST. REP. 479.

Scope and effect of municipal ordinances regulating street railways, see note, 13 L. R. A. 74.

the right to subject the company to reasonable regulations, both in conduct of its business and in the location of its track over the places authorized by its ordinance. *Springfield R. Co.* v. *Springfield*, 85 *Mo.* 674.

The legislature has full power to authorize the laying of railways in the streets of a city. And a company having such chartered authority, and having complied with all the conditions of its charter, is entitled to operate its railway without other impediment or restriction on the part of the city than such as it may have voluntarily submitted itself to, or as may arise from reasonable municipal regulations. *Paterson & P. Horse R. Co.* v. *Mayor, etc., of Paterson*, 24 *N. J. Eq.* 158.

A grant to a corporation of a privilege to carry passengers in cars over the streets of a city does not necessarily involve exemption from liability to municipal regulation. It is neither more nor less than a natural person possesses. *Frankford & P. Pass. R. Co.* v. *Philadelphia*, 58 *Pa. St.* 119.

A company having accepted its charter with the knowledge that the city possesses the most ample power to legislate by ordinance as to her streets and highways, to make all needed regulations for the most convenient enjoyment of the same, it is bound by an implied agreement to hold its special privileges subject to a proper exercise of this power by the councils of the city. *West Phila. Pass. R. Co.* v. *Philadelphia*, 10 *Phila.* (*Pa.*) 70.—REVIEWING Com. *v.* Central Pass. R. Co., 52 Pa. St. 506.

The vital question in every such case is, Is the regulation or order of the municipal authority reasonable and necessary? If it is, it will be maintained; if it is not, it will be set aside. *West Phila. Pass. R. Co.* v. *Philadelphia*, 10 *Phila.* (*Pa.*) 70.

260. Regulating fares.* —Under the Constitution and laws of the state of Louisiana the city of New Orleans is clothed with full and exclusive power to grant franchises for the construction and operation of street railways, by steam or horse power, within her corporate limits, including the right of regulating the rates of fare to be exacted by said corporations. *Forman* v. *New Orleans & C. R. Co.*, 36 *Am. & Eng. R. Cas.* 38, 40 *La. Ann.* 446, 4 *So. Rep.* 246.

The city's discretion in regulating such matters is not subject to judicial control or interference, unless arbitrarily or unlawfully exercised. *Forman* v. *New Orleans & C. R. Co.*, 36 *Am. & Eng. R. Cas.* 38, 40 *La. Ann.* 446, 4 *So. Rep.* 246.

A provision in the charter of a company that the city may purchase the road after ten years does not give to either the city or its officers such an interest in the property as to enable them to maintain a bill in equity to restrain the company from raising fares, in violation of provisions assented to by the company, in the absence of a fraudulent intent, though it may have the effect of diminishing the value of the property, and perhaps expose the franchise to forfeiture. *Cambridge* v. *Cambridge R. Co.*, 10 *Allen* (*Mass.*) 50.

An ordinance provided that the rate of fare on a horse railway should not exceed five cents. At the time the ordinance was passed defendant company was operating a single line with cars running between two points, but afterwards it constructed diverging lines, over which separate cars were run from the main line to the several *termini*. *Held*, that the ordinance did not entitle a passenger to ride over the main line to a point of divergence, and then over a branch line to its terminus, for one fare. *Ellis* v. *Milwaukee City R. Co.*, 27 *Am. & Eng. R. Cas.* 77, 67 *Wis.* 135, 30 *N. W. Rep.* 218, 58 *Am. Rep.* 858.

A regulation or custom of a company by which several distinct and separate lines of cars are run between different *termini* is reasonable. *Ellis* v. *Milwaukee City R. Co.*, 27 *Am. & Eng. R. Cas.* 77, 67 *Wis.* 135, 30 *N. W. Rep.* 218, 58 *Am. Rep.* 858.

261. —— and requiring the sale of tickets on cars.*—The rights and franchises of a company are not destroyed or unreasonably impaired by an ordinance requiring it to sell to persons applying therefor, upon all of its cars, tickets, to be good for transportation over its entire route or any portion thereof, traveling continuously either way, between certain hours, at the rate of eight tickets for twenty-five cents. *Detroit* v. *Ft. Wayne & B. I. R. Co.*, 95 *Mich.* 456, 54 *N. W. Rep.* 958.—QUOTING Sternberg *v.* State, 36 Neb. 307, 54 N. W.

* Municipal regulation of street railways, including right to regulate fares and to prohibit smoking, etc., see note, 19 L. R. A. 570.

* Right of cities to compel sale of tickets on street-cars, see 56 AM. & ENG. R. CAS. 429, *abstr.*

Rep. 553. REVIEWING South Covington & C. St. R. Co. *v.* Berry, 93 Ky. 43, 18 S. W. Rep. 1026.

A reservation in the ordinance under which a company is operating of the right "to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public" includes the right to enact an ordinance requiring the company, for the accommodation of the public, to keep tickets for sale upon its cars in the manner stated. *Detroit* v. *Ft. Wayne & B. I. R. Co.*, 95 *Mich.* 456, 54 *N. W. Rep.* 958.

It is competent to provide for the enforcement of such an ordinance by making each day's neglect to comply with its provisions an offense punishable by fine, and to provide for the collection of such fine in an action at law. *Detroit* v. *Ft. Wayne & B. I. R. Co.*, 95 *Mich.* 456, 54 *N. W. Rep.* 958.

A street railway has no depots. Its stopping places are on each street corner and it transacts its business with the public in its cars, and its tickets should be kept for sale where it transacts its business with the public. *Sternberg* v. *State*, 56 *Am. & Eng. R. Cas.* 424, 36 *Neb.* 307, 54 *N. W. Rep.* 553.

The street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rates of fare for passage over said railway, and may require tickets, six for twenty-five cents, to be kept for sale by each conductor. *Sternberg* v. *State*, 56 *Am. & Eng. R. Cas.* 424, 36 *Neb.* 307, 54 *N. W. Rep.* 553.

262. Regulating car service. — A city granted to a company the right to construct a street railway on certain streets, under an ordinance requiring a stated car service to be furnished. The company thereafter executed and delivered to defendant a deed by its terms granting, assigning, and conveying all franchises, powers, privileges, and immunities possessed by it and its line of road in plaintiff city. Defendant accepted the deed, and operated the line for a time. *Held*, that defendant thereby assumed the performance of the duties toward the public which before rested on the grantor. *Potwin Place* v. *Topeka R. Co.*, 56 *Am. & Eng. R. Cas.* 549, 51 *Kan.* 609, 33 *Pac. Rep.* 309.

In an action against a street-railway company to recover a penalty for the violation of a city ordinance requiring it to run cars at certain intervals during certain hours of the night, the defendant is entitled to show that as to it such ordinance is unreasonable, and may give evidence of such facts as will establish, or tend to establish, that the public convenience does not require the running of its cars during the hours specified. The fact that the evidence offered relates to a period of time subsequent to the date when the ordinance went into effect is not a ground for objection. Nor is the question of the reasonableness of such ordinance controlled by considerations of the expense to the defendant. *Mayor, etc., of N. Y.* v. *Dry Dock, E. B. & B. R. Co.*, 50 *Am. & Eng. R. Cas.* 438, 133 *N. Y.* 104, 30 *N. E. Rep.* 563, 44 *N. Y. S. R.* 94; *reversing* 39 *N. Y. S. R.* 105, 15 *N. Y. Supp.* 297.

The charter under which defendant operates its street railroad (N. Y. Laws of 1860, ch. 512) provides that said railroad "shall be run as often as the convenience of passengers may require and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of New York may from time to time by ordinance prescribe." The common council passed an ordinance requiring street surface railroads to run "not less than one car every twenty minutes between the hours of twelve midnight and six o'clock A.M., each and every day, both ways, for the transportation of passengers." *Held*, in an action to recover the penalty prescribed for a violation of the ordinance, that while the authority of the common council was qualified as to defendant, and an unreasonable regulation would not be obligatory upon it, the presumption was in favor of the reasonableness of the ordinance, and the burden was upon it to show the contrary. *Mayor, etc., of N. Y.* v. *Dry Dock, E. B. & B. R. Co.*, 50 *Am. & Eng. R. Cas.* 438, 133 *N. Y.* 104, 30 *N. E. Rep.* 563, 44 *N. Y. S. R.* 94; *reversing* 39 *N. Y. S. R.* 105, 15 *N. Y. Supp.* 297.

Defendant offered evidence to the effect that it ran its cars for a time in obedience to the ordinance, and that they ran empty, often not carrying a single passenger. This evidence was objected to and excluded. *Held*, error; that the evidence was proper, as bearing upon the question of the reasonableness of the ordinance. *Mayor, etc., of N. Y.* v. *Dry Dock, E. B. & B. R. Co.*, 50 *Am. & Eng. R. Cas.* 438, 133 *N. Y.* 104, 30 *N. E. Rep.* 563, 44 *N. Y. S. R.* 94; *reversing* 39 *N. Y. S. R.* 105, 15 *N. Y. Supp.* 297,

The fact that defendant operated branches of its road on parallel avenues, and that upon one branch cars were run in compliance with the ordinance, but not upon the other, was not a sufficient compliance with the ordinance. *Mayor, etc., of N. Y.* v. *Dry Dock, E. B. & B. R. Co.*, 50 *Am. & Eng. R. Cas.* 438, 133 *N. Y.* 104, 30 *N. E. Rep.* 563, 44 *N. Y. S. R.* 94; *reversing* 39 *N. Y. S. R.* 105, 15 *N. Y. Supp.* 297.

263. Regulating motive power and speed.* — A city no doubt has the power, for the protection of its citizens and their property, to regulate the mode of propelling cars within its limits, to say whether steam or horse power shall be employed, and to prescribe the rate at which they may move. *Donnaher* v. *State*, 16 *Miss.* 649.

The charter of a city conferred power upon the common council to pass ordinances necessary and proper for the good government, order, and protection of persons and property; also power to prescribe the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street. *Held*, that under either of these powers reasonable regulations controlling the running of street-cars may be adopted. *State* v. *Trenton*, 53 *N. J. L.* 132, 20 *Atl. Rep.* 1076.

264. Construction of track, generally.—A municipal corporation declaring it unlawful for any railroad or street-car company operating its road within the limits of the corporation to permit any part of its track "to remain in the streets so high above the surface thereof as to discommode and seriously inconvenience public travel on said streets, or interfere with the free and easy passage of vehicles over said track," and subjecting the superintendent, managing agent, and other officers, to a fine for its violation, is oppressive, unreasonable, and void, in its operation on the officers personally. *Oxanna* v. *Allen*, 90 *Ala.* 468, 8 *So. Rep.* 79.

An incorporated town, by its charter clothed with a general police power over its streets, and also with a like general power over the subject of nuisances, has the right to pass an ordinance requiring a city railway company to make its track, located in and along any of its streets, conform to the requirements thereof, so as to enable wagons, carriages, and other vehicles to pass over its track without inconvenience or danger, and to punish for a failure to do so. *North Chicago City R. Co.* v. *Lake View*, 105 *Ill.* 183.

A city is under no obligation to conform its treatment of its streets to the construction of the roadbed of a street railway, but the company must conform such construction to such reasonable regulations as are made by the city in the exercise of its powers respecting the use, control, regulation, and improvement of its streets. *Detroit* v. *Ft. Wayne & E. R. Co.*, 50 *Am. & Eng. R. Cas.* 447, 90 *Mich.* 646, 51 *N. W. Rep.* 688.

A municipal corporation, under the ordinary powers of local government, may pass ordinances requiring a company, incorporated by the legislature, and having its rails down and in use through the streets, under legislative sanction, to make its tracks conform to grade; to keep in repair the space between the rails; to remove snow, and the like. *State* (*North Hudson County R. Co., Pros.*) v. *Mayor, etc., of Hoboken*, 41 *N. J. L.* 71.

Such regulations do not appreciably interfere with the franchises of the company, and the legislature is presumed to have intended, when it authorized the use of the public streets for such purposes, that its grantee should hold its privileges subject to such regulations as are reasonably necessary for the common use of the streets for a street railway, and for ordinary travel. *State* (*North Hudson County R. Co., Pros.*) v. *Mayor, etc., of Hoboken*, 41 *N. J. L.* 71.

265. Prescribing gauge.—Where a city has granted to a company the privilege of constructing and operating a street railway, regulating the track as to the grade, but making no provision as to the kind of rails to be used, or as to the gauge of the road, it is not entitled to an injunction to restrain the company from using a certain kind of rail, or from building its road upon a certain gauge. Notwithstanding the general power of the city to control the use of the streets, the company may regulate the manner of laying the track without equity interference. *Waterloo* v. *Waterloo St. R. Co.*, 29 *Am. & Eng. R. Cas.* 601, 71 *Iowa* 193, 32 *N. W. Rep.* 329.

City authorities who have been enjoined from interfering with the extension and operation of a street-railway line are not justified in interfering therewith by resolu-

* Regulation of street railways as to motive power, see note, 10 L. R. A. 176.

tions subsequently passed by the city council, to the effect that all street railroads shall be of the standard or broad gauge, and declaring the privileges of the company forfeited for violation of the ordinance under which they were granted; and proposing the passage of another ordinance, granting to the company the right to operate its road upon terms and conditions materially different from those contained in the original ordinance. *Des Moines St. R. Co.* v. *Des Moines Broad Gauge St. R. Co.*, 36 *Am. & Eng. R. Cas.* 132, 74 *Iowa* 585, 38 *N. W. Rep.* 496.

A city which has for fifteen years permitted, without objection, a company to lay its track of a certain width or gauge, pursuant to an ordinance which prescribes no particular gauge, has no power to require such company to construct its additional track of a different gauge. *Des Moines St. R. Co.* v. *Des Moines Broad-Gauge St. R. Co.*, 36 *Am. & Eng. R. Cas.* 132, 74 *Iowa* 585, 38 *N. W. Rep.* 496.

266. — and kind of rails to be used.—A city can require the tram rail to be substituted for the crescent rail, under a contract by the company with the city for a right of way, in which it was stipulated that the most approved rail should be used. The law under which the contract was made reserved to the city council the right to regulate and control such railways as it might authorize to be laid down and operated in the streets and highways of the city. All the streets in the city were bouldered or macadamized when the railway tracks were constructed with the crescent rail. The city, having inaugurated a system of street improvements by which the "Nicholson" was gradually being substituted for the stone pavements, required the company to take up its crescent and put down the tram rail as the construction of the Nicholson pavement progressed, it being agreed that the tram was the better rail for streets in which the Nicholson pavement was used. *Held*, that the city had the right to require the company to substitute the tram for the crescent rail, at the cost of the company. *Louisville City R. Co.* v. *Louisville*, 8 *Bush* (*Ky.*) 415.

A council cannot by contract deprive itself of the power to regulate the reconstruction of railways made necessary by the changes in the character of pavement used upon the streets of the city. *Louisville City R. Co.* v. *Louisville* 8 *Bush* (*Ky.*) 415.

A street railway was laid with flat rails, and after many years was relaid with T rails. After it was relaid the city authorities, by ordinance, forbade the use of T rails, and proceeded to tear up the rails. *Held*, in the absence of anything to the contrary in its charter, that the company could change the kind of rail used, and that the town officers were trespassers, and an injunction would lie to restrain further interference with the track. *Easton, S. E. & W. E. Pass. R. Co.* v. *Easton*, 43 *Am. & Eng. R. Cas.* 253, 133 *Pa. St.* 505, 19 *Atl. Rep.* 486.—DISTINGUISHING Klingler *v.* Bickel, 117 Pa. St. 326.

267. Requiring a conductor and driver on each car.—A city ordinance requiring both a driver and a conductor on each street-car, and requiring the police to cause every car not provided with a driver and a conductor to be returned to the stables, is a valid exercise of the police power of the city. *South Covington & C. St. R. Co.* v. *Berry*, 50 *Am. & Eng. R. Cas.* 434, 93 *Ky.* 43, 18 *S. W. Rep.* 1026.—REVIEWING Brooklyn Crosstown R. Co. *v.* Brooklyn, 37 Hun (N. Y.) 413; Ravenna *v.* Pennsylvania Co., 45 Ohio St. 118.

Where the ordinances of a city do not require a street-railway company to keep a conductor on each of its cars, in addition to a driver, its failure to do so is not negligence *per se*. *Dunn* v. *Cass Ave. & F. G. R. Co.*, 21 *Mo. App.* 188.

Under a petition which alleges negligence of the conductor in not complying with an ordinance, it is error to instruct the jury upon the hypothesis that no conductor was upon the car. *Dunn* v. *Cass Ave. & F. G. R. Co.*, 21 *Mo. App.* 188.

An ordinance enacting that it shall not be lawful for any company to run cars without having an agent, in addition to the driver, to assist in the control of the car and passengers, and to prevent accidents and disturbances of the good order and security of the streets, is not, upon its face, an unreasonable regulation. *State* (*Trenton Horse R. Co., Pros.*) v. *Trenton*, 53 *N. J. L.* 132, 20 *Atl. Rep.* 1076.—DISTINGUISHING Haynes *v.* Cape May, 50 N. J. L. 55.

A city cannot compel a horse-railway company to provide its cars with conductors as well as drivers, under its general power to regulate street railways and the carrying of passengers; neither can it make such requirement under a general provision in the company's charter that it shall be subject to

all ordinances of the city. (Dykman, J., dissenting.) *Brooklyn Crosstown R. Co.* v. *Brooklyn*, 37 *Hun* (*N. Y.*) 413.—QUOTED IN Lamline *v.* Houston, W. S. & P. F. R. Co., 14 Daly 144, 6 N. Y. S. R. 248. REVIEWED IN South Covington & C. St. R. Co. *v.* Berry, 50 Am. & Eng. R. Cas. 434, 93 Ky. 43, 18 S. W. Rep. 1026.

In 1852 a city passed a by-law prohibiting the operation of cars within the city without two men in charge. Defendant refused to conform to this by-law, and this action was brought to compel it to do so, the agreement of 1861 between the city and the company as to the operation and management of its road being relied on. *Held*: (1) that the by-law in question was not within the terms of the agreement, and that it was therefore *ultra vires*; (2) that the by-law was invalid, as it was an invasion of the domestic concerns of the company. *Toronto* v. *Toronto St. R. Co.*, 36 *Am. & Eng. R. Cas.* 44, 15 *Ont. App.* 30. — REVIEWING Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 527; Toledo, W. & W. R. Co. *v.* Jacksonville, 67 Ill. 37; Brooklyn Crosstown R. Co. *v.* Brooklyn, 37 Hun (N. Y.) 413.

268. Requiring cars to be stopped on first appearance of danger. — An ordinance of a city is valid which requires conductors and drivers of street-cars to keep a vigilant watch for all vehicles and persons on foot, especially for children, either on the track or moving towards it, and that on the first appearance of danger to such person or vehicles the car shall be stopped in the shortest time and space possible. *Fath* v. *Tower Grove & L. R. Co.*, 50 *Am. & Eng. R. Cas.* 426, 105 *Mo.* 537, 16 *S. W. Rep.* 913; *affirming* 39 *Mo. App.* 447.—DISTINGUISHING Hays *v.* Gainesville St. R. Co., 70 Tex. 602. QUOTING Mayor, etc., of Lyme Regis *v.* Henley, 1 Bing. N. C. 222; Conrad *v.* Ithaca, 16 N. Y. 158; Hickock *v.* Plattsburgh, 16 N. Y. 161, *n.*; Willy *v.* Mulledy, 78 N. Y. 310.

The validity of said ordinance rests on the fact that under the state Constitution and city charter street railways are allowed to lay their tracks upon the streets of the city upon the condition of yielding obedience to the city ordinances. *Fath* v. *Tower Grove & L. R. Co.*, 50 *Am. & Eng. R. Cas.* 426, 105 *Mo.* 537, 16 *S. W. Rep.* 913; *affirming* 39 *Mo. App.* 447.

The city, as a consideration for granting the franchise, can require an enhanced degree of care on the part of the company in running its cars. *Fath* v. *Tower Grove & L. R. Co.*, 50 *Am. & Eng. R. Cas.* 426, 105 *Mo.* 537, 16 *S. W. Rep.* 913; *affirming* 39 *Mo. App.* 447.

A street-railway company is liable in a private action at the suit of any person injured by its neglect of the ordinance, and this is the case although a pecuniary penalty is imposed for its non-observance. *Fath* v. *Tower Grove & L. R. Co.*, 50 *Am. & Eng. R. Cas.* 426, 105 *Mo.* 537, 16 *S. W. Rep.* 913; *affirming* 39 *Mo. App.* 447.—DISTINGUISHING Heeney *v.* Sprague, 11 R. I. 456.—See also *Liddy* v. *St. Louis R. Co.*, 40 *Mo.* 506.

269. Requiring track to be watered.—A provision in the charter of a city giving it power "to make, ordain, and establish such by-laws, ordinances, rules, and regulations as shall appear to them requisite and necessary for the security, welfare, and convenience of the city and its inhabitants, and for preserving health, peace, and good government within the limits of the same," gives it authority to pass an ordinance requiring street-car companies to keep their tracks watered so as to lay the dust. *City & S. R. Co.* v. *Mayor, etc., of Savannah*, 77 *Ga.* 731, 4 *Am. St. Rep.* 106.

Such an ordinance is not invalid on account of being partial or wanting in generality. *City & S. R. Co.* v. *Mayor, etc., of Savannah*, 77 *Ga.* 731, 4 *Am. St. Rep.* 106.

270. Requiring cars to be numbered or licensed. — Ordinances of a city prescribing the mode and times of running horse-cars and requiring that a license shall first be taken out under certain penalties mentioned is invalid as against a company holding under its charter, and also under anterior rights derived from a turnpike company which had the right to lay rails through the city without the consent of the council. *State* (*Hoboken & W. Horse R. Co., Pros.*) v. *Mayor, etc., of Hoboken*, 30 *N. J. L.* 225.

As a police regulation, a city may by ordinance require street-cars to be numbered and licensed, and that the certificate of license be numbered and hung in each car. *Frankford & P. Pass. R. Co.* v. *Philadelphia*, 58 *Pa. St.* 119.—APPROVED IN Allerton *v.* Chicago, 9 Biss. (U. S.) 552. EXPLAINED IN Union Pass. R. Co. *v.* Philadelphia, 83 Pa. St. 429.

271. Prohibiting smoking in cars. —A city ordinance prohibiting smoking in

street-cars is constitutional and valid. *State* v. *Heidenhain*, 43 *Am. & Eng. R. Cas.* 287, 42 *La. Ann.* 483, 7 *So. Rep.* 621.—DISTINGUISHING State *v.* Bright, 38 La. Ann. 1.

272. Limiting number of passengers, and requiring report of number carried.—An ordinance requiring a street-railway company to report to the city quarterly the number of trips made, and the number of passengers carried, and punishing by fine the carrying of more than eighteen passengers on the average, is a regulation reasonable in its nature, and is binding and valid. *St. Louis* v. *St. Louis R. Co.*, 26 *Am. & Eng. R. Cas.* 534, 89 *Mo.* 44, 1 *S. W. Rep.* 305; *affirming* 14 *Mo. App.* 221.—REVIEWING St. Louis R. Co. *v.* South St. Louis R. Co., 72 Mo. 67.

Such an ordinance is within the grant of power conferred upon the city, authorizing it to make such municipal regulations concerning the defendant company "as the public interest and convenience may require." *St. Louis* v. *St. Louis R. Co.*, 26 *Am. & Eng. R. Cas.* 534, 89 *Mo.* 44, 1 *S. W. Rep.* 305; *affirming* 14 *Mo. App.* 221.

273. Removal of snow.*—Mass. Act of 1864, ch. 229, § 16, providing that "the board of aldermen of any city, or the selectmen of any town, in which a street railway is operated, may from time to time establish, by an order, such rules and regulations as to the rate of speed, mode of the use of the tracks, and removal of snow and ice from the same, as in their judgment the interest and convenience of the public may require," authorizes the passage of an order entirely prohibiting the removal of snow and ice by a railway company, and thereby suspending for a time the running of cars. *Union R. Co.* v. *Mayor, etc., of Cambridge*, 11 *Allen* (*Mass.*) 287.

And such an order is not invalid as an attempt to delegate power to another officer because it provides that snow shall only be removed with the consent of the superintendent of streets. *Union R. Co.* v. *Mayor, etc., of Cambridge*, 11 *Allen* (*Mass.*) 287.

A city ordinance restraining a street-car company from using a snow plow on its tracks so as to throw snow upon the adjacent streets, unless a license is first obtained from the mayor, is not invalid because a subsequent section provides that the license shall continue only at the will of the mayor. *Broadway & S. A. R. Co.* v. *Mayor, etc., of N. Y.*, 49 *Hun* 126, 16 *N. Y. S. R.* 950, 1 *N. Y. Supp.* 646.

A provision of an ordinance requiring the company not only to remove the snow which it throws from its track but also that in the other portion of the street, so as to level it with the track and make it easy for vehicles to approach the sidewalk, and so the whole of the street may be safe for travel within twenty-four hours, is not unreasonable. Where the council has the right to restrain the use of snow plows altogether it may impose the terms on which they may be used. *Broadway & S. A. R. Co.* v. *Mayor, etc., of N. Y.*, 49 *Hun* 126, 16 *N. Y. S. R.* 950, 1 *N. Y. Supp.* 646.

The fact that the company is required to run its cars as often as the convenience of the public may require does not give it the right to control the use of the whole of the street. If it be conceded that the company cannot operate its road without the removal of snow, it does not follow that it may obstruct every part of the street except that which is occupied by its tracks. *Broadway & S. A. R. Co.* v. *Mayor, etc., of N. Y.*, 49 *Hun* 126, 16 *N. Y. S. R.* 950, 1 *N. Y. Supp.* 646.

274. Putting sand on track.—A city has a right to prevent a street-car company from using sand on its track at certain seasons of the year; and this is so though the company is chartered with a provision that it shall be the duty of the city officers to do such acts as may be needful to promote the construction and protect the operation of the road, and that any act in violation of the statute shall be void. Preventing the use of sand in no manner prevents the construction or operation of the road, which is all that is meant by the statute. *Dry Dock, E. B. & B. R. Co.* v. *Mayor, etc., of N. Y.*, 47 *Hun* 221, 13 *N. Y. S. R.* 391.

The above provision in the company's charter was only designed to give it the right to use the streets so far as they might be necessary for the construction and operation of the road. Beyond that it was designed to subject the company to the control of the common council having the general supervision over the use and management of the streets. *Dry Dock, E. B. & B. R. Co.* v. *Mayor, etc., of N. Y.*, 47 *Hun* 221, 13 *N. Y. S. R.* 391.

*See also *ante*, **201**, and *post*, **317**.

Duty of street-railway companies to remove snow from tracks, see notes, 25 AM. ST. REP. 480; 19 AM. & ENG. R. CAS. 136; 26 *Id.* 207.

275. Using bells and lights.—Driving a car at considerable speed through a city street, not lighted, on a dark evening, and without any proper means of giving notice to persons who may be on the track, and without any lamps on the car to enable the driver to see what is on the rails before him, is such proof of negligence as to justify a submission of the case to the jury. *Johnson* v. *Hudson River R. Co.*, 20 *N. Y.* 65; *affirming* 6 *Duer* (*N. Y.*) 633.

Owing to their momentum and noiselessness, street-cars are generally required to use bells and to display lights. *Memphis City R. Co.* v. *Logue*, 13 *Lea* (*Tenn.*) 32.—APPROVING Johnson *v.* Hudson River R. Co., 20 N. Y. 65; Shea *v.* Potrero & B. V. R. Co., 44 Cal. 414.

But the above rule does not go so far as to require a street-car company to furnish such lights as will enable its drivers "to see objects ahead on the track, with the aid of the street lights, in time to avoid an accident"; and it is error so to instruct the jury. *Memphis City R. Co.* v. *Logue*, 13 *Lea* (*Tenn.*) 32.

276. Where charter is granted by legislature.—The general power of a city to regulate street-cars, and to prohibit nuisances, and to prevent needless obstructions to the streets, does not give it the right to interfere with the tracks of a street railroad at certain places, where such tracks are authorized by the legislature, on the alleged ground that there are too many on the street. *Brooklyn City R. Co.* v. *Furey*, 4 *Abb. Pr. N. S.* (*N. Y.*) 364. —APPLYING Brooklyn C. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 363.

Whether the company has exceeded its legislative grant, and whether the tracks are a nuisance, must be determined by the courts, and cannot be determined summarily in the exercise of the city's authority to abate nuisances and remove obstructions. *Brooklyn City R. Co.* v. *Furey*, 4 *Abb. Pr. N. S.* (*N. Y.*) 364.

A company having laid its road in the streets of a city under a charter from the state, it is liable to the regulations adopted by councils for the preservation of the public rights in the highway. *West Phila. Pass. R. Co.* v. *Philadelphia*, 10 *Phila.* (*Pa.*) 70.

But where an obstruction arises by the laying of another track on the same street, under a subsequent charter, it is not reasonable ground to authorize a city ordinance to require the removal of the first track, and such removal by the city authorities is illegal and will be restrained. Such removal is not a public work under Pa. Act of April 8, 1846. *West Phila. Pass. R. Co.* v. *Philadelphia*, 10 *Phila.* (*Pa.*) 70.

277. City cannot prevent use of street authorized by charter.—Power granted to a city to regulate and control the use of streets does not empower it to prohibit a street-car company from using a street under authority conferred upon it by its charter. *Citizens' St. R. Co.* v. *Memphis*, 53 *Fed. Rep.* 715.

VIII. TAXATION; ASSESSMENTS.

1. *In General.*

278. Tax on easement or franchise.*—The right of way or easement of a street-railway company in city streets is property and taxable as such, and may be assessed for improvements. *Chicago City R. Co.* v. *Chicago*, 90 *Ill.* 573. *Chicago* v. *Baer*, 41 *Ill.* 306.

279. Tax on gross earnings.—Md. Act. of 1874, ch. 483, § 145, excepting the stock of railroad companies from assessment, applies only to steam railroads, as the act of 1874, ch. 408, had imposed a tax on the gross receipts of such companies in lieu of other taxation. *Mayor, etc., of Baltimore* v. *Baltimore City Pass. R. Co.*, 7 *Am. & Eng. R. Cas.* 362, 57 *Md.* 31.

When an ordinance granting to a company the privilege of using city streets provides that the percentage upon the gross earnings payable therefor shall be correspondingly reduced whenever the amount of the gross receipts of any other company shall be reduced, such company is not entitled to a reduction because of the acceptance by the city from other companies, by way of compromise of suits and controversies, of sums less than claimed by it. *Baltimore Union Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 41 *Am. & Eng. R. Cas.* 646, 71 *Md.* 405, 18 *Atl. Rep.* 917.

In an action by a city to enforce payment of a percentage of the earnings of a company whose road extends beyond the city limits, the testimony of passengers as to their estimate of the number of persons

* Taxation of easement of street railway. Real estate, see note, 39 AM. & ENG. R. CAS. 537.

traveling upon the portion beyond the city limits is not admissible for the purpose of showing the proportion of receipts applicable to such portion of the road. *Baltimore Union Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 41 *Am. & Eng. R. Cas.* 646, 71 *Md.* 405, 18 *Atl. Rep.* 917.

The testimony of witnesses who rode twice or more a day on the line which extended beyond the city limits, and who stated their estimate from casual observation as to the proportion of passengers on that line who got on in the country and rode into the city, or in the city and rode into the country, compared with that of those who began and ended their rides in the city, but who did not and could not tell at what point outside the city the passengers they observed got on, or where they got off in the city, could not of itself supply a safe method of ascertaining the real earnings of that part of the track lying outside the city. *Baltimore Union Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 41 *Am. & Eng. R. Cas.* 646, 71 *Md.* 405, 18 *Atl. Rep.* 917.

A city ordinance which granted defendant its privileges, and imposed the tax sued for, provided that "whenever the amount of the gross receipts of any passenger-railway company, owning or operating railway tracks in the city of Baltimore, now required to be paid to the city register for the use of the park fund, shall be reduced from twelve *per centum* to any less amount, the said reduction shall apply to the railways hereby authorized to be constructed." *Held*, that the fact that the city had accepted from other companies less than was due on account of said tax, by way of compromise for the purpose of ending certain suits and controversies over amounts claimed as due, did not constitute a reduction of the *per centum* of tax, within the meaning and intention of said ordinance, which would entitle defendant to a like reduction. *Baltimore Union Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 41 *Am. & Eng. R. Cas.* 646, 71 *Md.* 405, 18 *Atl. Rep.* 917.

280. Tax on dividends.—The charter of a street-car company provided that when the dividends exceeded six per cent. per annum on the capital stock six per cent. on the dividends should be paid to the city. *Held*, that the tax to the city was to be on the whole dividend, not merely on the excess over the six per cent. *Philadelphia* v. *Philadelphia & G. F. Pass. R. Co.*, 52 *Pa. St.* 177.

281. Improving street in lieu of taxation.—The general council of a city adopted a report of a committee recommending that a certain street-railroad company be exempted from taxation for a certain time, and that it be required to macadamize its track and three feet on each side and keep it in good order, to conform to the street as it is, or to the grade when given, "and otherwise to comply with ordinances now in force or that may hereafter be adopted." *Held*, that the company was required to comply with such ordinances as were then in force, and such as might thereafter be adopted relating to its track or paving the street. *Atlanta* v. *Gate City St. R. Co.*, 80 *Ga.* 276, 4 *S. E. Rep.* 269.

In such case it was error in the trial court to rule that, if the company macadamized its track and three feet on each side of it, and kept it in good order, the city could not require it further to pave its track and three feet on each side with rubble-stone. *Atlanta* v. *Gate City St. R. Co.*, 80 *Ga.* 276, 4 *S. E. Rep.* 269.

282. Right to increase taxes. — A city ordinance, passed in pursuance of a statute imposing a license tax on street railways, does not impair the obligation of a contract, entered into before the passage of the statute, by which the city sold to the company the right to operate a railroad for a number of years, whereby the company agreed to pay to the city an annual real-estate tax, and the city in turn agreed not to grant a similar franchise to any other company. *New Orleans City & L. R. Co.* v. *New Orleans*, 143 *U. S.* 192, 12 *Sup. Ct. Rep.* 406.—DISTINGUISHING Gordon *v.* Appeal Tax Court, 3 How. (U. S.) 133. FOLLOWING Memphis Gaslight Co. *v.* Shelby County, 109 U. S. 398.

A provision in the charter of a street-railway company making it liable to pay a certain tax to the city does not take away from the state the right afterwards to impose a greater tax. *Union Pass. R. Co.* v. *Philadelphia*, 83 *Pa. St.* 429, 15 *Am. Ry. Rep.* 431.

283. Property subject to taxation. —A company is not taxable for horses or other personal property used in and necessary for the prosecution of its business. *Middlesex R. Co.* v. *Charlestown*, 8 *Allen* (*Mass.*) 330.

Debts of horse-railroad corporations, secured by mortgage on land to trustees, are non-taxable, if the mortgagor has not

claimed a deduction therefor. *Merchants' Ins. Co.* v. *Newark*, 54 *N. J. L.* 138, 23 *Atl. Rep.* 305.

Horses owned by companies are taxable under the law requiring assessors to assess, rate, and value all objects of taxation; and it is not necessary that the city should first, by ordinance, provide a special system for taxing them. Assessors having taken their oath of office, and received a proper precept from the board of revision of taxes, though prior to their present term, their service being broken, are fully qualified to levy and assess taxes. *Smith* v. *Philadelphia City Pass. R. Co.*, 15 *Phila.* (*Pa.*) 89.

The act (45 Vict. (Q) ch. 22) which imposes an annual tax of fifty dollars on passenger-railway companies for each mile of railway or tramway worked refers to the distances between terminal points, and does not include the length of double, switch, and yard tracks. *Lambe* v. *Montreal St. R. Co.*, 4 *Montr. Super.* 162.

A street railway is not assessable as for land, within the meaning of the Assessment Act, 32 Vict. ch. 36, O, for those portions of the streets occupied by it for the purposes of its railway. *Toronto St. R. Co.* v. *Fleming*, 37 *U. C. Q. B.* 116; *reversing* 35 *U. C. Q. B.* 264.

284. Manner of assessing.—The basis of the assessment under the act to improve the Bull's Ferry road (N. J. Pamph. L. 1872, p. 1379) is landownership, and a failure to assess a horse-railroad company, the track of which runs over said improved road, because its franchise is more valuable by reason of the improvement, is not erroneous, in the absence of proof that the real estate of the company is peculiarly benefited. *State* (*King, Pros.*) v. *Duryea*, 45 *N. J. L.* 258.

2. *License Taxes.*

285. Generally. — A legislative franchise to run street-cars, prescribing certain conditions to be performed by the grantees, does not exempt the occupation of operating the road from lawful police regulations and municipal taxation. *San José* v. *San José & S. C. R. Co.*, 53 *Cal.* 475.—APPLYING Sacramento *v.* California Stage Co., 12 Cal. 134.

Where the city of New York has granted to a company a right of way over certain streets, it cannot afterwards levy a license tax upon the company's cars, for revenue purposes only, under a mere reservation of the right of municipal regulation in the grant. *Mayor, etc., of N. Y.* v. *Third Ave. R. Co.*, 33 *N. Y.* 42.—FOLLOWING Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 32 N. Y. 261.—DISTINGUISHED IN Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co., 97 N. Y. 275. EXPLAINED IN Mayor, etc., of N. Y. *v.* Third Ave. R. Co., 3 N. Y. S. R. 181. REVIEWED IN Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co., 17 Hun (N. Y.) 242.

And as the attempt to impose such license tax was illegal, the common council could not impose a penalty for non-compliance. *Mayor, etc., of N. Y.* v. *Third Ave. R. Co.*, 33 *N. Y.* 42.

By defendant's charter its right to construct and operate a railroad was made subject "to the payment to the city of the same license fee annually for each car run thereon as is now paid by other city railroads in said city." At the time the charter was granted two railroads were paying fifty dollars per car, another paid twenty dollars per car, and three companies paid nothing. *Held*, that the city was entitled to collect fifty dollars per car from defendant. *Mayor, etc., of N. Y.* v. *Broadway & S. A. R. Co.*, 97 *N. Y.* 275; *affirming* 28 *Hun* 323, *mem.* —DISTINGUISHING Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 32 N. Y. 261; Mayor, etc., of N. Y. *v.* Third Ave. R. Co., 33 N. Y. 42.—FOLLOWED IN Mayor, etc., of N. Y. *v.* Dry Dock, E. B. & B. R. Co., 112 N. Y. 137, 19 N. E. Rep. 420, 20 N. Y. S. R. 236.

The common council of a city passed an ordinance requiring street-cars, except one-horse cars, to pay an annual license fee of fifty dollars per car. *Held*, that the ordinance was valid as to companies whose charters provide that they shall be subject to the payment of license fees. *Mayor, etc., of N. Y.* v. *Broadway & S. A. R. Co.*, 97 *N. Y.* 275; *affirming* 28 *Hun* 323, *mem.*

286. Power of city to tax.*—A city granted to a corporation a franchise to construct and operate a street railroad within its limits, and in the ordinance conferring the grant provided how and when the road should be constructed, and the manner in which it should be maintained. *Held*, that the grant thus made did not prevent the city from levying and collecting a license tax

*Validity of a municipal ordinance requiring street-car company to pay a certain sum for each car run, see 39 AM. & ENG. R. CAS. 542, *abstr.*

thereon. *Wyandotte* v. *Corrigan*, 35 *Kan.* 21, 10 *Pac. Rep.* 99.

Under its amended charter of 1875 Kansas City passed an ordinance "to license, tax, and regulate street-railroad cars," under which defendant was prosecuted for carrying passengers on a street railway without a license. The defense set up was that he was an officer of a company which occupied the streets by virtue of ordinances enacted in 1869, and that the rights of the company could not be impaired or changed by subsequent legislation without its assent, and that the city had no power to impose any new burden or condition upon the company as a condition precedent to its right to operate its road. *Held:* (1) that in 1869 the city had no power to impose such tax, and therefore could not, by the ordinance of that year, part with a power it did not possess; (2) that under the Missouri Constitution of 1865 a tax upon occupations and professions had to be uniform. If said city had the power to impose the license tax, it must have been imposed on all alike, and the legislature itself could not tax otherwise; so that giving to the ordinance of 1869 the construction asked by defendant, it was null and void. *Kansas City* v. *Corrigan*, 18 *Mo. App.* 206.—DISTINGUISHING Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 32 N. Y. 272.

The city of Hoboken has no power under its charter to compel a company to take out licenses and pay an annual license fee of fifteen dollars for every one-horse car, and twenty-five dollars for every two-horse car, which the company shall run. *State* (*North Hudson County R. Co., Pros.*) v. *Mayor, etc., of Hoboken*, 41 *N. J. L.* 71.

Such license and fees cannot be exacted unless power is given to the city to resort to licenses and license fees for revenue purposes. A provision in its charter granting power "to license and regulate" does not authorize the city to exact license fees for revenue purposes. *State* (*North Hudson County R. Co., Pros.*) v. *Mayor, etc., of Hoboken*, 41 *N. J. L.* 71.

N. J. Act of 1882, respecting licenses in cities of the first class, is local and special, and therefore unconstitutional, and an ordinance of a city passed thereunder requiring street railways to pay an annual license fee of ten dollars for each car is void. *State* (*Pavonia Horse R. Co., Pros.*) v. *Mayor, etc., of Jersey City*, 45 *N. J. L.* 297.

An ordinance imposing a license duty upon city cars, for revenue purposes only, is not an ordinance for police and internal government. The imposition of an annual tax by such corporation upon a company, in derogation of its rights, for purposes of revenue only, is unlawful and void. *Mayor, etc., of N. Y.* v. *Second Ave. R. Co.*, 32 *N. Y.* 261; *affirming* 34 *Barb.* 41, 12 *Abb. Pr.* 364, 21 *How. Pr.* 257.—APPLIED IN People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173. DISTINGUISHED IN Kansas *v.* Corrigan, 18 Mo. App. 206; Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co., 97 N. Y. 275; Frankford & P. Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119. FOLLOWED IN Mayor, etc., of N. Y. *v.* Third Ave. R. Co., 33 N. Y. 42. NOT FOLLOWED IN Allerton *v.* Chicago, 9 Biss. (U. S.) 552. RECONCILED IN Mayor of N. Y. *v.* Third Ave. R. Co., 3 N. Y. S. R. 181. REVIEWED IN Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co., 17 Hun (N. Y.) 242.

Under Pa. Act of April 2, 1850, the city of Philadelphia has authority to regulate all vehicles, including street-cars, and a license tax of fifty dollars is valid. *Railroad Co.* v. *Philadelphia*, 6 *Phila.* (*Pa.*) 238.

287. Justified as a police regulation.—A city ordinance requiring street-car companies to obtain a license, and pay fifty dollars per annum for each car, is a valid exercise of the police power of the city. *Allerton* v. *Chicago*, 9 *Biss.* (*U. S.*) 552, 6 *Fed. Rep.* 555.—APPLYING Chicago P. & P. Co. *v.* Chicago, 88 Ill. 221. APPROVING Johnson *v.* Philadelphia, 60 Pa. St. 445; Frankford & P. Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119. NOT FOLLOWING Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 32 N. Y. 261.

The imposition by the councils of Philadelphia of an annual sum on cars, as a tax to raise revenue, would be an invasion of the chartered rights of the company and void; but the imposition of a reasonable charge for a license, as a police regulation, although its incidental operation should augment the treasury receipts, is not invalid. *Johnson* v. *Philadelphia*, 60 *Pa. St.* 445.—FOLLOWING Frankford & P. Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119.—APPROVED IN Allerton *v.* Chicago, 9 Biss. (U. S.) 552.

288. When company subject to taxation.—The grant of an exclusive right, by city ordinance, to a company, to

construct, operate, and maintain over the streets of the city a street railway, containing no provision in relation to the payment of any fee or license, does not exempt the company from paying a license fee provided by a prior ordinance to be paid by all persons engaged in carrying passengers. *State* v. *Herod*, 29 *Iowa* 123.

Operating a street railroad by horse and steam is a business which can be subjected to the payment of a license, under La. Act 101 of 1886 and New Orleans city ordinance 2035. *New Orleans* v. *New Orleans City & L. R. Co.*, 40 *La. Ann.* 587, 4 *So. Rep.* 512.

A contract conferring the right to lay rails to operate a street railway, without dispensing with the payment of a license, is not impaired by the exaction of such license. *New Orleans* v. *New Orleans City & L. R. Co.*, 40 *La. Ann.* 587, 4 *So. Rep.* 512.

By N. Y. Act of 1874, ch. 478, defendant company was authorized to extend its road, and it was provided that it should be "subject only to the provisions of the General Railroad Act of this state (act of 1850, ch. 140), with its amendments." The General Railroad Act did not require payment of any license fee to the city. The company was organized in 1855, under the Street Railroad Act of 1854, and agreed to pay a certain license fee on its cars, which it did pay from 1860 to 1874. *Held*, that the company was not relieved of paying the license tax by the act of 1874. *Mayor, etc., of N. Y.* v. *Eighth Ave. R. Co.*, 118 *N. Y.* 389, 23 *N. E. Rep.* 550, 29 *N. Y. S. R.* 17; *affirming* 43 *Hun* 614, 6 *N. Y. S. R.* 631. — DISTINGUISHED IN Mayor, etc., of N. Y. *v.* New York & H. R. Co., 46 N. Y. S. R. 349.

A city ordinance required each passenger-railroad company to pay a license fee of fifty dollars per car, "except the small one-horse cars which have each paid twenty-five dollars annually." Defendant's charter made it subject to reasonable rules and regulations of the council, and required "payment to the city of the same license fee annually for each car run thereon as is now paid by other railroads in said city." *Held*, that the liability of defendant to pay did not depend upon the amount actually paid by other companies, but the amount which by law they were required to pay. *Mayor, etc., of N. Y.* v. *Forty-second & G. St. R. Co.*, 52 *How. Pr.* (*N. Y.*) 106.

289. A street-car an "omnibus" for purposes of taxation. — A street railroad is a mere omnibus on rails. *Hoyt* v. *Sixth Ave. R. Co.*, 1 *Daly* (*N. Y.*) 528.

A resolution of the common council of the city of New York recited that defendant company "shall pay from the date of the opening of the said railroad the license fee on each car now allowed by law, and shall have licenses accordingly." At the time there was no law specifically regulating the license fees to be paid by street-cars; but it appeared that there were stages or omnibuses, which were engaged in the transportation of passengers between points which corresponded nearly with the route of defendant's road, which paid an annual license fee to the city under an ordinance. *Held*, that the resolution related to the license fee already prescribed for such omnibuses. *Mayor of N. Y.* v. *Third Ave. R. Co.*, 3 *N. Y. S. R.* 181.—EXPLAINING Mayor, etc., of N. Y. *v.* Third Ave. R. Co., 33 N. Y. 42. RECONCILING Hegan *v.* Eighth Ave. R. Co., 15 N. Y. 380; Whitaker *v.* Eighth Ave. R. Co., 51 N. Y. 295; Mayor of N. Y. *v.* Second Ave. R. Co., 32 N. Y. 261.

Ill. Rev. St. ch. 24, § 1, giving city councils authority to license "hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations," includes street-cars. *Allerton* v. *Chicago*, 9 *Biss.* (*U. S.*) 552, 6 *Fed. Rep.* 555. *Frankford & P. Pass. R. Co.* v. *Philadelphia*, 58 *Pa. St.* 119.—DISTINGUISHING Mayor of N. Y. *v.* Second Ave. R. Co., 32 N. Y. 261. —APPLIED IN Mayor of N. Y. *v.* Third Ave. R. Co., 3 N. Y. S. R. 181.

290. Right to increase the tax. — A company was by statute authorized to operate a railway upon certain streets subject "to the payment to the city of the same license fee annually for each car running thereon as is now paid by other city railroads." The license fee then payable was fifty dollars for each two-horse car and twenty-five dollars for each one-horse car. By a subsequent statute the company was authorized to extend its tracks subject to the payment of five per cent. of the net proceeds of the cars running on such extension, and all acts inconsistent with the provisions of the act authorizing the extension were repealed. *Held*, that the two statutes must be deemed to have created different franchises, that they were not inconsistent with each other, and that the company must pay the license fee and a percentage if it wished to claim the benefit

of both statutes. *Mayor, etc., of N. Y.* v. *Dry Dock, E. B. & B. R. Co.*, 37 *Am. & Eng. R. Cas.* 411, 112 *N. Y.* 137, 19 *N. E. Rep.* 420, 20 *N. Y. S. R.* 236; *affirming* 47 *Hun* 199, 13 *N. Y. S. R.* 396.—FOLLOWING Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co., 97 N. Y. 275.

A provision in the charter of a street-car company that the "company shall also pay such license for each car run by said company as is now paid by other passenger-railway companies" does not import a contract that the company shall never be required to pay a license fee greater than that required of other companies at the date when the company was incorporated. *Union Pass. R. Co.* v. *Philadelphia*, 101 *U. S.* 528; *affirming* 83 *Pa. St.* 429, 15 *Am. Ry. Rep.* 431.

Where a street-car company is chartered with a provision that it shall annually pay a certain license tax to the city on each car run, and the state Constitution, in force at the time, reserves to the state the right to alter or amend charters, a subsequent legislature may increase the license tax. *Union Pass. R. Co.* v. *Philadelphia*, 101 *U. S.* 528; *affirming* 83 *Pa. St.* 429, 15 *Am. Ry. Rep.* 431.

A bond executed by a street-railway company to a city, for the faithful observance of an ordinance, imposing a license of five dollars on each car, is not such a contract as to prevent the city from afterwards increasing the amount of the license. *Johnson* v. *Philadelphia*, 60 *Pa. St.* 445.

The charter of a street railway made it liable to the city for such license tax on each car as was fixed by ordinance, which was then thirty dollars. Afterwards a law was passed making the tax fifty dollars, and extending to street railways certain immunities, on condition that they accept the provisions of the act. *Held*, that payment of the increased tax for seven years raised a legal presumption of acceptance. *Union Pass. R. Co.* v. *Philadelphia*, 83 *Pa. St.* 429, 15 *Am. Ry. Rep.* 431; *affirmed in* 101 *U. S.* 528.—EXPLAINED IN Frankford & P. Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119.

Under Wis. Act of 1860, ch. 313, as amended by Rev. St. of 1862, § 1862, providing that street railroads shall pay an annual license fee such "as the proper municipal authorities may from time to time prescribe," a municipality may increase the license fee imposed upon a company before the adoption of the Revised Statutes. *State ex rel.* v. *Hilbert*, 36 *Am. & Eng. R. Cas.* 118, 72 *Wis.* 184, 39 *N. W. Rep.* 326.

It seems that a municipal ordinance granting a franchise to a company, and providing that before any car shall be used no said railway the company shall pay to the city a license fee of a certain amount per annum for each car, does not prohibit the municipal authorities from afterwards increasing or diminishing the amount of such license fee. *State ex rel.* v. *Hilbert*, 36 *Am. & Eng. R. Cas.* 118, 72 *Wis.* 184, 39 *N. W. Rep.* 326.

291. Tax on each car.—Where a franchise for a street railroad has been granted upon condition of the payment of the "annual license fee for each car now allowed by law," and at that time an ordinance existed imposing license fees upon each "accommodation coach" or "stage coach," the company is liable for the payment of the license fee imposed by the ordinance for each street-car owned and operated by it. *Mayor, etc., of N. Y.* v. *Third Ave. R. Co.*, 40 *Am. & Eng. R. Cas.* 278, 117 *N. Y.* 404, 22 *N. E. Rep.* 755, 27 *N. Y. S. R.* 170; *affirming* 16 *N. Y. S. R.* 122, 1 *N. Y. Supp.* 397.

Where a company accepts a charter providing that it shall pay to the city the same license fee annually "for each car * * * as is now paid by other city railroads in said city," it is estopped by the act of acceptance from questioning the validity of the provision, when sued to recover the license fee. *Mayor, etc., of N. Y.* v. *Broadway & S. A. R. Co.*, 17 *Hun* (*N. Y.*) 242.—REVIEWING Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 32 N. Y. 261; Mayor, etc., of N. Y. *v.* Third Ave. R. Co., 33 N. Y. 42.

The above provision that the company should pay the same license fee "as is now paid by other city railroads" meant the same fee as then established by ordinance; and it was immaterial to the defendant that two other companies, by contract with the city, paid nothing. *Mayor, etc., of N. Y.* v. *Broadway & S. A. R. Co.*, 17 *Hun* (*N. Y.*) 242.

A provision in defendant's charter required it to pay to the city the same license fee on each car as then paid by other companies. At the time an ordinance was in force requiring other companies to pay fifty dollars annually, except for small one-horse cars, which paid twenty-five dollars. *Held*, that the fee so to be paid was predicated upon the size of the cars; and a car which was known at the time as a one-horse pas-

senger car was subject to the payment of only twenty-five dollars, though it might be drawn by more than one horse. It was the cars that were taxed, and not the motive power. *Mayor, etc., of N. Y.* v. *Twenty-third St. R. Co.*, 42 *N. Y. S. R.* 433, 62 *Hun* 545, 17 *N. Y. Supp.* 32.

292. When company liable for both license and ad valorem tax.— The payment to a city of a tax or license of twenty-five dollars on each car employed by a company, as required by a contract between the company and the city, in which certain franchises are secured to the company, does not exonerate it from the payment of an *ad valorem* tax on its property, horses, stables, etc. *Louisville City R. Co.* v. *Louisville*, 4 *Bush* (*Ky.*) 478.

By one section of a city ordinance there was granted to a company the exclusive privilege of constructing and operating a street railway over certain streets, and by another section it was provided that the company should pay into the city treasury "the sum of ten dollars annually for each and every car run and operated upon said railway." *Held*, that the ten dollars per car was in no sense a tax, but a bonus for the franchise granted to the company, and therefore a clause of the city charter providing that "merchants and others paying a license or specific tax on their business or calling shall be exempt from an *ad valorem* tax thereon" does not exempt the company from the payment of an *ad valorem* tax. *Newport* v. *South Covington & C. St. R. Co.*, 89 *Ky.* 29, 11 *S. W. Rep.* 954.

293. Penalty for failing to obtain license. — Where a city ordinance makes it unlawful for any person or firm, as well as a corporation, to run street-cars, without procuring a license and paying a tax, the general manager of a street-car company, who is actually engaged in running cars and operating a street railroad which has not paid the license tax, may be arrested and punished for such failure. A corporation can only act through its agents, and the agent cannot escape liability on the ground that the ordinance did not impose the duty of paying the tax on him, but on the company. *Wyandotte* v. *Corrigan*, 35 *Kan.* 21, 10 *Pac. Rep.* 99.

3. *Assessments for Local Improvements.*

294. Generally.—The track of a street railway, laid in the usual manner, is so attached to the soil as to become realty and liable to be assessed for the cost of paving the street. *New Haven* v. *Fair Haven & W. R. Co.*, 38 *Conn.* 422, 3 *Am. Ry. Rep.* 230.

Street railways occupy public streets subject to their use by the public, and to such burdens as may be made necessary by reason of their improvement, and to such changes in the construction of their roadbeds as improved and changed conditions may demand. *Detroit* v. *Ft. Wayne & E. R. Co.*, 50 *Am. & Eng. R. Cas.* 447, 90 *Mich.* 646, 51 *N. W. Rep.* 688.

295. Franchise and right of way may be assessed. — The right of way, right of occupancy, franchise, and interest of a street railway are property, and as such are liable to be assessed for benefits in widening the street. *Chicago City R. Co.* v. *Chicago*, 90 *Ill.* 573. — QUOTING Chicago *v.* Baer, 41 Ill. 306.

And if the assessment is not paid the property may be sold. *Little* v. *Chicago*, 46 *Ill. App.* 534.

296. Assessing according to benefits received.—A company, whose track ran through the main street of a borough, was required by its charter to keep in repair the part of the street occupied by its track and two feet on each side. The borough charter provided that, upon any street being improved, certain officials of the borough should have power to determine what "land and buildings" would be specially benefited by the improvements, and to assess the persons interested in such land or buildings such part of the cost as they should judge reasonable. The company neglecting to keep in repair its part of the street, the borough, in paving the street with stone, paved about 1500 feet of the space that the company was bound to repair, at a cost of $1992. In making an assessment on the "land and buildings," the officials, and afterwards a committee appointed by the court on appeal, assessed the entire sum on the company. *Held:* (1) that the question was to be determined by the borough charter, and not by the charter of the company imposing on it the duty of keeping the street in repair; (2) that the question was simply whether the company, through the enhanced value of its "land and buildings," received such a special benefit as to be liable to be assessed for the improvement; (3) that the franchise of the company could not be regarded as

covered by that term, and that it was not enough that it was increased in value by the improvement; (4) that the fact that the improvement had cost a certain sum could not fix that as the amount of the assessment, if the company had property liable to the assessment, as the legal liability of the company to the borough for the money expended for it by the latter had nothing to do with the matter. *Farmers' L. & T. Co.* v. *Ansonia*, 61 *Conn.* 76, 23 *Atl. Rep.* 705.

The right of a street-railway company to occupy and use a part of a street for the purpose of its road is property which may be benefited by paving the street; and it should contribute its share to the cost of the pavement, in proportion to the benefits received. *Chicago* v. *Baer*, 41 *Ill.* 306.— MODIFIED IN Parmelee *v.* Chicago, 60 Ill. 267. QUOTED IN Chicago City R. Co. *v.* Chicago, 90 Ill. 573. REVIEWED IN Ludlow *v.* Cincinnati Southern R. Co., 7 Am. & Eng. R. Cas. 231, 78 Ky. 357; In re Cedar Park, 1 How. Pr. N. S. (N. Y.) 257.

A company had a double track in a street, and neither the spaces between the rails nor the spaces between the tracks were paved nor contracted to be. *Held*, that the board of public works might fairly be of the opinion that the company was not benefited by the paving of the rest of the street, and therefore might properly refrain from assessing the company towards the expense thereof. *State ex rel.* v. *Ramsey County Dist. Court*, 32 *Minn.* 181, 19 *N. W. Rep.* 732.

297. Enforcing claim — Jurisdiction — Estoppel. — The acceptance by a company of its franchise, granted by a city under an ordinance providing that when any part of the street over which the road should run should be ordered improved or reimproved the company should be held for the payment of its *pro rata* share of the cost thereof, the cost to be assessed and collected in the same manner as other street assessments, and to be a lien upon its roadbed, rolling stock, and franchise, is equivalent to an express agreement by the company to pay its proportion of the cost of whatever improvement of the street the city should order, whether ordered under its then existing charter or under a subsequent act of the legislature authorizing such improvements, and the cost of the same may be collected, in the manner provided for the collection of other street assessments, at the time of the improvement. *Schmidt* v. *Market St. & W. G. R. Co.*, 90 *Cal.* 37, 27 *Pac. Rep.* 61.

Under such ordinance, the liability of the company is not limited to payment to the city for the improvement, but it may be held liable to the person entitled to make the collection, and if the manner of collecting other street assessments is by a suit by the contractor in his own name to recover an assessment, that mode may be pursued against the company. *Schmidt* v. *Market St. & W. G. R. Co.*, 90 *Cal.* 37, 27 *Pac. Rep.* 61.

An action of debt will lie to enforce payment of an assessment against a street-car company for paving the street, notwithstanding the charter of the city, which authorizes the assessment, provides that it shall constitute a lien on the property assessed. The lien is only additional security, and does not prevent a remedy at law. *New Haven* v. *Fair Haven & W. R. Co.*, 38 *Conn.* 422, 3 *Am. Ry. Rep.* 230.

In such case the city charter also provided that any person aggrieved by an assessment might appeal to the superior court. *Held*, that the company might raise the question of the want of jurisdiction in the city to make the assessment, in an action at law to enforce the assessment, and was not confined to the remedy by appeal. *New Haven* v. *Fair Haven & W. R. Co.*, 38 *Conn.* 422, 3 *Am. Ry. Rep.* 230.

Where a company stands by and allows the city to pave a street on which its track is laid, with full knowledge of the fact, and that it will be expected to pay its share of the cost of the pavement, but without objections, it is estopped, when sued for its share of the cost of the pavement, from setting up as a defense that, under its charter, it was required to pave the street itself at its own expense. *New Haven* v. *Fair Haven & W. R. Co.*, 38 *Conn.* 422, 3 *Am. Ry. Rep.* 230. — FOLLOWED IN Columbus *v.* Columbus St. R. Co., 32 Am. & Eng. R. Cas. 292, 45 Ohio St. 98. REVIEWED IN Re Cedar Park, 1 How. Pr. N. S. (N. Y.) 257.

298. Liability for widening street. —A company was exempt from assessment for grading, paving, macadamizing, filling, or planking the streets or parts of streets upon which it should construct its railways. *Held*, that this did not exempt it from assessment to defray the expense of widening the streets upon which its railways

were constructed. *Parmelee* v. *Chicago*, 60 *Ill.* 267.

299. When company not liable.—Where a section of a city charter is in conflict with the Constitution of the state, and is therefore void, a company cannot be compelled to contribute to the improvement of a street on which its railroad is built, in the manner prescribed by such section. *Mayor, etc., of Mobile* v. *Royal St. R. Co.*, 45 *Ala.* 322.—FOLLOWING Mayor, etc., of Mobile *v.* Dargan, 45 Ala. 310.

A company in such city cannot be compelled to pay any sum as a contribution or assessment to defray the expenses of paving the streets on which its road is built, under the second section of the act authorizing the construction of street railroads (Ala. Acts 1859-60, pp. 261, 262), unless said company has incurred fines to the amount of such assessment under such act. *Mayor, etc., of Mobile* v. *Royal St. R. Co.*, 45 *Ala.* 322.

A company having a right of way for its track over a street cannot be taxed for the cost of an improvement of the street under Iowa Code, § 466. *Koons* v. *Lucas*, 52 *Iowa* 177, 3 *N. W. Rep.* 84.

A city charter provided that one half of the expense of paving streets should be paid by the city, and the other half assessed upon the property benefited. The council passed a resolution to pave a certain street, and provided that if it was not done by the abutting owners within a specified time it should be done by the city, "and apportioned and assessed pursuant to law." The city made the improvement and assessed one third of the cost to the city, one third against the abutting owners, and a like amount against a street-car company which had a track on the street, which assessment against the company was claimed to be made under an agreement that the company had entered into with the city, upon obtaining a license to use the street. *Held*, that the assessment should have been divided into two equal parts, one of which should have been charged to the city and the other against the company and the abutting property owners benefited. The resolution to improve the street showed an intention to make the assessments under the city charter, and not under any agreement with the company, and the intention could not afterwards be changed. *People ex rel.* v. *Coffey*, 48 *N. Y. S. R.* 882, 66 *Hun* 160, 21 *N. Y. Supp.* 34.

A company, authorized by its charter to construct and maintain a railway upon a certain street, is not liable, under a municipal by-law requiring it "to keep the roadway between rails, and twelve inches on each side thereof, paved, macadamized, or graveled, as the case may be, so as to suit the kind of paving used in the streets through which their lines run," to contribute to the cost of a new pavement laid down by the city over the street, including the portion that the company was bound to keep in order. *Montreal* v. *Montreal St. R. Co.*, 3 *Montr. Super.* 320.

The laying of new pavements, like the making of the street itself, is a permanent improvement, which is solely at the charge of the city, and to which the company is not bound to contribute. *Montreal* v. *Montreal St. R. Co.*, 3 *Montr. Super.* 320.

300. Company required to improve between rails not further liable.—Where a company is bound to pave and keep in repair a portion of a street that it occupies for tracks, it cannot be further assessed for the cost of paving the remainder of the street. *Chicago, R. I. & P. R. Co.* v. *Chicago, (Ill.)* 27 *N. E. Rep.* 926.—FOLLOWING Parmelee *v.* Chicago, 60 Ill. 267.

301. Power of New York city to assess under act of 1882.—By the charter of New York city (ch. 410, Laws of 1882), no power is given to the municipality to assess the property of a street-railroad company for an improvement of a street through which the road runs. The power given by it to the board of assessors (section 868) to assess for that purpose "upon the property benefited in the manner authorized by law" is limited (section 878) to the houses and lots benefited, and upon the owners and occupants of these alone can the assessment be imposed. *People ex rel.* v. *Gilon*, 126 *N. Y.* 147, 27 *N. E. Rep.* 282, 37 *N. Y. S. R.* 17; *reversing* 58 *Hun* 76, 33 *N. Y. S. R.* 838, 11 *N. Y. Supp.* 439.—DISTINGUISHING Gilmore *v.* Utica, 121 N. Y. 561.

The provision of said charter (section 899) included in the title (3) in reference to "vacating and modifying assessments," which, after providing that certain specified omissions and defects shall not be sufficient reason for vacating or setting aside an assessment, declares that "all property in said city benefited by any improvement * * * shall be liable to assessment for such improvement," was not intended to introduce

a new class of subjects for taxation, or to extend the power given by the preceding provisions; it applies only to such property as had previously been defined, and such as the municipal authorities were permitted to assess. *People ex rel.* v. *Gilon*, 126 *N. Y.* 147, 27 *N. E. Rep.* 282, 37 *N. Y. S. R.* 17; *reversing* 58 *Hun* 76, 33 *N. Y. S. R.* 838, 11 *N. Y. Supp.* 439.

In proceedings by *certiorari* to review an assessment for a street improvement in said city, based upon the ground that the property of a surface-railroad company, operating its road upon said street, was property benefited, and so liable to assessment, but was omitted, the record contained no evidence tending to show that it was benefited, and the board of assessors returned that it was not. *Held*, that the burden was upon the relator to show that the property was benefited; that the question was one of fact to be determined by the board of assessors, and in the absence of evidence in the record its determination could not be reviewed by the general term. *People ex rel.* v. *Gilon*, 126 *N. Y.* 147, 27 *N. E. Rep.* 282, 37 *N. Y. S. R.* 17; *reversing* 58 *Hun* 76, 33 *N. Y. S. R.* 838, 11 *N. Y. Supp.* 439.

It seems, also, that the determination of said board could not, in any event, be reviewed upon a *certiorari*, except for errors of law. (N. Y. Code Civ. Pro. § 2140.) *People ex rel.* v. *Gilon*, 126 *N. Y.* 147, 27 *N. E. Rep.* 282, 37 *N. Y. S. R.* 17; *reversing* 58 *Hun* 76, 33 *N. Y. S. R.* 838, 11 *N. Y. Supp.* 439.

302. How far validity of assessment of property owner is affected by failure to assess company.—An ordinance of a city authorized it to assess two thirds of the cost of paving a street upon the property holders who were especially benefited thereby, after deducting the amount required of a street-railway company. The city paved only the middle portion of a street, not including the portion where the track was laid, and only assessed the property owners five eighths of the required two thirds, and did not assess the street-car company at all. *Held*, that the property owners, under the circumstances, could not complain that the company was not assessed. *Bowditch* v. *New Haven*, 40 *Conn.* 503.

It is no objection to the validity of a city ordinance authorizing the repaving of a street, the cost of which is to be assessed upon the owners of the property binding thereon, that it does not provide that a passenger-railway company, which is required by its charter to keep its track and two feet on each side in thorough repair, should be assessed for its proportion of the cost of repaving such street, on which its tracks are laid. *Mayor, etc., of Baltimore* v. *Scharf*, 10 *Am. & Eng. R. Cas.* 241, 54 *Md.* 499.

Where a street-car company is required to pave and keep in repair a certain portion of a street, a failure of the city authorities to assess the company therefor is such error as will enable a property owner, whose assessment is thereby increased, to have the assessment set aside. *In re Appleby*, 26 *Hun* (*N. Y.*) 427.—NOT FOLLOWED IN Gilmore *v.* Utica, 43 Am. & Eng. R. Cas. 225, 121 N. Y. 561, 24 N. E. Rep. 1009, 31 N. Y. S. R. 880.

Even if a company be under obligation, by the statute under which it is organized, to repave the streets between its tracks, and therefore ought to bear some portion of the expense of a pavement ordered by the city, the failure of the city to enforce the liability of the company does not render illegal an assessment imposing two thirds of the expense upon the abutting property owners and one third upon the city. *Gilmore* v. *Utica*, 43 *Am. & Eng. R. Cas.* 225, 121 *N. Y.* 561, 24 *N. E. Rep.* 1009, 31 *N. Y. S. R.* 880; *reversing* 55 *Hun* 514, 29 *N. Y. S. R.* 781, 9 *N. Y. Supp.* 912.—NOT FOLLOWING In re Appleby, 26 Hun 427.—DISTINGUISHED IN People ex rel. *v.* Gilon, 126 N. Y. 147.

303. Constitutional provisions as to equal ad valorem taxes construed.—A provision in a state Constitution that taxes shall be levied so that each person shall pay in proportion to the value of his property, and that municipal taxes shall be uniform in respect to persons and property, does not prevent a legislature from authorizing a street railway to use streets, on conditions imposed by the city, whereby the company is exempt from assessments to pay cost of grading and paving the streets. *Chicago* v. *Sheldon*, 9 *Wall.* (*U. S.*) 50.—APPROVING Illinois C. R. Co. *v.* McLean County, 17 Ill. 291; Hunsaker *v.* Wright, 30 Ill. 146; Neustadt *v.* Illinois C. R. Co., 31 Ill. 484. DISTINGUISHING Chicago *v.* Larned, 34 Ill. 203; Chicago *v.* Baer, 41 Ill. 306.

304. Impairing obligation of contract by increasing assessment.—Iowa Code, § 1090, provides that the fran-

chises of corporations thereafter created shall be subject to such conditions as the legislature may impose as necessary for the public good. Under this provision, a city may, by ordinance, require a street-railway company to pave the street outside of its rails, although such company had constructed its track under an ordinance giving to it the right to operate its road upon the condition that it pave the street between the rails only. The construction of the road under the first ordinance did not constitute a contract between the company and the state or the city the obligation of which was impaired by the laying of a special tax against the company for the cost of paving outside the rails. *Sioux City St. R. Co.* v. *Sioux City*, 46 *Am. & Eng. R. Cas.* 169, 138 *U. S.* 98, 11 *Sup. Ct. Rep.* 226; *affirming* 40 *Am. & Eng. R. Cas.* 275, 78 *Iowa* 367.—DISTINGUISHING Des Moines *v.* Chicago, R. I. & P. R. Co., 41 Iowa 569; Burlington *v.* Burlington St. R. Co., 49 Iowa 144.—DISTINGUISHED IN Western P. & S. Co. *v.* Citizens' St. R. Co., 46 Am. & Eng. R. Cas. 176, 128 Ind. 525.

IX. POWERS, DUTIES, AND LIABILITIES AS RESPECTS THE MANAGEMENT OF THE ROAD.

1. *Under the Contract to Carry.*

305. Common-law liability.—Street-railway companies are common carriers of passengers, and are liable as other common carriers upon common-law principles. *Spellman* v. *Lincoln Rapid Transit Co.*, 58 *Am. & Eng. R. Cas.* 297, 36 *Neb.* 890, 55 *N. W. Rep.* 270.

So in determining the liability of a street-car company for an injury to a passenger, the question turns upon the degree of care due from a common carrier to its passengers. *Spellman* v. *Lincoln Rapid Transit Co.*, 58 *Am. & Eng. R. Cas.* 297, 36 *Neb.* 890, 55 *N. W. Rep.* 270.

306. Fixing fare and making change.—A passenger on a street-car is not bound to tender the exact amount of his fare, but may tender any reasonable sum, and the conductor must furnish change. Five dollars is not an unreasonable amount to tender. *Barrett* v. *Market St. R. Co.*, 40 *Am. & Eng. R. Cas.* 671, 81 *Cal.* 296, 22 *Pac. Rep.* 859.—DISTINGUISHING Fulton *v.* Grand Trunk R. Co., 17 U. C. Q. B. 428.

Below that limit fixed by law as a maximum, a company can exercise its own discretion as to the amount of fare or any discount on the same. *Baltimore & Y. Turnpike Road* v. *Boone*, 45 *Md.* 344.

307. Penalty for overcharge.—The practical effect of the Cal. statute of 1863 in relation to street railroads is to provide that each separate cause of action or separate forfeiture for overcharges upon tickets purchased shall be prosecuted or enforced separately. *Smith* v. *Omnibus R. Co.*, 36 *Cal.* 281.—FOLLOWING Reed *v.* Omnibus R. Co., 33 Cal. 212.

308. Unjust discrimination as to fares.—Only such discriminations as are unjust, unreasonable, or oppressive are unlawful. Therefore where a city in granting to a company a franchise provides that it may charge a certain fare to a certain point in the city, and that beyond that it shall sell ten tickets for fifty cents "to actual residents," while all others are to be charged ten cents, the discrimination thus forced upon the company is not unlawful. *Forman* v. *New Orleans & C. R. Co.*, 36 *Am. & Eng. R. Cas.* 38, 40 *La. Ann.* 446, 4 *So. Rep.* 246.—QUOTING Hays *v.* Pennsylvania Co., 12 Fed. Rep. 311.

309. Limiting size of packages that may be carried on cars.—Plaintiff took passage on one of defendant's cars, paying the usual fare. A rule of the company imposed an extra charge for each package "too large to be carried on the lap of the passenger without incommoding others." Plaintiff carried two packages of picture frames about two feet in length and twenty inches wide, and, because of alleged refusal to pay an additional charge therefor or to leave the car was forcibly ejected therefrom. *Held*, that the question as to whether the package came within the rule was one of fact for the jury; that the determination of the conductor in reference thereto was not conclusive. *Morris* v. *Atlantic Ave. R. Co.*, 40 *Am. & Eng. R. Cas.* 677, 116 *N. Y.* 552, 22 *N. E. Rep.* 1097, 27 *N. Y. S. R.* 667; *reversing* 5 *N. Y. S. R.* 874.

310. Liability for loss of package.—Plaintiff sought to charge a street-car company as a common carrier with the loss of a box of merchandise which he placed on the front platform of a car, and for that purpose introduced the evidence of two persons that they had paid money at other times to conductors for the purpose of trans-

porting merchandise, with the knowledge of the superintendent of the road. *Held*, that the evidence was proper to go to the jury, and, in the absence of anything to contradict it, was sufficient to warrant the jury in finding that the company was acting as a common carrier. *Levi* v. *Lynn & B. R. Co.*, 11 *Allen* (*Mass.*) 300.

In such case it was proper to instruct the jury that if they found that the company was a common carrier, and if plaintiff's box was delivered to it for transportation, and the price of the transportation paid, then it would be liable for a failure to deliver the box at its place of destination. *Levi* v. *Lynn & B. R. Co.*, 11 *Allen* (*Mass.*) 300.

If the company was proved to be a common carrier, the law would supply the proof of the contract, so far as regards the extent and degree of liability, and plaintiff having proved delivery to it, and a loss, the burden was then shifted to the carrier to discharge itself from liability, within the exceptions which the law creates. *Levi* v. *Lynn & B. R. Co.*, 11 *Allen* (*Mass.*) 300.

311. Duty to adopt new improvements.*—Where the charter of a company is silent as to the kind of rails to be used, the company is not confined to the kind of rails used when the charter was granted, but may adopt another improved rail. *Easton, S. E. & W. E. Pass. R. Co.* v. *Easton*, 133 *Pa. St.* 505, 19 *Am. St. Rep.* 658, 19 *Atl. Rep.* 486.

Street railways must be constructed and maintained upon the most approved plans, and by the use of the common and approved means, with a view to the safety and convenience of the public traveling on the streets. *Fitts* v. *Cream City R. Co.*, 15 *Am. & Eng. R. Cas.* 462, 59 *Wis.* 323, 18 *N. W. Rep.* 186.—QUOTING Wooley *v.* Grand St. & N. R. Co., 83 N. Y. 121.

312. Right to make rule prohibiting riding on platform.—A street-railroad company has a right to make and enforce a rule prohibiting passengers from riding upon the platforms, and a request by a conductor to a passenger to come inside is a notice of the rule, and must be complied with. *Ft. Clark St. R. Co.* v. *Ebaugh*, 49 *Ill. App.* 582.

It is a reasonable regulation of a street-railway corporation, which it has the right to make, that passengers shall not be on the front platform of a car. *Wills* v. *Lynn & B. R. Co.*, 2 *Am. & Eng. R. Cas.* 27, 129 *Mass.* 351.

2. *Liability for Injuries Caused by Negligence, Generally.*

313. Liability not affected by grant of franchise.—The granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property, or in the character of the motive power employed in propelling its cars. *Lincoln Rapid Transit Co.* v. *Nichols*, 56 *Am. & Eng. R. Cas.* 584, 37 *Neb.* 332, 55 *N. W. Rep.* 872.

314. Liability for negligence of servants.—Street-railway companies are not liable for wilful and tortious acts of their servants committed outside of the scope of their employment. *Lafitte* v. *New Orleans, C. & L. R. Co.*, 47 *Am. & Eng. R. Cas.* 645, 43 *La. Ann.* 34, 8 *So. Rep.* 701.

Such companies are under obligations to carry their passengers safely and properly, and to treat them respectfully; if this duty is intrusted to a servant, he is responsible for the manner in which he executes the trust. They must protect their passengers, not only from violence and insults of strangers, but *a fortiori* against the violence and insults of their own servants. *Lafitte* v. *New Orleans, C. & L. R. Co.*, 47 *Am. & Eng. R. Cas.* 645, 43 *La. Ann.* 34, 8 *So. Rep.* 701.

N. Y. Rev. St. 695, ch. 20, entitled "Of the law of the road, and the regulation of public stages," is not applicable to street railways, and a company is not liable, under section 6, for the wilful act of one of its employés. *Whittaker* v. *Eighth Ave. R. Co.*, 51 *N. Y.* 295, 4 *Am. Ry. Rep.* 476; *reversing* 5 *Robt.* 650.—RECONCILED IN Mayor of N. Y. *v.* Third Ave. R. Co., 3 N. Y. S. R. 181.

315. Street-car not a "carriage."—The conductor of a street-car is not the

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*See also *post*, **330.**

Right of street-railway companies to adopt new improvements, see note, 25 AM. ST. REP. 479.

* Liability of street-car companies for personal injuries generally, see 56 AM. & ENG. R. CAS. 597, *abstr.*

driver of "a carriage," within the meaning of N. Y. Rev. St. 696, § 6, which makes persons owning carriages used for the conveyance of passengers liable for injuries done by the drivers. *Isaacs* v. *Third Ave. R. Co.*, 47 *N. Y.* 122.

316. Joint negligence of two companies. — Where a passenger is injured through a collision of two cars occasioned by the negligence of those in charge of both, he may recover damages against either or both companies; and if both are sued, he may dismiss as to one, or may take a verdict against one, where the other is shown to be not guilty. *Tompkins* v. *Clay St. Hill R. Co.*, 18 *Am. & Eng. R. Cas.* 144, 66 *Cal. Rep.* 163, 4 *Pac. Rep.* 1165.

The law will not enforce contribution as between joint tort-feasors. So where a passenger on a street-car sues a company and recovers damages for an injury caused by the joint negligence of the company and the driver of a wagon, the company cannot in turn recover against the owner of the wagon. *Rend* v. *Chicago W. D. R. Co.*, 8 *Ill. App.* 517.

Where a collision occurs between two street-cars belonging to different companies, where their tracks pass, whereby a passenger is injured, defendant company is liable, if the negligence of its employés contributed to the injury, notwithstanding that the negligence of those in charge of the other car may have contributed to the injury also. The comparative degree in the culpability of the two will not affect the liability of either; and if both were negligent in a manner, and to a degree contributed to the injury, they are liable jointly or severally. *Barrett* v. *Third Ave. R. Co.*, 45 *N. Y.* 628; *affirming* 8 *Abb. Pr. N. S.* 205, 1 *Sweeny* 568.—FOLLOWING Webster *v.* Hudson River R. Co., 38 N. Y. 260.

317. Negligence in removing snow from track.*—Plaintiff, an abutting property owner, sued a street-car company, alleging that, in removing snow from its track, it obstructed the natural flow of water on the street, whereby his house was injured. *Held*, that the company had a right to remove the snow from its track and throw it on the adjoining portion of the street; but it had no right to throw it in the gutter nor to bank it up on the street so as to prevent the natural flow of water. In removing the snow it was required to exercise ordinary care and prudence. (Alvey, J., dissenting.) *Short* v. *Baltimore City Pass. R. Co.*, 50 *Md.* 73.

A company is bound to exercise such care and diligence in clearing its track of snow as not to interfere needlessly with the safety and convenience of those lawfully using the street; and if an extraordinary snowfall takes place, it must make extraordinary efforts to dispose of it. *Bowen* v. *Detroit City R. Co.*, 19 *Am. & Eng. R. Cas.* 131, 54 *Mich.* 496, 20 *N. W. Rep.* 559, 52 *Am. Rep.* 822.

In an action for an injury caused by obstructions which, in the first instance, are lawfully in the street, but which defendant is bound to remove as speedily as possible, it is not necessary to allege that they were left there for an unreasonable time, since the offense of leaving them there relates back so that it becomes unlawful from the beginning; and the time necessary for their removal is matter of justification and defense. *Bowen* v. *Detroit City R. Co.*, 19 *Am. & Eng. R. Cas.* 131, 54 *Mich.* 496, 20 *N. W. Rep.* 559, 52 *Am. Rep.* 822.

It cannot be charged, as matter of law, that the disposition of snow cleared from a horse-railway track in a public street in such a way as to raise the road level above the track was unlawful. *Wallace* v. *Detroit City R. Co.*, 58 *Mich.* 231, 24 *N. W. Rep.* 870.

Where a street-car company is sued for a personal injury caused by the manner of throwing snow from its track, evidence that the snow during the winter had been thrown upon the side of the track and tramped down so as to leave a depression at the track on a street crossing of six to ten inches or more, making a short slope downward, which caused plaintiff's sleigh to tip over in crossing the track at right angles, causing the injury sued for, is sufficient evidence of negligence to make the company liable. *Laughlin* v. *Grand Rapids St. R. Co.*, 26 *Am. & Eng. R. Cas.* 377, 62 *Mich.* 220, 28 *N. W. Rep.* 873.

Plaintiff, in attempting to cross the tracks of defendant's road, slipped, fell, and was run over by one of its cars. In an action to recover damages it appeared that the street, at the place of the accident, was icy and slippery. Plaintiff, for the avowed purpose of imputing negligence to defendant, "by reason of that condition of the track," offered and was permitted to give evidence tending to show that it had not rained or

* See also *ante*, **201, 273,** and *post*, **356.**

snowed for two days previous to the accident. *Held*, error; that no duty rested upon the company to keep the space between its tracks free from ice and snow. *Silberstein* v. *Houston, W. S. & P. F. R. Co.*, 40 *Am. & Eng. R. Cas.* 268, 117 *N. Y.* 293, 22 *N. E. Rep.* 951, 27 *N. Y. S. R.* 330; *reversing* 52 *Hun* 611, 22 *N. Y. S. R.* 452, 4 *N. Y. Supp.* 843.

318. Liability for injuries caused by defects in street.—An action was brought against a city for personal injuries resulting from defects in a street arising from the failure of a street-car company to observe an ordinance requiring it to lay its tracks on a level with the street and to keep the space between them in good repair. The petition alleged that the street was full of holes and that the rails of the street-car track were some four inches above the level of the street, and that by reason thereof plaintiff was thrown from his wagon and injured. The company was notified of the action and rendered some aid in the defense. The jury was instructed that the city was liable, and judgment was entered for plaintiff. *Held*, in an action over by the city against the company for the amount of such judgment, that the latter was conclusive only of the facts that the street was defective as charged, that by reason thereof plaintiff was injured, and as to the amount recovered. *St. Joseph* v. *Union R. Co.*, 116 *Mo.* 636, 22 *S. W. Rep.* 794.

It was error to exclude evidence offered by defendant that its tracks were laid, kept, and maintained as required by the ordinance. *St. Joseph* v. *Union R. Co.*, 116 *Mo.* 636, 22 *S. W. Rep.* 794.

The burden of proof was upon the city to show that the company was in fault because of the failure to comply with the ordinance, and the record in the first suit did not make out a *prima facie* case for the city on that issue. *St. Joseph* v. *Union R. Co.*, 116 *Mo.* 636, 22 *S. W. Rep.* 794.

Where a company is authorized to take up and replace pavement along its track, it is no excuse for an injury that results from a defect in the pavement that the accident would not have happened if there had not been negligence also on the part of the municipal authorities; and especially is this so where a statute requires the company to construct its road "upon the most approved plan for city railroads." *Carpenter* v. *Central Park, N. & E. R. R. Co.*, 11 *Abb. Pr. N. S.* (*N. Y.*) 416, 4 *Daly* 550, *mem.*

319. —— by overhanging sign.—A company maintained an overhanging sign, above a sidewalk, at its ticket office. In putting in electric-light wires the servants of an independent contractor, with the company's knowledge, cut the wires which fastened the sign and neglected to restore them. Two months afterward the sign fell and injured plaintiff. *Held*, that the company was guilty of negligence in failing to see that the fastenings were safely restored. *St. Louis, I. M. & S. R. Co.* v. *Hopkins*, 54 *Ark.* 209, 15 *S. W. Rep.* 610.

An instruction that defendant was not liable if the sign fell from the act of God was properly refused, where the only evidence on that point was that it fell on a windy day in March. It was defendant's duty to take such precautions in fastening the sign as to make it secure against the force of such winds as might be expected in the regular course of the seasons. *St. Louis, I. M. & S. R. Co.* v. *Hopkins*, 54 *Ark.* 209, 15 *S. W. Rep.* 610.

320. Using bridge belonging to state. — Where a company, organized for the purpose of constructing its road along a city street which is intersected by a state canal crossed by a bridge erected by and under the control of the state, lays its tracks and runs its cars over the bridge, it does not thereby make the bridge an appliance of its own, within the meaning of the rule which exacts extreme care and caution from common carriers in relation to the condition of the appliances employed by them; but its liability, while on the bridge, is none other than or different from its liability while traversing the rest of the street. *Birmingham* v. *Rochester City & B. R. Co.*, 137 *N. Y.* 13, 32 *N. E. Rep.* 995, 49 *N. Y. S. R.* 888; *reversing* 63 *Hun* 635, 45 *N. Y. S. R.* 724, 18 *N. Y. Supp.* 649.

321. Placing diseased horses in close proximity to others. — Plaintiff charged defendant, a street-car company, with negligently placing a number of its horses, suffering from a contagious disease, in a shed adjoining plaintiff's stable, whereby his horses became diseased. The company rested its defense on the ground that it had a right to use its own property in any way that it thought proper. *Held*, that this right would not extend to creating a nuisance; and it was negligence in the company to allow its horses to drink at a public tank where plaintiff's horses were watered.

The company was bound to use diligence to see that plaintiff's horses were not injured. *Mills* v. *New York & H. R. Co.*, 2 *Robt.* (*N. Y.*) 326; *affirmed in* 41 *N. Y.* 619.

The evidence showed that the sheds or pens in which the company's horses were placed were only separated from plaintiff's stables by a wooden partition. In the rear of the stables a board fence separated their respective lots. It was in evidence that defendant's horses gnawed the boards and fence so as to make holes through the same. *Held*, that it was the duty of the company to have immediately closed such holes, and to have been vigilant in using all necessary means to prevent the disease from being conveyed to plaintiff's horses, or else place its horses so remote that contact would not have been possible. *Mills* v. *New York & H. R. Co.*, 2 *Robt.* (*N. Y.*) 326; *affirmed in* 41 *N. Y.* 619.

322. Liability of city for negligence of company. — Where a city licenses a company to use the streets in a lawful way, it is not liable for the negligence of the company; but where it authorizes rails to be laid and permits them to remain projecting their full width above the surface of the street, it is liable for its own negligence in failing to keep the street in a reasonably safe condition. *Michigan City* v. *Boeckling*, 122 *Ind.* 39, 23 *N. E. Rep.* 518.

A city dug a trench in a highway across and under the track of a horse railroad, for the purpose of laying a sewer. The trench was fenced in by planks, the planks across the railroad being removable for the passage of the cars. Plaintiff, on a dark night, stepped upon the track to take a car, which, as he was about to reach it, started and moved slowly. He followed it and fell into the trench. *Held*, that there was sufficient evidence to authorize the jury in finding that plaintiff was in the exercise of due care; that the city was bound to guard the excavation so as to make it reasonably safe, and that the act of the company in removing the barriers from the track did not relieve the city, if it was otherwise liable to an action for the defect in the highway. *Prentiss* v. *Boston*, 112 *Mass.* 43.

A street-car line terminated so that passengers could step immediately from the cars to the sidewalk. The company maintained a turntable at this place, and in turning cars the rear platform would overlap the sidewalk two to three feet. Plaintiff, who had just left a car and stepped on the sidewalk, was struck by a turning car before she had time to move away. *Held*, that the city was not liable because of the position of the track and turntable. *Fitch* v. *Mayor, etc., of N. Y.*, 23 *J. & S.* 494, 2 *N. Y. Supp.* 700; *affirmed in* 119 *N. Y.* 608, *mem.*, 23 *N. E. Rep.* 1143, *mem.*

323. Recovery over by city. — A company, which was required to keep the street in and about its track in good order, failed to do so, whereby an individual was injured and brought an action against the city. Notice was given to the company, and it was requested to defend and indemnify the city, but declined to do so. Judgment was obtained against the city, which it paid, and then brought suit against the company. *Held*, that the judgment against the city was conclusive upon the company as to the extent of the damages, and that the excavation in the street made by the company, and which caused the injury, rendered the street unsafe and dangerous. *Mayor, etc., of Troy* v. *Troy & L. R. Co.*, 49 *N. Y.* 657, *mem.*; *affirming* 3 *Lans.* 270.

324. Recovery over by company against a third person.—A wagon was driven against a street-car so as to injure a passenger therein, and the company was required to pay damages. After doing so, it brought an action over against the owner of the wagon, alleging generally an unlawful trespass in running into the car, and setting up as special damages the amount of the judgment against it. *Held*, that it was error to sustain a demurrer to the complaint. The law would allow at least nominal damages for the trespass, irrespective of its right to recover the amount of the judgment; and the complaint, therefore, stated a cause of action. *Chicago W. D. R. Co.* v. *Rend*, 6 *Ill. App.* 243.—REVIEWING Talmadge *v.* Zanesville & M. Road Co., 11 Ohio 197.

3. *Injuries to Passengers.*

a. Amount of Care Company Must Exercise.

325. Generally.* — A street-railway company is bound to exercise all possible

* Duty of street-railway companies to exercise care to avoid accidents, see note, 25 AM. ST. REP. 481.

Care required in running cars of street railways and cable lines, see note, 7 L. R. A. 819.

skill, care, and foresight in the running of its cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run. "All possible skill and care" implies that every reasonable precaution in the management and operation of the street-cars be used to prevent injuries to passengers; it means good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. "All possible foresight" means more than this; it means anticipation, if not knowledge, that the operation of the cars will result in danger to passengers, and that there may be some action with reference to the future, and a provident care to guard against such occurrences—a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so. *Topeka City R. Co.* v. *Higgs*, 34 *Am. & Eng. R. Cas.* 529, 38 *Kan.* 375, 16 *Pac. Rep.* 667.—QUOTING Tuller *v.* Talbot, 23 Ill. 357; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 226; Philadelphia & R. R. Co. *v.* Derby, 14 How. (U. S.) 468.

Street-railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest neglect. This rule extends to the management of cars and track, and to all the arrangements necessary for the safety of passengers as respects accidents from collision or otherwise. *Smith* v. *St. Paul City R. Co.*, 16 *Am. & Eng. R. Cas.* 310, 32 *Minn.* 1, 50 *Am. Rep.* 550, 18 *N. W. Rep.* 827.

They must exercise the utmost foresight, knowledge, skill, and care. *Dougherty* v. *Missouri R. Co.*, 34 *Am. & Eng. R. Cas.* 488; *see also* 37 *Am. & Eng. R. Cas.* 206, 97 *Mo.* 647, 15 *West. Rep.* 235, 8 *S. W. Rep.* 900, 11 *S. W. Rep.* 251.

They are bound to exercise extraordinary care and the utmost skill, diligence, and human foresight, and are liable for the slightest negligence. *Spellman* v. *Lincoln Rapid Transit Co.*, 58 *Am. & Eng. R. Cas.* 297, 36 *Neb.* 890, 55 *N. W. Rep.* 270.

Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons. *Maverick* v. *Eighth Ave. R. Co.*, 36 *N. Y.* 378. *Barrett* v. *Third Ave. R. Co.*, 8 *Abb. Pr. N. S.* (*N. Y.*) 205; *affirmed in* 45 *N. Y.* 628. *McSwyny* v. *Broadway & S. A. R. Co.*, 27 *N. Y. S. R.* 363, 54 *Hun* 637, 4 *Silv. Sup. Ct.* 495, 7 *N. Y. Supp.* 456.

An instruction to the effect that a street-railway company is not bound to exercise more than "ordinary care and diligence, such care and diligence as a man of ordinary prudence and capacity might be expected to exercise under the same circumstances," correctly states the law as an abstract proposition, yet a refusal by a referee so to find is not ground for the reversal of a judgment against a street-car company, where his findings are supported by the evidence. *Fuller* v. *Jamestown St. R. Co.*, 75 *Hun* 273, 26 *N. Y. Supp.* 1078.

326. In receiving and discharging passengers.—While such carrier of passengers is not an insurer of their safety, it is bound to use due care and vigilance, so as safely to transport them. It must allow reasonable time for them to enter and leave its vehicle with safety, in the exercise of ordinary care, and should also allow reasonable time for passengers to enter and take seats, if there be any, or reasonable time for them to seize the straps furnished for passengers when standing; and while it may start before a passenger has had time to take his seat or to secure his hold on the strap, it must exercise the utmost care when thus starting, so as not to jar or upset him. *Dougherty* v. *Missouri R. Co.*, 21 *Am. & Eng. R. Cas.* 497, 81 *Mo.* 325, 51 *Am. Rep.* 239; *affirming* 9 *Mo. App.* 478.—REVIEWED IN Murphy *v.* St. Louis, I. M. & S. R. Co., 43 Mo. App. 342.—*North Chicago St. R. Co.* v. *Cook*, 43 *Ill. App.* 634; *affirmed in* 145 *Ill.* 551, 33 *N. E. Rep.* 958. *Central R. Co.* v. *Smith*, 74 *Md.* 212, 21 *Atl. Rep.* 706. *Steeg* v. *St. Paul City R. Co.*, 52 *Am. & Eng. R. Cas.* [illegible], 50 *Minn.* 149, 52 *N. W. Rep.* 393, 16 *L. R. A.* 379, 20 *Wash. L. Rep.* 541.

The extent of a street railroad's obligation is to exercise the utmost care which a prudent man is accustomed to exercise under like circumstances. *Gainard* v. *Rochester City & B. R. Co.*, 7 *N. Y. S. R.* 103.—REVIEWING Etherington *v.* Prospect Park & C. I. R. Co., 88 N. Y. 641.

It is the duty of such companies to allow their patrons an opportunity to get on and off the cars, and the starting of the car while the passenger is so doing is clearly negligent; but such act does not make defective a construction of the car which, under other circumstances, is reasonably

safe. *Werbowlsky* v. *Ft. Wayne & E. R. Co.*, 86 *Mich.* 236, 48 *N. W. Rep.* 1097.

A street-railway company is bound in receiving and discharging passengers to observe an unvarying and unbending requirement on every part of its line without regard to the denseness of the population. It is bound to see every passenger who attempts to get on its cars while they are standing still, but it is not so bound after they are in motion. But when it sees such attempt to board a moving train, or from circumstances has reason to know thereof, it must exercise such prudence in the management of the car as is demanded by the exigencies of the situation. *Meriwether* v. *Kansas City Cable R. Co.*, 45 *Mo. App.* 528.

A driver of an ordinary horse car, in looking out for persons desiring to become passengers, is bound to exercise that ordinary care which a person ought to observe under the circumstances in which he is placed; and if such care is exercised, though plaintiff has signaled the car but without being seen by the driver, there can be no recovery for an injury. *Lamline* v. *Houston, W. S. & P. F. R. Co.*, 6 *N. Y. S. R.* 248.

In attempting to get on a car plaintiff was thrown down and injured by a car passing in the opposite direction on an adjoining track. Plaintiff's evidence tended to show that the car which injured him was eighty feet away when he was thrown down; while the evidence for the defendant tended to show that he was thrown down immediately in front of the car. *Held*, that an instruction that there was no negligence, "if the driver took all the measures that an ordinarily prudent and careful man would have taken to prevent the collision," was sufficient, and it was not error to refuse to give a further instruction which involved a comparison with drivers of other vehicles on the street. *Pallas* v. *Brooklyn City R. Co.*, 22 *N. Y. S. R.* 657, 51 *Hun* 644, 4 *N. Y. Supp.* 384; *affirmed in* 123 *N. Y.* 652, *mem.*, 25 *N. E. Rep.* 954, *mem.*

327. In carrying sick or aged persons.—A degree of attention beyond that given to an ordinary passenger should be bestowed on one known to be affected by a disability by which the hazards of travel are increased. *Wardle* v. *New Orleans City R. Co.*, 13 *Am. & Eng. R. Cas.* 60, 35 *La. Ann.* 202.

A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more care and attention from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on or off the cars, and to more consideration in crossing a street. *Sheridan* v. *Brooklyn City & N. R. Co.*, 36 *N. Y.* 39, 34 *How. Pr.* 217.—FOLLOWED IN Solomon *v.* Central Park, N. & E. R. R. Co., 1 Sweeny (N. Y.) 298. QUOTED IN Costello *v.* Syracuse, B. & N. Y. R. Co., 65 Barb. (N. Y.) 92; Louisville, N. & G. S. R. Co. *v.* Fleming, 14 Lea (Tenn.) 128. REVIEWED IN Thurber *v.* Harlem Bridge, M. & F. R. Co., 60 N. Y. 326.

328. In protecting passenger against insults or violence.—A company has the power of refusing to receive as a passenger, or of expelling, any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety of, or annoying, others. *Putnam* v. *Broadway & S. A. R. Co.*, 55 *N. Y.* 108, 15 *Abb. Pr. N. S.* 383, 6 *Am. Ry. Rep.* 40; *reversing* 4 *J. & S.* 195.—APPLYING Pittsburgh, Ft. W. & C. R. Co. *v.* Hinds, 53 Pa. St. 512; Flint *v.* Norwich & N. Y. Transp. Co., 34 Conn. 554.—DISTINGUISHED IN Carpenter *v.* Boston & A. R. Co., 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540; Lehr *v.* Steinway & H. P. R. Co., 118 N. Y. 556. EXPLAINED IN Milliman *v.* New York C. & H. R. R. Co., 66 N. Y. 642. FOLLOWED IN Meyer *v.* St. Louis, I. M. & S. R. Co., 54 Fed. Rep. 116, 10 U. S. App. 677, 4 C. C. A. 221; Peck *v.* New York C. & H. R. R. Co., 70 N. Y. 587; Weeks *v.* New York, N. H. & H. R. Co., 72 N. Y. 50. QUOTED AND REVIEWED IN Carpenter *v.* Boston & A. R. Co., 24 Hun (N. Y.) 104.

And this police power the conductor, or other servant of the company in charge of the car or train, is bound to exercise with all the means he can command whenever occasion requires. If this duty is neglected without good cause, and a passenger receives injury which might have been reasonably anticipated or naturally expected from one who is improperly received or permitted to continue as a passenger the carrier is responsible. *Putnam* v. *Broadway & S. A. R. Co.*, 55 *N. Y.* 108, 15 *Abb. Pr. N. S.* 383, 6 *Am. Ry. Rep.* 40; *reversing* 4 *J. & S.* 195.

The fact that an individual may have drunk to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion. *Putnam* v. *Broadway & S. A. R. Co.*, 55 *N. Y.* 108, 15 *Abb. Pr. N. S.* 383, 6 *Am. Ry. Rep.* 40; *reversing* 4 *J. & S.* 195.

329. Duty to furnish safe cars, track, and appliances.—A company is guilty of negligence when it attempts to run its cars over a palpably defective track, when by the use of such increased vigilance and care as are practicably available the safety of its passengers is not well assured. *Citizens' St. R. Co.* v. *Twiname*, 30 *Am. & Eng. R. Cas.* 616, 111 *Ind.* 587, 10 *West. Rep.* 824, 13 *N. E. Rep.* 55.

Carriers of passengers for hire are bound to use the utmost care and diligence in providing safe, sufficient, and suitable coaches, harness, horses, and coachmen, in order to prevent injuries which human care and foresight can guard against. *Warren* v. *Fitchburg R. Co.*, 8 *Allen* (*Mass.*) 227. — QUOTED IN Libby *v.* Maine C. R. Co., 85 Me. 34. REVIEWED IN Northern C. R. Co. *v.* State, 29 Md. 420.

It is the duty of a company to provide, in the construction of its cars, against every danger to passengers that is probable and reasonably to be apprehended; but not against such as are so remote as to be barely possible. *Keller* v. *Hestonville, M. & F. Pass. R. Co.*, 149 *Pa. St.* 65, 24 *Atl. Rep.* 159; *affirming* 1 *Pa. Dist.* 197.

330. —— and to adopt new and improved appliances.*— A street-railway company is bound to provide suitable tracks, rolling stock, etc., keeping pace with science, art, and modern improvements in their application to such transportation. *Citizens' St. R. Co.* v. *Twiname*, 30 *Am. & Eng. R. Cas.* 616, 111 *Ind.* 587, 10 *West. Rep.* 824, 13 *N. E. Rep.* 55.

A company is not required to furnish its road with new cars, nor is it liable for using old ones, but, in either case, must keep them in good repair, and fit for use, so as not to endanger the safety of passengers. *Wormsdorf* v. *Detroit City R. Co.*, 40 *Am. & Eng. R. Cas.* 271, 75 *Mich.* 472, 42 *N. W. Rep.* 1000.

Plaintiff was injured on leaving a car in stepping in the space between the car and the platform. For the purpose of charging the company with negligence it was shown that another company in the city bridged or covered this space by the adoption of some peculiar device; but there was no evidence that any such appliance was in general use, or that the attention of the company had been called to the fact that its platform as it stood was unsafe. *Held*, that there was no duty calling upon the company to adopt the device, which, so far as the evidence showed, was only used by the one other company. *Fox* v. *Mayor, etc., of N. Y.*, 70 *Hun* 181, 53 *N. Y. S. R.* 902, 24 *N. Y. Supp.* 43.

331. In shifting cars. — Defendant company operated a double-track road, and at the end of its line moved its cars sidewise from one track to the other by a movable section of the track. Plaintiff, who was not familiar with this arrangement, attempted to get on a car, supposing it was ready, but was injured by its being thrown against her. *Held*, that the manner of moving cars imposed upon the company greater care than is generally imposed upon a railway company in shifting its cars *Gordon* v. *Grand St. & N. R. Co.*, 40 *Barb.* (*N. Y.*) 546.—QUOTED IN Kennayde *v.* Pacific R. Co., 45 Mo. 255. REVIEWED IN Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 32 How. Pr. 61.

In the absence of all proof of knowledge by the person injured of the manner of shifting cars by a side movement, and the danger resulting therefrom, he cannot be charged with having contributed to the accident by his own carelessness. *Gordon* v. *Grand St. & N. R. Co.*, 40 *Barb.* (*N. Y.*) 546.

332. In passing dangerous places or structures. — A street-railway company, as a carrier of passengers, is bound to exercise the highest care in the management of its cars in approaching and passing structures and obstacles in the street situated unreasonably close to the track. *Dahlberg* v. *Minneapolis St. R. Co.*, 18 *Am. & Eng. R. Cas.* 202, 32 *Minn.* 404, 21 *N. W. Rep.* 545.

It is proper to charge that when a horse car crosses the track of a steam railroad the driver is bound to exercise the highest

*See also *ante*, **311**.

degree of care and prudence, the utmost skill and foresight. *Coddington* v. *Brooklyn Crosstown R. Co.*, 26 *Am. & Eng. R. Cas.* 393, 102 *N. Y.* 66, 5 *N. E. Rep.* 797; *affirming* 32 *Hun* 467.

Plaintiff was riding on defendant's car, and was injured in crossing a drawbridge by the falling of a key. There was evidence tending to show that the car was driven at such a rate as to cause the bridge to oscillate and the key to fall. It appeared that the driver was familiar with the bridge and the lurking danger connected with it. *Held*, that he was bound to be more cautious and vigilant in crossing it to guard against accidents. *Catalanotto* v. *Coney Island & B. R. Co.*, 27 *N. Y. S. R.* 47, 7 *N. Y. Supp.* 628.

333. Presumption as to condition of car or track.—In an action to recover damages for injuries sustained while riding on the platform of a street-car, the court will presume, in the absence of evidence to the contrary, that the car was a good one. *Andrews* v. *Capitol, N. O. St. & S. W. R. Co.*, 2 *Mackey* (*D. C.*) 137.

When a duly equipped car is placed upon a track, under circumstances indicating that it is ready to receive passengers and about to proceed on its way, an invitation to all suitable persons to enter and become passengers is implied, and the acceptance of such an invitation cannot be held to be contributory negligence on the part of a passenger, although he may have knowledge that portions of the track over which he is to be carried are defective, he having a right to presume that all necessary precautions have been taken to secure his safety. *Citizens' St. R. Co.* v. *Twiname*, 30 *Am. & Eng. R. Cas.* 616, 111 *Ind.* 587, 10 *West. Rep.* 824, 13 *N. E. Rep.* 55.

334. Street-cars distinguished from steam-cars, as to care required.*—The rule which requires the highest skill in the management of cars operated by steam applies to street-cars and other vehicles drawn by horses, to its full extent, the difference being in the means and instrumentalities used to prevent accident by reason of the mode, rather than the degree, in which the preventive means are to be employed. *Topeka City R. Co.* v. *Higgs*, 34 *Am. & Eng. R. Cas.* 529, 38 *Kan.* 375, 16 *Pac. Rep.* 667.

There is a broad and just distinction between the rules of negligence applicable to steam and to horse railways. What might be undoubted negligence as respects the former might not be so as respects the latter. *Ober* v. *Crescent City R. Co.*, 52 *Am. & Eng. R. Cas.* 576, 44 *La. Ann.* 1059, 11 *So. Rep.* 818. — DISTINGUISHING Walker *v.* Vicksburg, S. & P. R. Co., 41 La. Ann. 795; Reddington *v.* Philadelphia Traction Co., 132 Pa. St. 154.

The same degree of care is not required of the carriers of passengers upon street-cars drawn by horses as of railroad companies, whose cars are drawn by steam. No greater degree of care as to pedestrians in a street is required of them than is required of the driver or owner of any other vehicle. In the attachment of horses to their cars they are not bound to use the best method human skill and ingenuity have devised to prevent accidents. If they use the method in general use, and which has been found usually adequate and safe, their duty in this respect is discharged. *Unger* v. *Forty-second St. & G. S. F. R. Co.*, 51 *N. Y.* 497, 4 *Am. Ry. Rep.* 481; *affirming* 6 *Robt.* 237.— APPROVED IN Memphis City R. Co. *v.* Logue, 13 Lea (Tenn.) 32.

b. Relation of Passenger and Carrier.

335. When the relation begins.—One is a passenger in a street-car who is in the act of stepping on the platform, the car having stopped for him. In case of an accident when stepping on, his rights are those of a passenger. *McDonough* v. *Metropolitan R. Co.*, 21 *Am. & Eng. R. Cas.* 354, 137 *Mass.* 210. *Smith* v. *St. Paul City R. Co.*, 16 *Am. & Eng. R. Cas.* 310, 32 *Minn.* 1, 50 *Am. Rep.* 550, 18 *N. W. Rep.* 827.— QUOTED IN Murphy *v.* St. Louis, I. M. & S. R. Co., 43 Mo. App. 342.

Where a person desiring to enter a street-car signals the driver to stop, and the driver holds the car, the instant the person places his foot upon the step of the car he is a passenger. The signal amounts to an offer or request to ride in that car, and its recognition by the person in charge of the car to an acceptance of the same. *Gainard* v. *Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 692, 50 *Hun* 22, 2 *N. Y. Supp.* 470; *affirmed in* 121 *N. Y.* 661, *mem.*, 24 *N. E. Rep.* 1092, *mem.*

336. Payment of fare.—It is not necessary that there be an express con-

* Application to street railways and dummy lines of statutes referring to railroads generally, see 49 AM. & ENG. R. CAS. 277, *abstr.*

tract in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract. The contract may be implied from slight circumstances, and it need not be actually consummated by the payment of fare or entry into the car or boat of the carrier, but the matter depends largely upon the intention of the person at the time he enters the car or boat. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590. —QUOTING Butler *v.* Glens Falls, S. H. & F. E. St. R. Co., 121 N. Y. 112.

If a person riding with due care on the platform of a horse-car, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the company, is injured through the driver's negligence, the company is liable. *Wilton* v. *Middlesex R. Co.*, 107 *Mass.* 108.—APPLIED IN Buck *v.* People's St. R., E. L. & P. Co., 46 Mo. App. 555. DISTINGUISHED IN Way *v.* Chicago, R. I. & P. R. Co., 64 Iowa 48, 52 Am. Rep. 431; Ohio & M. R. Co. *v.* Allender, 47 Ill. App. 484; Lott *v.* New Orleans, C. & L. R. Co., 37 La. Ann. 337; Higley *v.* Gilmer, 3 Mont. 90; Snyder *v.* Hannibal & St. J. R. Co., 60 Mo. 413. QUOTED IN Little Rock & Ft. S. R. Co. *v.* Miles, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10; Whitehead *v.* St. Louis, I. M. & S. R. Co., 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751. REVIEWED IN Healey *v.* City Pass. R. Co., 28 Ohio St. 23.

Where one gets on a car merely for the purpose of riding a short distance, and then jumps off, without any intention of paying his fare, and does not pay fare, nor offer to pay it, he cannot be considered a passenger, even though the driver knew he was on the car, unless the driver had consented to his being and remaining on. *Muehlhausen* v. *St. Louis R. Co.*, 28 *Am. & Eng. R. Cas.* 159, 91 *Mo.* 332, 2 *S. W. Rep.* 315.

Where a person gets upon a street-car for the purpose of becoming a passenger, expecting and willing to pay fare, he becomes a passenger for hire, although the conductor, owing to the crowded condition of the car, may fail to collect the fare from him. *Cogswell* v. *West St. & N. E. Elec. R. Co.*, 52 *Am. & Eng. R. Cas.* 500, 5 *Wash.* 46, 31 *Pac. Rep.* 411.

337. Distinction as to care due passengers and the general public.—A rule which requires a carrier of passengers to exercise the greatest diligence for their safe transportation does not apply to persons not passengers. *Schneider* v. *Second Ave. R. Co.*, 4 *Silv. App.* 232, 133 *N. Y.* 583, 30 *N. E. Rep.* 752; *modifying* 27 *J. & S.* 536, 15 *N. Y. Supp.* 559, 39 *N. Y. S. R.* 370.

While the employés of a street railroad are bound to the highest degree of care and prudence in the management of the teams attached to the cars, with a view to securing the safety of the passengers, a different rule prevails as to the general public, between whom and the company no relation arising out of contract, express or implied, exists. As to such persons, the employés are only bound to exercise what amounts, under all the circumstances of the case, to ordinary care and prudence. *Pendleton St. R. Co.* v. *Shires*, 18 *Ohio St.* 255.—FOLLOWING Cleveland C. & C. R. Co. *v.* Terry, 8 Ohio St. 570.

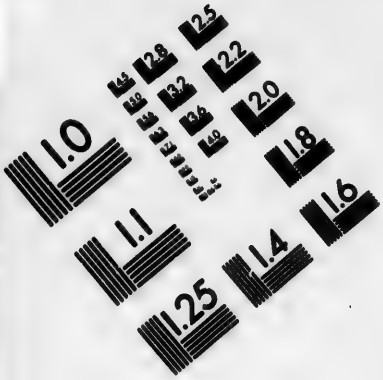
c. Negligence of Carrier.

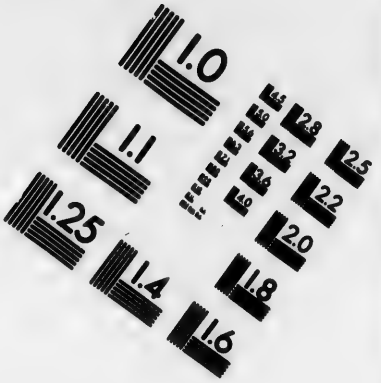
338. Presumption of negligence.—Proof of an injury to a passenger raises a presumption of negligence on the part of the carrier, but this presumption may be rebutted by showing fault on the part of the passenger. *City & S. R. Co.* v. *Findley*, 76 *Ga.* 311.

Liability does not arise in all cases from the mere happening of an accident, as where the accident is unavoidable. It is only when the accident and the resulting injury are traceable to the omission of some legal duty that the defendant can be called upon to make compensation for the injury done. *Potts* v. *Chicago City R. Co.*, 33 *Fed. Rep.* 610.

The fact that a street-car ran off the track raises a presumption of negligence, and to rebut it the company must show that it was free from the slightest negligence, and that the accident could not have been prevented by the highest degree of care. *Reading City Pass. R. Co.* v. *Eckert*, (*Pa.*) 4 *Atl. Rep.* 530.

339. Negligence of employes, generally.—Where a passenger is injured by being struck by the shaft of a wagon projecting into the car, the company is not chargeable with negligence because its employés had pulled down the curtains at the side of the car, to keep out rain, although the passengers were thereby prevented from seeing objects in the street. *Potts* v. *Chicago City R. Co.*, 33 *Fed. Rep.* 610.





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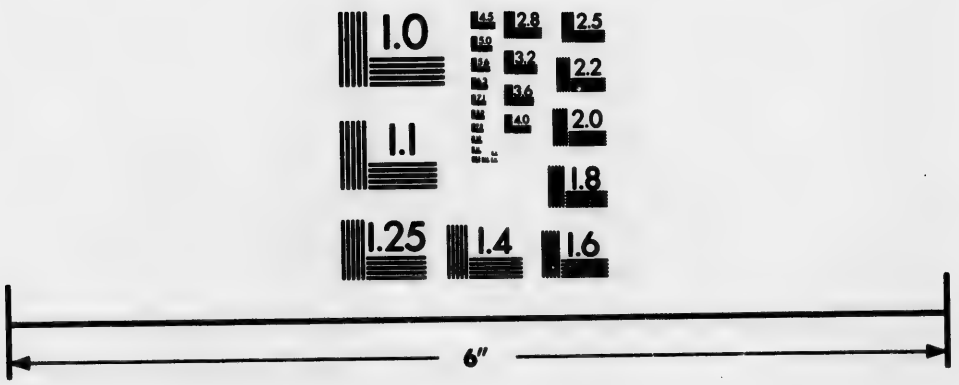

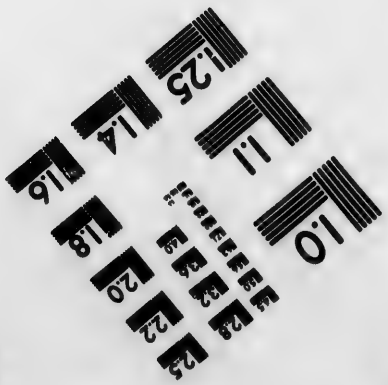

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Where a company has established a gate, in charge of a keeper, where a street-car track crosses a railroad, the driver of an approaching street-car who sees the gate open has a right to presume that the track is clear, and he is not bound to stop and look for trains before attempting to cross the track. *Whelan* v. *New York, L. E. & W. R. Co.*, 38 *Fed. Rep.* 15.

The court properly refused to instruct the jury "that it was not the duty of the driver of the street-car to stop his car and go ahead on foot to the crossing to see if a train was approaching unless he had reasonable ground to believe a train was approaching." The view of the railroad being obstructed, and there being no conductor or other person on the car to exercise this vigilance, the probability of danger imposed this duty on the driver. *Central Pass. R. Co.* v. *Kuhn*, 32 *Am. & Eng. R. Cas.* 16, 86 *Ky.* 578, 6 *S. W. Rep.* 441.

It is within the scope of the employment of a driver who is also a conductor to receive passengers on the car, and to let them off. *Buck* v. *People's St. R., E. L. & P. Co.*, 46 *Mo. App.* 555.—APPLYING Wilton *v.* Middlesex R. Co., 107 Mass. 108; Ramsden *v.* Boston & A. R. Co., 104 Mass. 117.

Employés are in their line of duty in rendering assistance to young or infirm persons in getting on or off cars; and the company is liable for an injury to such person, received through the negligence of the driver, while attempting to get on. *Drew* v. *Sixth Ave. R. Co.*, 1 *Abb. App. Dec.* (*N. Y.*) 556, 3 *Keyes* 429.—FOLLOWING Drew *v.* Sixth Ave. R. Co., 26 N. Y. 49.

While plaintiff was riding on one of defendant's cars the driver jumped off and the conductor ran through the car shouting that he was not going to be killed. Plaintiff followed him to the platform and was then knocked off by a collision of some kind not explained. *Held*, that the facts, unexplained, showed a clear breach of duty on the part of the carrier, affirmatively establishing negligence. *Kreusen* v. *Forty-second St., M. & St. N. A. R. Co.*, 38 *N. Y. S. R.* 461, 13 *N. Y. Supp.* 588.

The fact that the conductor of a street-car is inside the car when it has slowed up at a street crossing to permit a passenger to ascend is no evidence of negligence on the part of the company. *Picard* v. *Ridge Ave. Pass. R. Co.*, 147 *Pa. St.* 195, 23 *Atl. Rep.* 566.

It is the duty of a street-car driver to be skilful and prudent, and cautious to see that his passengers are not injured in his car, and in case a passenger on the car is injured by the negligence of the driver, the company is liable in damages for such injury. Negligence in a car driver is the want of such care and prudence as skilful, prudent, and careful car drivers observe under similar circumstances. *Allen* v. *Galveston City R. Co.*, 79 *Tex.* 631, 15 *S. W. Rep.* 498.

340. —— of driver in whipping horses.—It is no evidence of negligence in a driver of a horse-car that he whipped a pair of horses when about to start a car full of passengers, unless there appeared to be something unusual in the manner of his whipping. *Rochat* v. *North Hudson County R. Co.*, 30 *Am. & Eng. R. Cas.* 644, 49 *N. J. L.* 445, 9 *Atl. Rep.* 688, 10 *Atl. Rep.* 710, 8 *Cent. Rep.* 345; *reversing* 48 *N. J. L.* 401, 5 *Atl. Rep.* 276.

341. Negligent use of brake.—Where a street-car was so crowded that a passenger was compelled to stand on the platform, and there was evidence from which the jury might fairly have inferred that he was thrown to the ground by the sudden turning of the brake, a verdict in his favor for the injury should be sustained. *Chicago City R. Co.* v. *Young*, 62 *Ill.* 238.

A passenger on a street-car who wanted to smoke and knew the driver went to the front platform for the purpose. A large traveling trunk prevented his getting on the platform, and he stood on a lower step hanging only by the driving bar and the iron at the side of the car. He rode some distance, and after the car stopped and the horses were watered the driver told him to go to the rear platform if he wanted to smoke. He started a minute later to do so, but as he was stepping down and his foot was nearly on the ground the driver let go the brake, the car started, and he was thrown down and injured. *Held*, in an action against the company, that these facts did not make out a cause of action. *Brown* v. *Congress & B. St. R. Co.*, 8 *Am. & Eng. R. Cas.* 383, 49 *Mich.* 153, 13 *N. W. Rep.* 494.

In an action for personal injuries, caused by the handle of the brake on the front platform of a street-car striking a passenger, it is not error to submit the question to the jury upon evidence that the passenger had gone upon the front platform for

the purpose of leaving the car, but was not in the act of leaving when struck, where the statute provides that the railroad shall not be liable for injuries to "passengers, occasioned by their getting off the car at the front platform." *Nissen* v. *Missouri R. Co.*, 19 *Mo. App.* 662.

After a street-car had come to a full stop, plaintiff, a passenger, stooped to pick up his bundle, which was on the front platform; as he did so, the driver released the brake, which recoiled and struck plaintiff's head, causing injuries. *Held*, that the case was properly submitted to the jury under the rule that, in such circumstances, defendant owed to plaintiff the duty of the utmost care and diligence of very cautious persons. *Schuler* v. *Third Ave. R. Co.*, 1 *Misc.* 351, 48 *N. Y. S. R.* 663, 20 *N. Y. Supp.* 683; *affirming* 44 *N. Y. S. R.* 774, 17 *N. Y. Supp.* 834.—REVIEWING Maverick *v.* Eighth Ave. R. Co., 36 N. Y. 378.

The evidence should never be broader than the case made by the pleadings. So where a passenger sues a street-car company for being negligently thrown from the car platform, and the only negligence charged is in the use of the brake by the driver and in the manner of driving the horses, which caused him to be thrown down, it is error to admit evidence tending to show negligence on the part of the driver after he was thrown down. *Crooks* v. *Second Ave. R. Co.*, 49 *N. Y. S. R.* 376, 66 *Hun* 626, *mem.*, 20 *N. Y. Supp.* 813.

342. Closing car door on passenger's hand. — Plaintiff was riding on a street-car with a companion and had her finger cut off as they were leaving the car at the rear door. The door of the car was opened or shut by the driver from his place in front, and plaintiff testified that she started out first, and in passing out placed her hand on the side of the door, and that the door closed and cut off her finger. The driver and another witness testified for the company that the door did not close while plaintiff and her companion were getting off. It appeared that the accident was immediately proclaimed, and there was no other way of accounting for it. *Held:* (1) that it was negligence in the driver to close the door before they had time to leave the car; (2) that there was sufficient evidence to support a verdict for plaintiff. *McGlynn* v. *Brooklyn Crosstown R. Co.*, 6 *N. Y. S. R.* 51, 42 *Hun* 656.

343. Stopping on street crossings. —An instruction that a conductor is not bound to stop his car at other than the usual places of crossing, nor unless he saw the person who desired to get aboard, is properly refused where there is no proof of the company's rule on that subject. *Pleasants* v. *North Beach & M. R. Co.*, 34 *Cal.* 586.

Plaintiff sued for being thrown from a car, and gave evidence that he had told the driver to stop and let him off, that the brake had been applied and the horses had come to a slow walk, and plaintiff went to the car step to get off, but was thrown down by the brake being suddenly released and the horses urged forward. The company claimed that the place was where two streets crossed, and by an ordinance of the city it was unlawful to stop at that place, and that the driver had a right to urge the horses forward to the proper place to stop. *Held*, that the company had a right to refuse to stop where it was prohibited from doing so, but in moving forward it was bound to exercise ordinary care to prevent injury. *Medler* v. *Atlantic Ave. R. Co.*, 36 *N. Y. S. R.* 89, 12 *N. Y. Supp.* 930; *affirmed in* 126 *N. Y.* 669, *mem.*, 37 *N. Y. S. R.* 963, *mem.*, 27 *N. E. Rep.* 854, *mem.*—APPLYING Nichols *v.* Sixth Ave. R. Co., 38 N. Y. 131.

344. Approaching a railroad crossing at a rapid rate. — It is a question for the jury whether the driver of a horse car is guilty of negligence in approaching the crossing of another railroad at a rate of speed which will not enable him to stop his car almost instantly upon discovering another car approaching on such track. And if he does approach at a slackened rate of speed, it is also a question for the jury whether he was not guilty of negligence in attempting the experiment of crossing in front of the car, when to remain where he was and wait its crossing would result in absolute safety. *Schneider* v. *Second Ave. R. Co.*, 4 *Silv. App.* 232, 133 *N. Y.* 583, 30 *N. E. Rep.* 752; *modifying* 27 *J. & S.* 536, 15 *N. Y. Supp.* 556, 39 *N. Y. S. R.* 370.

345. Running over passenger who has fallen from car. — Where a passenger falls off a street-car that is in full motion, in front of the wheels, and the servants in charge of the same know that he is off the car and holding on to the iron rail to save himself from being run over, it is culpable negligence if they do not stop

the car and thereby save him from injury. *Chicago W. D. R. Co.* v. *Hughes*, 69 *Ill.* 170.

In an action for an injury caused by falling off the front rail of a street-car and being run over, the defendant's testimony, which was not contradicted, showed that the driver made every effort to rescue the plaintiff as he fell, and stopped the car as soon as he could. *Held*, that so far as running over him was concerned, there was no question of negligence on defendant's part to go to the jury. *Downey* v. *Hendrie*, 8 *Am. & Eng. R. Cas.* 386, 46 *Mich.* 498, 41 *Am. Rep.* 347, 9 *N. W. Rep.* 828.

Where a passenger falls from a car platform and is injured by being run over, it is proper to instruct the jury that the company is liable if the car was stopped and again negligently started, thus causing the injury, which would not have been caused but for such starting, though plaintiff may have been negligent in falling from the car. *McKeon* v. *Citizens' R. Co.*, 42 *Mo.* 79.—QUOTED IN Burns *v.* Bellefontaine R. Co., 50 Mo. 139.

As plaintiff was stepping on a car, it started with a quick jerk which threw him down and dragged him some distance. *Held*, that the liability of the company was not confined to negligence after he was thrown down; and it was, therefore, proper to refuse an instruction that held the company not liable unless its employés failed to stop the car as quickly as they could after plaintiff got in a position of peril. *Morison* v. *Broadway & S. A. R. Co.*, 28 *N. Y. S. R.* 498, 8 *N. Y. Supp.* 436, 55 *Hun* 608; *affirmed in* 130 *N. Y.* 166, 41 *N. Y. S. R.* 248, 29 *N. E. Rep.* 105.

346. Defects in cars or appliances.—A passenger who voluntarily jumps on or off a car while it is in motion does so at his peril, and a construction of the car which is only unsafe in view of such conduct cannot be said to be defective. *So held*, where plaintiff undertook to jump from a moving car which had a running step or foot-board along the side, and caught his foot in a hole in the riser of the foot-board, which was ordinarily safe, and only made dangerous by the position of plaintiff's body in jumping or falling from the car. *Werbowlsky* v. *Ft. Wayne & E. R. Co.*, 86 *Mich.* 236, 48 *N. W. Rep.* 1097.

It was a question for the jury whether the defendant, which permitted and invited passengers to ride on the rear platforms of its cars, was negligent in not protecting the platforms with guards of sufficient height to prevent passengers from falling off. *Matz* v. *St. Paul City R. Co.*, 52 *Minn.* 159, 53 *N. W. Rep.* 1071.

Plaintiff sued for an injury received in alighting from a moving car, and alleged that the injury was caused by a projection upon the step of the car which caught his heel and caused him to fall. At the trial plaintiff admitted that he looked at the step before he placed his foot upon it and saw nothing out of the ordinary course; and numerous witnesses for the defendant who were in a position to know the condition of the step agreed that it was then in perfect order. *Held*, sufficient to show that the step was not defective, and that the injury was not caused thereby. *Hitchcock* v. *Brooklyn City R. Co.*, 21 *N. Y. S. R.* 945, 50 *Hun* 606, 3 *N. Y. Supp.* 218.

A car started out in good condition, but upon the approach of a drunken man the driver kept the rear door closed against him. Soon afterward he discovered that the door was displaced by the efforts of the man to force it, but he made no further examination as to its condition. On the trip plaintiff attempted to enter and was injured by the glass from the door, which had been fractured by the drunken man, falling on him. *Held*, that the driver was negligent in not discovering the condition of the glass, and either warning plaintiff or refusing to admit him, and the evidence was sufficient to make a *prima facie* case of negligence. *Allen* v. *Dry Dock, E. B. & B. R. Co.*, 19 *N. Y. S. R.* 114, 2 *N. Y. Supp.* 738.

The driver of such car was in sole charge. *Held*, that knowledge on his part of the condition of the door was imputable to the company; and if the driver was negligent in not making a further examination, the company was chargeable therewith. *Allen* v. *Dry Dock, E. B. & B. R. Co.*, 19 *N. Y. S. R.* 114, 2 *N. Y. Supp.* 738.

In attempting to get on a car, plaintiff's foot slipped into the opening at the back of the car step, and he was injured. The evidence showed that the step was an open-back one; that for seven years closed-back steps had been in common use on horse-cars in all the leading cities of the country, and had been in use in defendant's city for five years, and were in use on a part of its cars; that the closed-back steps were both stronger and safer. *Held*, that it was a

question for the jury whether defendant exercised ordinary care in retaining the open-back step. The fact that other steps were in common use for the prevention of such accidents would justify a finding that defendant was negligent. *Boehncke* v. *Brooklyn City R. Co.*, 51 *N. Y. S. R.* 434, 22 *N. Y. Supp.* 712.

As plaintiff was leaving a car she was thrown down by her dress catching on the sheet-iron covering of the car wheel. The evidence showed that the wheel projected above the floor, and the covering was made with a flange, and had been screwed to the floor, but had become partially loosened, and a sharp corner projected an inch or two above the floor. It was admitted that the defect was known to the person in charge of the car. *Held:* (1) that the question whether the accident was caused by the defect was for the jury; (2) that the evidence was sufficient to warrant a verdict for plaintiff. *Chase* v. *Jamestown St. R. Co.*, 15 *N. Y. Supp.* 35, 60 *Hun* 582, *mem.*, 38 *N. Y. S. R.* 954; *affirmed in* 133 *N. Y.* 619, *mem.*, 30 *N. E. Rep.* 1150, *mem.*

A passenger on a street-car may recover for an injury caused by the car colliding with a locomotive car, the collision being caused by the defective condition of the street-car brakes, of which the company had knowledge. *People's Pass. R. Co.* v. *Weiller*, (*Pa.*) 2 *Atl. Rep.* 510.

Upon a street railway a separate track was used for the cars going in each direction, and frogs were so placed as to prevent cars going in the proper direction from being thrown from the track while going upon or leaving a swing bridge. A loaded wagon having broken down on the bridge upon one of the tracks, a car approaching thereon was necessarily lifted to the other track, and being then driven rapidly upon the bridge was thrown from the track, injuring a passenger. *Held*, that the company was not negligent in not placing frogs so as to prevent a car thus going in the wrong direction upon the track from being thrown off, but that the question whether the speed at which the car was driven upon the bridge was not, under the circumstances, negligent, was for the jury. *White* v. *Milwaukee City R. Co.*, 18 *Am. & Eng. R. Cas.* 213, 61 *Wis.* 536, 21 *N. W. Rep.* 524, 50 *Am. Rep.* 154.—FOLLOWED IN Stuart *v.* Havens, 17 Neb. 211.

347. Placing or maintaining track too near other structures.—Where a company places its track so near a telegraph pole or other obstruction which it is necessary for its cars to pass that its passengers, in getting on and off the cars and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.—FOLLOWING Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272. REVIEWING Illinois C. R. Co. *v.* Welch, 52 Ill. 183. REVIEWING AND FOLLOWING Chicago & I. R. Co. *v.* Russell, 91 Ill. 298.

It is inexcusable in a company to permit an obstruction to stand so near its track as to render the use of the step or running-board dangerous to life or limb, inasmuch as exceptional cases may arise where it is lawful and proper for a passenger to use such stepping-board. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.

Defendant's track having been placed near a derrick on the morning of the day of the accident, defendant must have known of its proximity to the cars, and was bound to use all reasonable care to avoid exposing passengers to danger; and especially is this true in view of the fact that passengers were allowed to stand on the side steps of the cars. *Seymour* v. *Citizens' R. Co.*, 58 *Am. & Eng. R. Cas.* 395, 114 *Mo.* 266, 21 *S. W. Rep.* 739.

Plaintiff entered one of defendant's open cars on the easterly side, and, with the columns of an elevated railroad in full sight, crossed to the westerly side and endeavored to pass forward on the step on that side, when he was injured by his shoulder coming in contact with one of the columns, which was fourteen inches from the step. There was evidence that a vacant seat could have been reached by him without crossing the car. *Held*, that defendant was not negligent in continuing to run its cars on its own tracks after the erection of the columns, especially in view of the fact that it made its open cars narrower than on other roads; that the injury was either the result of an accident, or, if due to any negligence, more to plaintiff's own negligence than that of defendant, and that a refusal to dismiss the complaint or to direct a verdict for defendant was error. *Murphy* v. *Ninth Ave.*

R. Co., 6 *Misc.* 298, 26 *N. Y. Supp.* 783, 58 *N. Y. S. R.* 140.—APPROVING Moylan *v.* Second Ave. R. Co., 128 N. Y. 583; Craighead *v.* Brooklyn City R. Co., 123 N. Y. 391.

348. Derailing car.—Proof that an injury to a passenger was caused by a car running off the track at a place where the track and the car were under the exclusive control of the company is sufficient to charge it with negligence, in the absence of evidence that the accident happened without its fault. *Feital* v. *Middlesex R. Co.*, 109 *Mass.* 398, 6 *Am. Ry. Rep.* 300.—DISTINGUISHED IN Pennsylvania R. Co. *v.* MacKinney, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462. QUOTED IN Gulf, C. & S. F. R. Co. *v.* Smith, 74 Tex. 276.

349. Maintaining platform too far from track.—Plaintiff sued for an injury received by stepping in the open space between the car and the platform, in alighting from a car running over the Brooklyn bridge. The evidence showed that the car stopped on a curve, where it was necessarily nearer the platform in the middle than at the ends. The evidence was conflicting, but tended to show that the space at the ends of the car was from eleven and a half to twenty inches, and in the middle from one inch to seven inches. It further appeared that plaintiff had often crossed before, and neither she nor any other person had been injured during the several years that the cars had been run. *Held*, that the mere existence of the opening in itself was not sufficient evidence of negligence to entitle plaintiff to recover. *Fox* v. *Mayor, etc., of N. Y.*, 70 *Hun* 181, 53 *N. Y. S. R.* 902, 24 *N. Y. Supp.* 43.—FOLLOWING Ryan *v.* Manhattan R. Co., 121 N. Y. 126.

350. Speed of cars.— A reasonable and lawful speed for a street-car, in the absence of statute or ordinance upon the subject, is the average rate of carriages used to convey passengers by horse power. *Adolph* v. *Central Park, N. & E. R. R. Co.*, 76 *N. Y.* 530; *affirming* 11 *J. & S.* 199.

351. Permitting baskets in cars.—A street-car company is not chargeable with negligence because it permits one passenger to bring a basket on the car and place it between his feet, causing another passenger to fall on leaving the car, in the absence of some complaint or request for the removal of the basket. *Van Winkle* v. *Brooklyn City R. Co.*, 46 *Hun* 564, 12 *N. Y. S. R.* 548.

And if the passenger, with full knowledge of the obstruction, undertakes to pass it unassisted, and to step over the obstruction, he thereby assumes all the dangers and risks of such passage, and the result of the undertaking cannot be charged against the company. *Van Winkle* v. *Brooklyn City R. Co.*, 46 *Hun* 564, 12 *N. Y. S. R.* 548.

352. Permitting passengers to ride on steps or platforms.—A street-railway company has the right to carry passengers on the car platforms. *Topeka City R. Co.* v. *Higgs*, 34 *Am. & Eng. R. Cas.* 529, 38 *Kan.* 375, 16 *Pac. Rep.* 667.

The failure of a conductor to prevent plaintiff from standing on the step, or to warn him of any possible danger which might arise therefrom, is not negligence. *Craighead* v. *Brooklyn City R. Co.*, 123 *N. Y.* 391, 25 *N. E. Rep.* 387, 33 *N. Y. S. R.* 620; *reversing* 25 *N. Y. S. R.* 941, 5 *N. Y. Supp.* 431.

Whether permitting plaintiff to stand on the front platform and get off from it were negligence, and proper care was exercised in not stopping the car sooner, was for the jury. It is the duty of a company to cause its cars to come to a full stop for passengers to get off. *Crissey* v. *Hestonville, M. & F. Pass. R. Co.*, 75 *Pa. St.* 83.—DISTINGUISHED IN Hagan *v.* Philadelphia & G. F. R. Co., 15 Phila. (Pa.) 278.

353. Overloading cars. — It is the duty of a company to carry passengers with safety; and if the death of a passenger results from the carelessness of its servants in the management of its car, or from a defective track, or from an overloaded car, or from all combined, the company will be liable. *Chicago City R. Co.* v. *Young*, 62 *Ill.* 238, 6 *Am. Ry. Rep.* 230.

When a company undertakes to carry large numbers of people, vastly in excess of the seating capacity of its cars, and permits passengers to ride on the platforms and foot-boards without objection, and collects fare from them, and stops its cars when in such a crowded condition that no seats are attainable, and permits passengers to get upon them to be carried, and, when the cars are in such a crowded condition, with passengers riding on the foot-boards, runs them so near the intersection of a switch with the main track that they cannot pass without injury to passengers, the company is guilty of gross negligence. *Topeka City R. Co.* v. *Higgs*, 34 *Am. & Eng. R. Cas.* 529, 38 *Kan.* 375, 16 *Pac. Rep.* 667.

Where a conductor undertakes to carry more passengers than can sit and stand within the car, and both platforms are filled to their utmost capacity, and by the breaking of the rear platform a passenger is thrown to the street, sustaining permanent and serious injuries, the questions as to whether the platform was insecure to defendant's knowledge, or in the exercise of proper care should have been known to be insecure, and whether defendant was negligent in permitting so large a number of persons to ride upon the platform, are for the jury. *Norris* v. *Brooklyn City R. Co.*, 4 *Misc.* (*N. Y.*) 294.—QUOTING Lehr *v.* Steinway & H. P. R. Co., 118 N. Y. 556.

354. Excavating under or about the track. — Plaintiff, a passenger in an open car, was thrown out and injured. It appeared that the company was repairing its track at the place, and had removed the paving stones in the street, and some of them had not been replaced; and there was evidence tending to show that the absence of the paving stones made the passage dangerous, and that this caused the injury. *Held*, that there was evidence of defendant's negligence which was properly submitted to the jury. *Valentine* v. *Middlesex R. Co.*, 137 *Mass.* 28.

Defendant company had dug a trench some six inches deep under its track, and a car, on which plaintiff was a passenger, approached in broad daylight. The workmen gave warning of the danger, but the driver drove on at a trot, and when the front wheels reached the excavation the track gave way, and plaintiff was injured by the dropping of the car. *Held*, such proof of negligence as to justify the court in declaring it such. *Daub* v. *Yonkers R. Co.*, 52 *N. Y. S. R.* 527, 23 *N. Y. Supp.* 268, 69 *Hun* 138.

355. Stopping over excavation made by city.—A declaration, in an action against a street-railway company for injuries to a passenger sustained while alighting from one of defendant's cars, by falling into a ditch made by the city and along which the car was stopped, is not demurrable in not showing that the condition of the place where the car stopped was such by reason of the absence of proper safeguards, the action not being founded on negligence in allowing the excavation to remain without safeguards, but arising out of the duty of the defendant as a carrier of passengers not to expose the passengers to any danger in alighting which could be avoided by the exercise of care. *Richmond City R. Co.* v. *Scott*, 44 *Am. & Eng. R. Cas.* 418, 86 *Va.* 902, 11 *S. E. Rep.* 404.

Where a street-car is stopped over an excavation made by the city in a street, and the passengers are not warned of the danger, nor assisted in alighting, the company is liable for injuries sustained by a passenger who steps off the car into the excavation. *Richmond City R. Co.* v. *Scott*, 44 *Am. & Eng. R. Cas.* 418, 86 *Va.* 902, 11 *S. E. Rep.* 404.

356. Throwing snow from track to street.* — While a company has the right to remove snow from its tracks, it is bound to exercise reasonable care and diligence in so doing, and if it negligently causes upon the street such an accumulation of the snow thus removed as to produce an obstruction therein, rendering travel unsafe, it is liable for injuries caused thereby. It seems the same duty is imposed upon such companies as is incurred by every owner of property adjoining the street who removes snow from his sidewalk to the street. *Dixon* v. *Brooklyn City & N. R. Co.*, 26 *Am. & Eng. R. Cas.* 203, 100 *N. Y.* 170, 3 *N. E. Rep.* 65.

Whatever obligations may be imposed upon a municipal corporation in exercising a supervisory care over its streets, and in preventing and removing obstructions, this does not relieve the owner of property or of franchises from liability for injuries occasioned by them, and continued by reason of their negligence. It is the duty of such a corporation, so far as practicable, to furnish safe and proper access to its cars. *Dixon* v. *Brooklyn City & N. R. Co.*, 26 *Am. & Eng. R. Cas.* 203, 100 *N. Y.* 170, 3 *N. E. Rep.* 65.

Plaintiff's evidence was to the effect that he attempted to enter, by the rear platform, one of defendant's cars, which was moving slowly; finding the platform full, he passed along by the side of the car to reach the front platform; there was a ridge of snow, about three feet high, along the track, thrown up by defendant's snow plow and sweepers, sloping towards the car, and so near it as to leave merely room for the car to pass; this ridge had been there for some weeks, and had become hard and slippery.

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* See also *ante*, **201, 273, 317.**

At the time of the accident it was covered with a thin coating of recently fallen snow. In passing along it, plaintiff slipped and fell under the wheels of the car and was injured. *Held*, that the evidence justified the submission to the jury of the questions of negligence and contributory negligence. *Dixon* v. *Brooklyn City & N. R. Co.*, 26 *Am. & Eng. R. Cas.* 203, 100 *N. Y.* 170, 3 *N. E. Rep.* 65.—DISTINGUISHED IN Conway *v.* Troy & B. R. Co., 1 N. Y. S. R. 587, 41 Hun 639.

Defendant ran its cars for a portion of its route over the track of another company, under a license by which the licensor was bound to keep the track clear from snow. Defendant claimed that the accident occurred upon this track. *Held*, that conceding this to be so, as defendant contributed in throwing up the snow bank it was its duty to remove it, as it rendered the access to its cars unsafe; and for a negligent omission to perform this duty it was liable. *Dixon* v. *Brooklyn City & N. R. Co.*, 26 *Am. & Eng. R. Cas.* 203, 100 *N. Y.* 170, 3 *N. E. Rep.* 65.

Where a company negligently throws large heaps of snow on a street, which cause a sleigh to overturn and frighten the horse attached to it so that he runs away and injures plaintiff, the act of the company in leaving the snow on the street is the proximate cause of the injury, and a recovery may be had against the company; and it is not necessary to allege in the complaint that the person driving the horse used due care where it charges that the injury was caused by the nuisance created by the company. *Lee* v. *Union R. Co.*, 12 *R. I.* 383.

357. Colliding with other cars.—It appeared that plaintiff, while passing along the step on the side of an open car, was struck by one of defendant's closed cars coming from an opposite direction. The undisputed testimony showed that the smallest space between defendant's tracks at or near the place of the accident was such that the space between the outside step of an open car and the body of a closed one was seventeen inches at least, and at the place where and about the hour when the accident occurred cars were passing each other every half minute; that people frequently stood at this place between defendant's tracks when cars were passing each other; that open cars had been in use on the road for twenty years, and at that place thousands of passengers had stood on the steps of open cars while they passed closed cars going in the opposite direction without accident except the one to plaintiff. *Held*, that defendant was not guilty of negligence in failing to have more space between its tracks; that the accident to plaintiff was not to be apprehended, and a failure to take such measures as would make its happening under any circumstances a physical impossibility was not an omission of duty on its part. *Craighead* v. *Brooklyn City R. Co.*, 123 *N. Y.* 391, 25 *N. E. Rep.* 387, 33 *N. Y. S. R.* 620; *reversing* 25 *N. Y. S. R.* 941, 5 *N. Y. Supp.* 431.

When on a down grade the driver applied the brake to check the speed, the chain broke, and the car collided with another ahead and plaintiff was injured. It appeared undisputedly that the driver did all that could be done after the chain broke to prevent an accident and remained at his post until his car was within four feet of the one in front. There was no evidence tending to show that the driver was not entirely fit for the position, or that he at any time had failed to use proper care. The trial court left it to the jury to determine whether defendant employed skilful servants on the car, and whether it was managed with proper care and skill. *Held*, error; that conceding the fact that the driver in handling the brake used more force than was absolutely necessary to check the speed of the car, this did not authorize the submission of the question of lack of skill or of negligence; nor did the fact that the driver did not shout to the driver of the forward car, at least in the absence of evidence that this would have been of service in preventing the injury. *Wynn* v. *Central Park, N. & E. R. R. Co.*, 133 *N. Y.* 575, *mem.*, 30 *N. E. Rep.* 721, 44 *N. Y. S. R.* 673; *reversing* 38 *N. Y. S. R.* 181, 14 *N. Y. Supp.* 172.

Plaintiff was injured by a collision between defendant's car and another. The evidence showed that the morning was foggy and that defendant's car was being driven at a rapid rate, and the driver admitted that he heard the bell of the other car when twenty-five or thirty feet distant. *Held*, sufficient to justify a finding of negligence. *Hourney* v. *Brooklyn City R. Co.*, 27 *N. Y. S. R.* 49, 7 *N. Y. Supp.* 602; *affirmed in* 130 *N. Y.* 641, *mem.*, 29 *N. E. Rep.* 1033, *mem.*, 41 *N. Y. S. R.* 950, *mem.*

Plaintiff was riding on the side step of an open car and was struck and injured by a

car on an adjoining track. The evidence showed that the rails of the two tracks were closer together at the place than was safe, and that the inner rails were somewhat depressed, so as to throw the cars nearer together, of which the company had knowledge. *Held*, that the failure of the company to keep its track in good order was such negligence as to render it liable. *Herdt* v. *Rochester City & B. R. Co.*, 48 *N. Y. S. R.* 46, 20 *N. Y. Supp.* 346.

Plaintiff having hailed a west-bound car, on the north track, in broad daylight, crossed over from the south side of the street to get into it; the east-bound car was coming on the south track at a fast trot, but was some 300 feet away, to the west. Plaintiff was somewhat intoxicated. As he took hold of the west-bound car to board it, he fell, and the east-bound car passed over his foot, which was on the rail. The jury found that there was no negligence on the part of the defendant, and that plaintiff was not guilty of contributory negligence, on which the trial judge entered judgment for the defendant. *Held*, that the attendant or surrounding circumstances were, in the absence of explanatory evidence by the defendant, sufficient to raise the presumption that there was negligence on the part of those in charge of the east-bound car the consequence of which was the happening of the accident, and that there must be a new trial. *Forwood* v. *Toronto*, 56 *Am. & Eng. R. Cas.* 445, 22 *Ont.* 351.

358. Colliding with objects in street.* — Plaintiff was a passenger on a street-car and was injured by a collision with a wagon which was approaching on a cross street at a right angle with the track. The evidence showed that it could have been seen by the driver when 250 feet distant, and that the car could have been stopped in 12 feet. *Held*, that there was sufficient evidence to have submitted the case to the jury, and a nonsuit was error. *Watkins* v. *Atlantic Ave. R. Co.*, 20 *Hun* (*N. Y.*) 237.

Where a passenger is injured by a collision between a coal cart and a horse-car, and it appears that the driver of the cart was compelled to back because of the large load of coal therein, and the car driver attempted to pass by before the cart backed upon the track, the question of negligence should be left to the jury. *Seidlinger* v. *Brooklyn City R. Co.*, 28 *Hun* 503; *affirmed* (?) 97 *N. Y.* 642, *mem.*

Plaintiff was injured, while riding in a street-car, by a collision between the car and a furniture van. The street-car was going very fast and collided with the rear end of the van as it was about to leave the track, and the evidence tended to show that the sole cause of the collision was the failure of the driver to slacken his speed so as to permit the van to pass over the track. *Held*, sufficient to sustain a verdict in favor of the plaintiff. *Franklin* v. *Forty-second St. & G. S. F. R. Co.*, 3 *N. Y. Supp.* 229, 50 *Hun* 605, 21 *N. Y. S. R.* 944; *affirmed in* 121 *N. Y.* 673, *mem.*, 24 *N. E. Rep.* 1095.

Both the car on which plaintiff was riding and an approaching wagon stopped when near each other; but after the wagon had started again the car also started, and the shafts of the wagon struck the side of the car and injured plaintiff. *Held*, that it was error to grant a nonsuit. There was sufficient evidence of negligence to go to the jury. *Devlin* v. *Atlantic Ave. R. Co.*, 32 *N. Y. S. R.* 958, 57 *Hun* 591, *mem.*, 10 *N. Y. Supp.* 848.

Plaintiff testified that he was riding on the front seat of an open car when it was driven with unchecked speed against a horse which was being led away from the track, but which was thrown against plaintiff, causing the injury sued for. This evidence was contradicted by both the conductor and driver of the car. *Held*, that there was not such a preponderance of evidence in favor of the company as to justify a dismissal. A preponderance does not mean the larger number of witnesses, but refers to its weight and character, of which the jurors are the judges. *Walker* v. *Atlantic Ave. R. Co.*, 34 *N. Y. S. R.* 118, 11 *N. Y. Supp.* 742.

A verdict in favor of a passenger, against a street-car company, to recover for personal injuries, is sustained by evidence showing that the car driver drove with such force against a wagon which was standing across the track as to throw plaintiff from the car platform, where he was standing, to the ground, causing the injury. *Fox* v. *Brooklyn City R. Co.*, 27 *N. Y. Supp.* 895, 7 *Misc.* 285.

In an action for a personal injury to a passenger in a street-car, in consequence of a collision at a street crossing between the car and a hook and ladder truck coming

* Passenger on street-car coming in contact with truck in street Liability of company for injury, see 48 AM. & ENG. R. CAS. 49, *abstr.*

from the north, it appeared that the car driver did not look to the north when approaching that street, and that if he had done so he might have seen the truck and have taken measures to avoid it. *Held*, that the question of his negligence was properly submitted to the jury. *Heucke* v. *Milwaukee City R. Co.*, 69 *Wis.* 401, 34 *N. W. Rep.* 243.

359. Failing to provide a conductor. — In the absence of a statute requiring it, a failure to have a conductor on a one-horse car is not negligence. *Lamline* v. *Houston, W. S. & P. F. R. Co.*, 14 *Daly* 144, 6 *N. Y. S. R.* 248.—QUOTING Brooklyn Crosstown R. Co. *v.* Brooklyn, 37 Hun 413.

But the fact that there was no person in charge of the car, aside from the driver, may be considered as a circumstance bearing on the question of the negligence of the company. *Gainard* v. *Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 692, 2 *N. Y. Supp.* 470, 50 *Hun* 22; *affirmed in* 121 *N. Y.* 661, *mem.*, 24 *N. E. Rep.* 1092.

360. Violation of city ordinance.— In the absence of contributory negligence, a carrier of passengers is liable for personal injuries resulting directly from its violation of a city ordinance passed for the safety of passengers. *Fortune* v. *Missouri R. Co.*, 10 *Mo. App.* 252.

361. Injuring passenger who is assisting in moving car.* — A street-car track was blocked by a broken-down van, and plaintiff and other passengers were requested by the conductor to get out, and help "jump" the car around the obstruction. While doing so a car approached from the opposite direction and those in charge tried to move it around the obstruction in the same way, but took the same side of the track on which was the other car, and plaintiff was caught between the two cars and injured. There was nothing to prevent the second car from being moved on the other side of the track. *Held:* (1) that plaintiff was lawfully on the street; (2) that the question of the negligence of the defendant was for the jury; (3) that there was sufficient evidence to sustain a verdict for plaintiff. *Stastney* v. *Second Ave. R. Co.*, 29 *J. & S.* 104, 46 *N. Y. S. R.* 537, 18 *N. Y. Supp.* 800; *affirmed in* 138 *N. Y.* 609, 51 *N. Y. S. R.* 932 33 *N. E. Rep.* 1082.

Plaintiff was a passenger on a car northward bound. The railway was a single track, with occasional side tracks for the passage of cars moving in opposite directions. The north-bound car having been drawn beyond the side track, where it was to have met the south-bound car, it became necessary to push it back to the side track, so that the cars could pass. At the request of the driver of the north-bound car, plaintiff assisted him in pushing the car back. While so engaged, without fault on his part, he was injured by the carelessness of defendant's driver on the south-bound car. *Held:* (1) plaintiff did not engage in the service of defendant as a mere volunteer; (2) under the circumstances plaintiff cannot be considered as a fellow-servant with the driver of the south-bound car; (3) in the case stated the doctrine of *respondeat superior* applies, and plaintiff can recover. *McIntire St. R. Co.* v. *Bolton*, 21 *Am. & Eng. R. Cas.* 501, 43 *Ohio St.* 224, 54 *Am. Rep.* 803, 1 *N. E. Rep.* 333.—REVIEWING Wright *v.* London & N. W. R. Co., 1 Q. B. D. 252.

362. Assaults by employes.*— Where a passenger leaves the car because he is insulted and abused by the driver, and is pursued and beaten by the driver in the street, it must all be regarded as one continuous wrong, and the company is as much liable as if the beating had taken place in its car. *Wise* v. *Covington & C. St. R. Co.*, 91 *Ky.* 537, 16 *S. W. Rep.* 351.—QUOTING Winnegar *v.* Central Pass. R. Co., 85 Ky. 547.

A conductor on a street-car may push a passenger who violently assaults him off the car while it is in motion without rendering the company liable for the injury, if he had reason to believe at the time that this action was necessary to his protection. *Hayes* v. *St. Louis R. Co.*, 15 *Mo. App.* 583.

Plaintiff and a conductor got into a protracted, angry dispute over the amount of change due plaintiff after paying his fare. The conductor claimed that plaintiff had given him but five cents, and plaintiff demanded twenty, saying that he had given twenty-five to the conductor. The evidence showed that plaintiff was angry, excited, violent, and abusive, going on the car platform where the conductor was and again charging that he had kept twenty cents, and threatening to report the conductor to the company. Thereupon the conductor, with-

See also *post*, **382.**

* Assault by street-car driver on passenger. Liability of company for, where contract of carriage has ceased, see 41 AM. & ENG. R. CAS. 39, *abstr.*

out stopping the car, shoved plaintiff off, causing the injuries sued for. *Held*, that there was sufficient to go to the jury as to whether the conductor was acting within the scope of his employment, and a verdict for plaintiff would not be disturbed. *Flynn* v. *Central Park, etc., R. Co.*, 17 *J. & S.* (*N. Y.*) 81.—APPLIED IN Corbett *v.* Twenty-third St. R. Co., 42 Hun 587, 4 N. Y. S. R. 535.

The conductor of a street-car assaulted a passenger while he was on the car. The court charged the jury that "if the conductor of the car assaulted the plaintiff while he was upon the car, he neglected the duty imposed on him by law as the agent or servant of a common carrier, and in the line of his employment he committed an outrage for which the common carrier is responsible." This charge was assigned, *inter alia*, as a reason for a new trial. *Held*, in refusing the rule, that while an employer is not responsible for the wilful, tortious acts, as a general rule, yet in this case the conductor violated a duty and the company was responsible. *Smith* v. *Hestonville, M. & F. R. Co.*, 17 *Phila.* (*Pa.*) 184.

363. Insults and assaults by other passengers. — Where a female passenger sues a street-car company for injuries received at the hands of other passengers who became riotous and fighting, a declaration alleging negligence in the company, both in respect to the failure to have a conductor aboard to preserve order and in respect to the negligence of the driver in failing to suppress the fight or to eject the combatants, is good on demurrer. *Holly* v. *Atlanta St. R. Co.*, 61 *Ga.* 215.

After the driver of a car had informed the conductor that a man was too drunk to ride on the front platform, the conductor took him in the car when he was dirty, ragged, bloody, with his clothes unbuttoned in a indecent manner, and he soon afterward made an unprovoked assault upon another passenger. *Held*, that the company was liable for full compensatory damages, but not for punitive or exemplary damages. *Hendricks* v. *Sixth Ave. R. Co.*, 12 *J. & S.* (*N. Y.*) 8.

In an action to recover for the death of a passenger, it appeared that he was in a car, accompanied by ladies, when a drunken man entered the car and used insulting language toward the ladies. The deceased remonstrated with him, and appealed to the conductor for protection, whereupon the drunken man took offense, and as deceased was leaving the car, grabbed a car hook belonging to the company, and struck him a fatal blow. *Held*, that the fact that the hook belonged to the company would not render it liable, in the absence of any proof of negligence or wrong-doing on the part of the employés. *Putnam* v. *Broadway & S. A. R. Co.*, 15 *Abb. Pr. N. S.* (*N. Y.*) 383.—DISTINGUISHING Scott *v.* Shepherd, 2 W. Bl. 892; Guille *v.* Swan, 19 Johns. (N. Y.) 381; Vandenburgh *v.* Truax, 4 Den. (N. Y.) 464. QUOTING Sharp *v.* Powell, L. R. 7 C. P. 258.

364. Male passenger stepping on female passenger's foot.—A company is not liable to a passenger for an injury received by another passenger stepping on her foot, the passenger committing the injury being somewhat intoxicated, and standing in a car, holding to a strap, swinging or lurching, but not drunk enough to justify his expulsion, though the guard's attention had been called to the man, and he had been requested to find him a seat or put him off. *Thomson* v. *Manhattan R. Co.*, 75 *Hun* 548, 27 *N. Y. Supp.* 608.

And the company is not liable to a female passenger for an injury received while alighting from a car by some one stepping on her foot, caused by a jam of people attempting to get on the car before plaintiff and others had left it, it appearing that the guard had requested those boarding the train to wait until those getting off had left it, and that the accident was unintentional. *Thomson* v. *Manhattan R. Co.*, 75 *Hun* 548, 27 *N. Y. Supp.* 608.

365. Liability of lessors and lessees of road.—A company cannot, without the authority of the legislature, transfer its property and franchises, and notwithstanding an unauthorized transfer, it will remain liable for injuries to passengers upon the cars operated by the transferee. *Ricketts* v. *Birmingham St. R. Co.*, 37 *Am. & Eng. R. Cas.* 12, 85 *Ala.* 600, 5 *So. Rep.* 353. — DISTINGUISHED IN Arrowsmith *v.* Nashville & D. R. Co., 57 Fed. Rep. 165.

A passenger may recover for personal injuries occasioned by the negligence of a corporation which is transporting him on a railway which it has leased unlawfully, but is using and maintaining without objection from its owners or the commonwealth. *Feital* v. *Middlesex R. Co.*, 109 *Mass.* 398, 6 *Am. Ry. Rep.* 300.

Where a corporation seeks to escape from the burdens imposed upon it by the legislature, clear evidence of the legislative assent to such exoneration should be found. *So held*, where a street-car company attempted to avoid liability to an injured passenger because its track was leased. *Braslin* v. *Summerville Horse R. Co.*, 32 *Am. & Eng. R. Cas.* 406, 145 *Mass.* 64, 4 *N. Eng. Rep.* 888, 13 *N. E. Rep.* 65.

The owner of a pleasure resort and street railway leading to it does not, by leasing the privilege of operating a switchback railway at the resort, and advertising it as one of the attractions of the place, become an insurer against accidents to persons patronizing the lessee, or become liable for his carelessness. *Knottnerus* v. *North Park St. R. Co.*, 93 *Mich.* 348, 53 *N. W. Rep.* 529.

366. Injuring passengers while getting on cars.* — (1) *Duty to stop a reasonable time.*—It is the duty of a company to stop its car a sufficient length of time to enable persons seeking passage to get fully and safely on the same. And it will be liable to a party injured by a failure properly to discharge such duty. *North Chicago St. R. Co.* v. *Cook*, 145 *Ill.* 551, 33 *N. E. Rep.* 958. *Black* v. *Brooklyn C. R. Co.*, 13 *N. Y. S. R.* 645, 1 *Silv. App.* 580.

And the duty devolving on those in charge of the car to give ample time for safely mounting is not limited to the person or persons who may have signaled the car, but includes others who are near by, and desire to take passage. *Joliet St. R. Co.* v. *Duggan*, 45 *Ill. App.* 450.

Where the allegation was that plaintiff was injured by the careless and negligent starting of defendant's car, an instruction defining defendant's duty upon the theory that the car was in motion when plaintiff got hold of it is inapplicable, yet where appellant's asked instructions contained a similar fault he cannot be heard to complain. *Meriwether* v. *Kansas City Cable R. Co.*, 45 *Mo. App.* 528.

Where a street-car is under the control of a conductor, it is his duty to see that a passenger who is lawfully entering the car is in a place of safety before giving the signal to the driver to proceed. *Akersloot* v. *Second Ave. R. Co.*, 4 *Silv. App.* 71, 43 *N. Y. S. R.* 290, 31 *N E. Reb.* 626, *mem.*; *affirming* 56 *Hun* 640, 8 *N. Y. Supp.* 926, 30 *N. Y. S. R.* 146.

(2) *Starting car with a sudden jerk.*—The carrier must allow a passenger a reasonable time to get on and off the car, and if, in doing so, the car is started suddenly and so as to produce a jerking motion, it is in and of itself an act of negligence, and will render the company liable. *Gainard* v. *Rochester City & B. R. Co.*, 50 *Hun* 22, 18 *N. Y. S. R.* 692, 2 *N. Y. Supp.* 470; *affirmed in* 121 *N. Y.* 661, *mem.*, 24 *N. E. Rep.* 1092. *Maher* v. *Central Park, N. & E. R. R. Co.*, 7 *J. & S.* (*N. Y.*) 155; *affirmed in* 67 *N. Y.* 52. *Morison* v. *Broadway & S. A. R. Co.*, 28 *N. Y. S. R.* 498, 8 *N. Y. Supp.* 436, 55 *Hun* 608, *mem.*; *affirmed in* 130 *N. Y.* 166, 41 *N. Y. S. R.* 248, 29 *N. E. Rep.* 105.—DISTINGUISHING Hayes *v.* Forty-second St. & G. S. F. R. Co., 97 N. Y. 259.—*Sahlgaard* v. *St. Paul City R. Co.*, 48 *Minn.* 232, 51 *N. W. Rep.* 111.

And the fact that the driver had been instructed to hurry on and not take any other passengers, which fact is unknown to plaintiff, will not excuse a sudden start. *Conner* v. *Citizens' St. R. Co.*, 26 *Am. & Eng. R. Cas.* 210, 105 *Ind.* 62, 55 *Am. Rep.* 177, 4 *N. E. Rep.* 441.

Nor the fact that the signal for starting was given by an unauthorized person. *North Chicago St. R. Co.* v. *Cook*, 145 *Ill.* 551, 33 *N. E. Rep.* 958.

Plaintiff sued for personal injuries received, as she claimed, through the negligence of the conductor in suddenly starting the car before she had time to get on. The company denied its liability on the ground that she attempted to get on the car while it was in motion. *Held*, that the questions whether the car was negligently started and whether plaintiff exercised proper care were for the jury. *Van de Venter* v. *Chicago City R. Co.*, 26 *Fed. Rep.* 32.

Plaintiff and his wife testified that he had signaled to the driver, and the car had come to a full stop, but suddenly started as he was stepping on, throwing him down and injuring him. Other witnesses for plaintiff testified that the car had not stopped, but had slackened its speed so that persons could enter it without risk. Defendant's witnesses testified that it had neither stopped nor slackened its speed, but was moving at an ordinary rate. *Held*, that the questions of negligence and contributory negligence were for the jury. *Seits* v.

* Injuries to passengers getting on street-cars, see note, 26 AM. & ENG. R. CAS 216.

Dry Dock, E. B. & B. R. Co., 16 *Daly* 264, 10 *N. Y. Supp.* 1, 32 *N. Y. S. R.* 56.

In an action against a street-railway company to recover damages for personal injuries, it is proper to submit the case to the jury where testimony on behalf of the plaintiff, an elderly woman, although contradicted, tended to show that she entered a street-car from the front platform on the invitation of the driver and before she was able to take her seat the car was started with a jerk and plaintiff was thrown and injured. *Holmes* v. *Allegheny Traction Co.*, 153 *Pa. St.* 152, 25 *Atl. Rep.* 640.

In such a case it is improper to ask an expert witness for defendant this question: "State what your experience is with relation to motion given to cars when starting, as affecting the passengers, either seated or standing." *Holmes* v. *Allegheny Traction Co.*, 153 *Pa. St.* 152, 25 *Atl. Rep.* 640.

There was evidence tending to show that the driver stopped the coach to receive a passenger; that the coach was crowded and all the seats in it were occupied; and that, immediately after she had got in, and when she was standing within the door, she was thrown out of the coach by its violent jerk at starting. *Held*, that there was some evidence in favor of plaintiff to go to the jury. *Geddes* v. *Metropolitan R. Co.*, 103 *Mass.* 391.

Plaintiff testified that the car on which she wished to take passage had stopped, and when she had placed one foot on the step, and was in the act of raising herself, the car started with a jerk and she was thrown violently to the ground. Her evidence was sustained by other witnesses, who testified that the car had stopped before she attempted to get on; but this was denied by the evidence of the conductor and other witnesses for the defendant. *Held*, that this presented a question for the jury, and their verdict was conclusive. *McSwyny* v. *Broadway & S. A. R. Co.*, 27 *N. Y. S. R.* 363, 54 *Hun* 637, 4 *Silv. Sup. Ct.* 495, 7 *N. Y. Supp.* 456.

In such case it was not a controlling circumstance whether the car was started by the conductor or the driver, if it was done while plaintiff was attempting to get on. By whomsoever it may have been put in motion, it was negligence to start it so as to throw plaintiff from the step. *McSwyny* v. *Broadway & S. A. R. Co.*, 27 *N. Y. S. R.* 363, 54 *Hun* 637, 4 *Silv. Sup. Ct.* 495, 7 *N. Y. Supp.* 456.

Though a street-car passenger sues to recover for injuries caused by the alleged negligence of the driver while she was getting on the car, yet where it is sought to show the incompetency of the driver generally, it is competent to prove his acts in suddenly starting the car after the accident, when she was about to get off. *Fuller* v. *Jamestown St. R. Co.*, 75 *Hun* 273, 26 *N. Y. Supp.* 1078.

Plaintiff was upon the rear platform and about to enter a street-car when the driver whipped up to avoid a collision with a runaway horse and carriage. The abrupt jolt communicated to the car threw plaintiff to the ground, when she was immediately struck by the runaway and injured. *Held*, that the court, upon request, should have instructed the jury that, even if the car driver was guilty of negligence, such negligence was not the proximate cause of the injury and plaintiff could not recover. *South Side Pass. R. Co.* v. *Trich*, 34 *Am. & Eng. R. Cas.* 549, 117 *Pa. St.* 390, 10 *Cent. Rep.* 367, 11 *Atl. Rep.* 627, 20 *W. N. C.* 324.

Plaintiff approached an open street-car from the rear as it stopped, without signaling the conductor or driver, and as he stepped on the running step at the side, the car started, and plaintiff was carried against a wagon which he had seen in the street about fifteen feet in advance of the car. There was no evidence that the conductor or driver saw either the truck or plaintiff, or perceived the danger. *Held*, that a nonsuit was properly allowed. *Littmann* v. *Dry Dock, E. B. & B. R. Co.*, 55 *N. Y. S. R.* 514, 25 *N. Y. Supp.* 1002.—FOLLOWING Moylan *v.* Second Ave. R. Co., 128 N. Y. 583, 37 N. Y. S. R. 871.

(3) *Where driver does not see the passenger.*—An instruction that it was the business of a company to know before starting up the car whether passengers were in a position to be injured, and that it would be negligence to start the car suddenly under such circumstances without exercising every precaution for the safety of those that might be getting off or on, is not erroneous, where it appeared that the person injured was sitting alongside of the gripman, in his immediate view, in alighting had one foot on or near the ground and the other upon the lower step, and was holding on to the stanchion when the gripman suddenly started the car. *Tobin* v. *Omnibus Cable*

Co., (*Cal.*) 58 *Am. & Eng. R. Cas.* 223, 34 *Pac. Rep.* 134.

There being no evidence that the driver had any knowledge of the purpose of plaintiff's wife to get on the car as a passenger, nor any evidence to charge defendant by reason of such purpose or intention on her part, a prayer that there was no evidence from which defendant could be charged with any responsibility on the ground that plaintiff's wife was to become a passenger on the car in question ought to have been granted. *Baltimore City Pass. R. Co.* v. *Wilkinson*, 30 *Md.* 224.

If a car driver sees a signal by an intending passenger and stops the car, but starts it again while the passenger is getting on, the company is chargeable with negligence; but if the driver exercised the care required of him by law, but did not see the passenger, and had no knowledge that she was in the act of getting on the car, then the company is not liable for an injury that results. *Lamline* v. *Houston, W. S. & P. F. R. Co.*, 14 *Daly* 144, 6 *N. Y. S. R.* 248.

A car driver, in looking out for persons desiring to become passengers, is bound to exercise ordinary care which a person ought to observe under the circumstances of the case, which means that degree of care which a person of ordinary prudence is presumed to exercise under the particular circumstances. *Lamline* v. *Houston, W. S. & P. F. R. Co.*, 14 *Daly* 144, 6 *N. Y. S. R.* 248.

Where the only negligence imputed to the defendant is the act of its driver in starting the car while plaintiff was stepping on the platform and before she had time to enter the car, it is error to refuse defendant's request to charge that, if the driver was properly engaged in attending to some other duty at the moment when plaintiff came to the car, and he thereby failed to see her, he could not be said to be negligent, and defendant would not be liable. *Gainard* v. *Rochester City & B. R. Co.*, 7 *N. Y. S. R.* 103.

(4) *Where passenger is encumbered with packages.*—Plaintiff's intestate, a man extremely stout in proportion to his height, about forty-five years of age, and accustomed to use cars daily, while encumbered by packages, one in each hand, attempted to board one of defendant's cars which was moving at a rate of more than six miles an hour, and was killed. *Held*, that defendant was not liable unless, discovering the peril of deceased, it failed to use proper diligence in endeavoring to avert the injury. *Baltimore Traction Co.* v. *State*, 58 *Am. & Eng. R. Cas.* 200, 78 *Md.* 409, 28 *Atl. Rep.* 397.

If the car was moving too rapidly for a person encumbered as the deceased was to attempt to board it, there was no duty on the part of defendant's agent to notify him not to make the effort. *Baltimore Traction Co.* v. *State*, 58 *Am. & Eng. R. Cas.* 200, 78 *Md.* 409, 28 *Atl. Rep.* 397.

(5) *Where another passenger gives signal to start.*—A street-car company cannot relieve itself of the high degree of care which it owes its passengers by showing that plaintiff was injured, when about to get on the car, through its premature starting in obedience to a signal given by another passenger. It is a sufficient answer to such a defense that the bell cord was so arranged that a passenger could give the signal. *North Chicago St. R. Co.* v. *Cook*, 43 *Ill. App.* 634; *affirmed in* 145 *Ill.* 551, 33 *N. E. Rep.* 958.

(6) *Unavoidable accident.*—In attempting to get on a car, plaintiff fell and was dragged some distance before the car was stopped. It appeared that there was snow on the ground and the car was on a down grade. There was some evidence tending to show that the cars would sometimes slide on the track in winter after the brakes were set, and the driver testified that he did set the brakes and hold the horses, but the car slid on the track, but other witnesses contradicted this. *Held*, that a charge that it must be taken as established that the cars would slide on a down grade in winter and be beyond the control of the driver was misleading, as it tended to convey the idea that it was established that the cars did slide at the particular time in question. *Woodard* v. *West Side St. R. Co.*, 34 *Am. & Eng. R. Cas.* 472, 71 *Wis.* 625, 38 *N. W. Rep.* 347.

367. While getting off.* — (1) *Generally.*—When the driver of a street-car has been notified that a passenger desires to get off at a certain house, and has agreed to stop the car at such place, an instruction that if the passenger, when near the place, undertook to get off the car while it was going slowly, the driver having no notice of his intention, he could not recover for a

*Injury to street-car passenger while alighting, caused by sudden starting of car, see 44 AM. & ENG. R. CAS. 423, *abstr*; 52 *Id.* 555, *abstr.*

personal injury, although the car started forward as he was stepping off, which threw him to the ground, is properly refused. *Chicago City R. Co.* v. *Mumford*, 3 *Am. & Eng. R. Cas.* 312, 97 *Ill.* 560.

Where street-car tracks are in close proximity, the running of a car or train of cars in one direction at a rapid speed, without signal or warning, over a sidewalk crossing, while a car or train bound in the opposite direction is discharging passengers at such crossing, and where the view of the approaching train is obstructed by the standing cars from which the person injured has just alighted, is such conduct as fairly tends to prove culpable negligence, even though the rate of speed of the approaching train does not exceed that allowed by ordinance; and it cannot be said, as matter of law, that such conduct is not negligence. *Chicago City R. Co.* v. *Robinson*, 36 *Am. & Eng. R. Cas.* 66, 127 *Ill.* 9, 4 *L. R. A.* 126, 18 *N. E. Rep.* 772; *affirming* 27 *Ill. App.* 26.

Notice to a conductor by a passenger that she wishes to stop at a certain place does not impose upon him the absolute duty of giving her express notice of the stoppage of the car at that place, or require any other action on his part than to stop for a reasonable time, in order to relieve the company from liability for an injury which she received by the starting of the car while she was getting off after a reasonable stop, the conductor thinking that she did not intend to get off. *Robinson* v. *Northampton St. R. Co.*, 157 *Mass.* 224, 32 *N. E. Rep.* 1.

Passengers have a right to assume that the car will not be started, after it has stopped to allow passengers to alight, until the driver has used reasonable care and diligence to ascertain whether any passenger is in the act of alighting, and that when the car is started it will be with reasonable care, and not in a sudden and violent manner. *Britton* v. *Grand Rapids St. R. Co.*, 90 *Mich.* 159, 51 *N. W. Rep.* 276. See *Finn* v. *Valley City St. & C. R. Co.*, 86 *Mich.* 74, 48 *N. W. Rep.* 696.

A passenger, on leaving a train at a street-railway station, remains a passenger while he is passing to the sidewalk in so far that he is entitled to protection against the negligent movement of the company's trains on an adjacent track. *Burbridge* v. *Kansas City Cable R. Co.*, 36 *Mo. App.* 669.—DISTINGUISHING Hurt *v.* St. Louis, I. M. & S. R. Co., 94 Mo. 255.

Passengers are not obliged to leave a car until it has been brought to a standstill; and have a right to insist upon that. *Saffer* v. *Dry Dock, E. B. & B. R. Co.*, 24 *N. Y. S. R.* 210, 53 *Hun* 629, 2 *Silv. Sup. Ct.* 343, 5 *N. Y. Supp.* 700.

The duty of the driver of a street-car, upon receiving a signal, to stop in order to let a passenger off is a matter of law. His practice on such occasions is irrelevant to the issue in an action for injuries to a passenger alleged to have been caused by the driver's failure to stop the car a sufficient length of time. *Hinton* v. *Cream City R. Co.*, 65 *Wis.* 323, 27 *N. W. Rep.* 147.

(2) *Duty to stop a reasonable time.*— A railway company being bound to deliver a passenger, its failure to stop long enough to enable him to alight with safety is a neglect of duty which involves liability for injuries therefrom. *Washington & G. R. Co.* v. *Harmon*, 58 *Am. & Eng. R. Cas.* 380, 147 *U. S.* 571, 13 *Sup. Ct. Rep.* 557. *Wardle* v. *New Orleans City R. Co.*, 13 *Am. & Eng. R. Cas.* 60, 35 *La. Ann.* 202.—REVIEWING Poulin *v.* Broadway & S. A. R. Co., 61 N. Y. 621, mem.—*Poulin* v. *Broadway & S. A. R. Co.*, 61 *N. Y.* 621; *affirming* 2 *J. & S.* 296.—FOLLOWED IN Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465. REVIEWED IN Wardle *v.* New Orleans City R. Co., 13 Am. & Eng. R. Cas. 60, 35 La. Ann. 202.

Passengers upon street-cars are entitled to sufficient time in which to get off, and the duty of the carrier is not discharged until the passenger is free from the car. *Finn* v. *Valley City St. & C. R. Co.*, 86 *Mich.* 74, 48 *N. W. Rep.* 696.

(3) *Sudden starts.*—Where the driver of a street-car has been notified by a passenger to stop the car, and does so, or partially, and then starts again without notice, he is chargeable with negligence. *Nichols* v. *Sixth Ave. R. Co.*, 38 *N. Y.* 131; *affirming* 10 *Bosw.* 260.—APPLIED IN Medler *v.* Atlantic Ave. R. Co., 36 N. Y. S. R. 89, 12 N. Y. Supp. 930.—*Munroe* v. *Third Ave. R. Co.*, 18 *J. & S.* (*N. Y.*) 284. *Schrieber* v. *Twenty-third St. R. Co.*, 10 *N. Y. S. R.* 441, 45 *Hun* 592. *Augusta & S. R. Co.* v. *Randall*, 34 *Am. & Eng. R. Cas.* 439, 79 *Ga.* 304, 4 *S. E. Rep.* 674. *Chicago City R. Co.* v. *Mumford*, 3 *Am. & Eng. R. Cas.* 312, 97 *Ill.* 560. *Chicago W. D. R. Co.* v. *Mills*, 11 *Am. & Eng. R. Cas.* 128, 105 *Ill.* 63. *Piper* v. *Minneapolis St. R. Co.*, 52 *Minn.* 269, 53 *N. W. Rep.* 1060.

The question of negligence in failing to stop a street-car long enough for a passenger to get off is for the jury. *Augusta & S. R. Co.* v. *Randall*, 34 *Am. & Eng. R. Cas.* 439, 79 *Ga.* 304, 4 *S. E. Rep.* 674.

Plaintiff indicated his wish to alight at the place where the car was then stopping, by requesting the driver to keep on the brake. The driver replied "Yes, sir," but instead of suffering the car to remain stationary until plaintiff should alight, he turned the brake and set the car in motion, thereby precipitating plaintiff (who was in the act of alighting) from the car into the street, causing an injury. *Held*, that if the jury believed the evidence, they were justified in finding the driver guilty of negligence; and that it was not the province of the court to discredit it and nonsuit plaintiff. *Mulhado* v. *Brooklyn City R. Co.*, 30 *N. Y.* 370.

It is error to submit to the jury the question as to a company's negligence causing a passenger to fall off by an alleged sudden jerk or jolting of the car while he was preparing to alight, in the absence of any affirmative proof by him as to what caused the jolting, or that the conductor or driver neglected any duty except to stop the car when first signaled. *Bradley* v. *Ft. Wayne & E. R. Co.*, 94 *Mich.* 35, 53 *N. W. Rep.* 915.

Plaintiff testified that the car on which he was riding came to a stop and that he followed another passenger out as closely as possible, but as he was in the act of stepping off, the car suddenly started and threw him into the street. Two witnesses for the defendant testified that the car stopped to let the other passenger off, but had started up again before plaintiff went out, and that he fell in jumping off. This evidence was corroborated to some extent by a witness for plaintiff, who testified that he did not see him fall, but saw him picked up ten or fifteen feet from where the car had stopped. *Held*, that there was such a preponderance of evidence against plaintiff as to justify the court in setting aside a verdict in his favor. *Kinsley* v. *Brooklyn Crosstown R. Co.*, 1 *N. Y. S. R.* 560, 41 *Hun* 643.

Where the action is for injuries caused by the negligence of a conductor in starting a car without warning plaintiff, who was in the act of alighting, it is error to charge the jury, "If you find from the evidence that this plaintiff was in the act of getting off, or had left her seat for any purpose, and the car started and she was thrown, the conductor had no right to start it without giving her warning to take her seat, or an opportunity to get her seat." *Losee* v. *Watervliet T. & R. Co.*, 44 *N. Y. S. R.* 343, 63 *Hun* 404, 18 *N. Y. Supp.* 297.—DISTINGUISHING McDonald *v.* Long Island R. Co., 116 N. Y. 546, 27 N. Y. S. R. 481.

The testimony of several witnesses for plaintiff tended to show that while she was attempting to alight from the car she was thrown to the ground and injured, by reason of the car starting before she had sufficient time to free herself from it. On the part of defendant there was evidence that she had alighted from the car and was entirely separate from it before it started. *Held*, that the evidence was sufficient to support a verdict for plaintiff. *Durfee* v. *Johnstown, G. & K. Horse R. Co.*, 71 *Hun* 279, 24 *N. Y. Supp.* 1016, 54 *N. Y. S. R.* 526.

Plaintiff and two other witnesses testified that the car was suddenly started while plaintiff was in the act of stepping off, causing her to fall. The conductor, driver, and four other witnesses testified for the defendant that the car did not stop at all, not even after plaintiff fell; that she stepped off while the car was in motion. There was evidence in the case that the conductor reported at the end of the trip that he stopped the car after the accident. *Held*, sufficient evidence to support a verdict for plaintiff. *Fitton* v. *Brooklyn City R. Co.*, 25 *N. Y. S. R.* 948, 5 *N. Y. Supp.* 641; *affirmed in* 127 *N. Y.* 650, *mem.*, 27 *N. E. Rep.* 856, *mem.*

Where plaintiff testifies that the accident occurred by reason of the car being started too soon, it is error to instruct the jury that they may consider the construction of the car as bearing on the question of defendant's negligence. *Lombard & S. St. Pass. R. Co.* v. *Christian*, 124 *Pa. St.* 114, 23 *W. N. C.* 273, 16 *Atl. Rep.* 628.

(4) *When a question for jury.*—Where there is evidence tending to prove that the car was negligently started, the question is for the jury. *Chicago W. D. R. Co.* v. *Mills*, 11 *Am. & Eng. R. Cas.* 128, 105 *Ill.* 63.

Where a plaintiff testifies that a street-car did actually move while he was attempting to alight, and that such movement threw him to the ground, causing the injury for which suit is brought, the question of the probability or possibility of the move-

ment of the car is for the jury, and not for the court. *Finn* v. *Valley City St. & C. R. Co.*, 86 *Mich.* 74, 48 *N. W. Rep.* 696.

Where a passenger sues for an injury caused by a sudden start before he is completely off the car, it is error to charge the jury that if the car suddenly started forward, at the will of the driver, and plaintiff was, by reason of the jerk, thrown to the ground and injured, the defendant was liable. The question whether the company was guilty of negligence in starting the car was for the jury. *West End & A. St. R. Co.* v. *Mozely*, 79 *Ga.* 463, 4 *S. E. Rep.* 324.—DISTINGUISHED IN Central R. & B. Co. *v.* Neighbors, 83 Ga. 444, 10 S. E. Rep. 115.

Plaintiff testified that while he was standing on the step of defendant's car, expecting it to slack up and stop, it increased its speed and threw him off and against a cart. The conductor and a passenger testified for defendant that the car was passing over a curve at a corner and diminishing its speed; that plaintiff stepped off while the car was in motion, and ran against the cart. *Held*, that it was for the jury to decide which they would believe. *Saffer* v. *Dry Dock, E. B. & B. R. Co.*, 24 *N. Y. S. R.* 210, 53 *Hun* 629, 2 *Silv. Sup. Ct.* 343, 5 *N. Y. Supp.* 700. —REVIEWING Maher *v.* Central Park, N. & E. R. R. Co., 67 N. Y. 52; Eppendorf *v.* Brooklyn City & N. R. Co., 69 N. Y. 195; Solomon *v.* Manhattan R. Co., 31 Hun 5.

Plaintiff and another passenger testified that plaintiff twice notified the driver to stop, and, when the horses came to a slow walk, stepped upon the side step of the car, when the driver released the brake and struck the horse, thereby causing a sudden jerk which threw plaintiff off. The driver denied releasing the brake or striking the horse. *Held*, that the cause was a proper one for the jury, and that a verdict for plaintiff would not be disturbed. *Medler* v. *Atlantic Ave. R. Co.*, 36 *N. Y. S. R.* 89, 12 *N. Y. Supp.* 930; *affirmed in* 126 *N. Y.* 669, *mem.*, 37 *N. Y. S. R.* 963, 27 *N. E. Rep.* 854. —DISTINGUISHING Hayes *v.* Forty-second St. & G. S. F. R. Co., 97 N. Y. 259.

(5) *In letting off a crippled or infirm person.*—The fact that a passenger is evidently crippled, infirm, or young is a circumstance which must be regarded by a carrier in the performance of its duty to stop a car a sufficient length of time to give the passenger a reasonable opportunity to alight in safety. *Ridenhour* v. *Kansas City Cable R. Co.*, 102 *Mo.* 270, 13 *S. W. Rep.* 889, 14 *S. W. Rep.* 760.

(6) *Duty of driver or conductor to know if passengers are off before starting.*—It is the duty of the driver of a horse-car, when signaled to stop, not only to stop a reasonable time for passengers to alight, but to see and know, before starting again, that no one is in the act of alighting, or in any other perilous condition. *Birmingham Union R. Co.* v. *Smith*, 90 *Ala.* 60, 8 *So. Rep.* 86. *Metropolitan R. Co.* v. *Jones*, 1 *App. Cas.* (*D. C.*) 200. *Chicago W. D. R. Co.* v. *Mills*, 11 *Am. & Eng. R. Cas.* 128, 105 *Ill.* 63. *North Chicago St. R. Co.* v. *Cook*, 145 *Ill.* 551, 33 *N. E. Rep.* 958.

In cases of injuries to passengers alighting from street-cars, caused by the premature starting of the car, the question of the negligence of the company or contributory negligence of the passenger ultimately depends upon whether the car was started when the passenger was in the act of getting off under such circumstances that with due regard to his safety the employés of the company could and would have discovered that he was in the act of alighting before the car started. *Tobin* v. *Omnibus Cable Co.*, (*Cal.*) 58 *Am. & Eng. R. Cas.* 223, 34 *Pac. Rep.* 124.

368. Duty to let a woman off who places a child on car. — Whether a person who attends a child in boarding a street-car, for the purpose of placing on the car small packages which the child is to have in charge, has frequently before done the same thing at the same place when the same driver of the car was on duty, is admissible evidence as tending to show that the person intended to get off after depositing the packages, as she had done on the previous occasions, and did not intend to remain, so as to justify the driver in starting the car suddenly while she was getting off. *Houston* v. *Gate City St. R. Co.*, 89 *Ga.* 272, 15 *S. E. Rep.* 323.

It being the duty of the driver to take notice of all persons entering the car, his knowledge that plaintiff did enter it in this instance might be inferred; and if he knew that she had withdrawn from the car and alighted in numerous previous instances under like circumstances, it could be inferred that he knew or ought to have known that such was her intention on the occasion in question. *Houston* v. *Gate City St. R. Co.*, 89 *Ga.* 272, 15 *S. E. Rep.* 323.

369. Duty to discharge passenger at proper place. — It is the duty of a company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose; yet if the place be safe for a passenger to get off while the car is at rest, the company is not responsible for any peril which the passenger incurs, without its fault, from attempting to alight after the stoppage has terminated and the car has been put in motion, provided a reasonable time for alighting was allowed while the car was at rest, and the conductor did not know that the particular passenger intended to get off at that place, and did not see him attempting to get off in time to warn or prevent him from so doing while the car was in motion. *Augusta R. Co.* v. *Glover*, 58 *Am. & Eng. R. Cas.* 269, 92 *Ga.* 132, 18 *S. E. Rep.* 406.

A conductor of a street-car is bound to know where, under the circumstances, it is prudent to stop the car, and to bring a passenger upon the platform to get off. *Maverick* v. *Eighth Ave. R. Co.*, 36 *N. Y.* 378.—APPLYING Bowen *v.* New York C. R. Co., 18 N. Y. 408; Deyo *v.* New York C. R. Co., 34 N. Y. 9.—QUOTED IN Griffith *v.* Utica & M. R. Co., 43 N. Y. S. R. 835. REVIEWED IN Schuler *v.* Third Ave. R. Co., 48 N. Y. S. R. 663.

370. Liability where car stops, but not to let off passengers.—When a car stops because of an obstruction on the track, and not to afford passengers an opportunity to get off, the company is not responsible for the safety of the place as one for getting off, whether the car, at the time the passenger undertakes to do so, be in motion or at rest, the conductor not seeing the passenger or being aware of his purpose at the time the attempt to get off is made. *Augusta R. Co.* v. *Glover*, 58 *Am. & Eng. R. Cas.* 269, 92 *Ga.* 132, 18 *S. E. Rep.* 406.

When a car stops at a place where the conductor makes his report, and a passenger attempts to get off without notice of such intention, and it does not appear that such place is one where passengers usually get on and off, or that those in charge know that persons are actually getting off, and they start the car, whereby a passenger is thrown and injured, the company will not be chargeable with negligence in starting the car. The passenger, before attempting to get off, should know that the stoppage is for the purpose of letting persons off, or make his intention to get off known. *Chicago W. D. R. Co.* v. *Mills*, 91 *Ill.* 39.

371. Where conductor adds to injury in effort to save passenger.—A female passenger was about to alight from a street-car, when, at a signal given by the conductor, the car started, and the conductor, seeing the passenger about to fall, reached out to save her, but instead struck her in such a way as to add to the force of the fall. In a suit against the company a motion was made to set aside a verdict for the plaintiff on the ground that the company was not liable for any increased injury resulting from the act of the conductor in thus striking her. *Held*, not sufficient ground for disturbing the verdict. *Macer* v. *Third Ave. R. Co.*, 15 *J. & S.* (*N. Y.*) 461.—FOLLOWING Chapman *v.* New Haven R. Co., 19 N. Y. 341; Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Pollett *v.* Long, 56 N. Y. 201; Slater *v.* Mersereau, 64 N. Y. 138; Sauter *v.* New York C. & H. R. R. Co., 66 N. Y. 50. REVIEWING Sheridan *v.* Brooklyn City & N. R. Co., 36 N. Y. 39.

372. Where conductor pulls passenger down after getting off cars. —Where a passenger is thrown down by the conductor holding on to him after he has left the car, and after it has started, he may recover from the company for any injuries received. *Bonney* v. *Bushwick R. Co.*, 1 *How. Pr. N. S.* (*N. Y.*) 66.

d. Contributory Negligence.*

373. In general.—The responsibility of a company for the safe carriage of passengers rests upon contract, and while the law casts certain duties upon the company, there is a corresponding obligation upon the passenger to observe the reasonable regulations of the company in entering, occupying, and leaving the cars, and for the consequences of a breach thereof the company is not responsible. *Baltimore City Pass. R. Co.* v. *Wilkinson*, 30 *Md.* 224.

There is no rule of law that forces a passenger upon a street-car to rush for the steps of the platform as soon as the car stops, or that forbids his giving precedence to a lady, or to others more infirm than himself. *Britton* v. *Grand Rapids St. R. Co.*, 90 *Mich.* 159, 51 *N. W. Rep.* 276.

* Contributory negligence of passengers on street-cars, see note, 48 AM. & ENG. R. CAS. 55.

It is the duty of a passenger getting on a street-car to place himself in as safe a position thereon as he is able to obtain, and it is no excuse on his part for placing himself in an unsafe one that the persons in charge know that he is unsafe and do not drive him therefrom, when the danger is equally well known to him. *Ward* v. *Central Park, N. & E. R. R. Co.*, 1 *J. & S.* (*N. Y.*) 392, 42 *How. Pr.* 289, 11 *Abb. Pr. N. S.* 411.—FOLLOWING Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135; Solomon *v.* Central Park, N. & E. R. R. Co., 1 Sweeny 298.

374. Care of passenger on street-car not so great as when on steam car. — Standing upon the platform of a street-car is not such an exposure to danger as standing upon the platform of a steam-railroad car, especially when no notice is given not to stand there. *Augusta & S. R. Co.* v. *Renz*, 55 *Ga.* 126.

An act which would amount to gross negligence in getting upon a train drawn by steam might be prudent if done on a horse-car when the latter is not in rapid motion. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.—QUOTING Germantown Pass. R. Co. *v.* Walling, 97 Pa. St. 55.

The rules applicable to persons getting on and off steam-cars are not to be applied in full force to railways operated by horse power. If a person has the free use of his faculties and limbs, and has given proper notice of his desire to be taken up, the car having slackened its speed, it is not negligence for him to attempt to get on while it is moving slowly. *Conner* v. *Citizens' St. R. Co.*, 26 *Am. & Eng. R. Cas.* 210, 105 *Ind.* 62, 55 *Am. Rep.* 177, 4 *N. E. Rep.* 441.

The same rule of care governing travelers approaching railroad crossings does not apply to those approaching street-railway crossings. *Muncie St. R. Co.* v. *Maynard*, 5 *Ind. App.* 372, 32 *N. E. Rep.* 343.

375. When contributory negligence not a defense.*—Though a person driving on a street may be careless in failing to observe the approach of a car, still, if the driver urges his car forward at an unusual rate of speed when by reasonable diligence the party might have been discovered and the car stopped, the company is liable for any injury that is caused by a collision. *Citizens' St. R. Co.* v. *Steen*, 19 *Am. & Eng. R. Cas.* 30, 42 *Ark.* 321.

A plaintiff may recover, notwithstanding his own negligence exposed him to injury, if the defendant, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid the injury. *Healey* v. *Dry Dock, E. B. & B. R. Co.*, 14 *J. & S.* (*N. Y.*) 473. *Central Pass. R. Co.* v. *Rose*, (*Ky.*) 22 *S. W. Rep.* 745. *Cawfield* v. *Asheville St. R. Co.*, 111 *N. Car.* 597, 16 *S. E. Rep.* 703. *Woodard* v. *West Side St. R. Co.*, 34 *Am. & Eng. R. Cas.* 472, 71 *Wis.* 625, 38 *N. W. Rep.* 347.

Contributory negligence will not avail as a defense where injuries to a horse-car passenger are caused by her precipitately rising from her seat upon seeing the defendant's steam-car approach, improperly propelled. *Holzab* v. *New Orleans & C. R. Co.*, 38 *La. Ann.* 185.

When a passenger in a horse-car has been injured by the carelessness of the engineer of a railroad company in the management of his locomotive, it is no defense to show contributory negligence in the driver of the horse-car. *Bennett* v. *New Jersey R. & T. Co.*, 36 *N. J. L.* 225, 12 *Am. Ry. Rep.* 79. — DISAPPROVING Thorogood *v.* Bryan, 8 C. B. 116. FOLLOWING Chapman *v.* New Haven R. Co., 19 N. Y. 341; Webster *v.* Hudson River R. Co., 38 N. Y. 260. NOT FOLLOWING Lockhart *v.* Lichtenthaler, 46 Pa. St. 152.

376. Passenger may assume that car will be properly managed. — Where a car has stopped, and the driver knows that a passenger is in the act of getting on, the latter has a right to assume that the car will not start until she has gained the platform, and having acted upon that assumption, negligence cannot be imputed to her. *Gainard* v. *Rochester City & B. R. Co.*, 50 *Hun* 22, 18 *N. Y. S. R.* 692; *affirmed in* 121 *N. Y.* 661, *mem*, 24 *N. E. Rep.* 1092.—APPLYING Stackus *v.* New York C. & H. R. R. Co., 79 N. Y. 464; Fordham *v.* London, B. & S. C. R. Co., L. R. 4 C. P. 619. REVIEWING Coleman *v.* South Eastern R. Co., 4 H. & C. 699.

377. Standing up or walking in car.*—A passenger is not guilty of inexcusable negligence in moving about on the floor of a horse-car while it is in motion;

*See also *post*, **511.**

*Liability of street-car companies for injuries to passengers while getting on or off moving cars, or standing up in cars, see 41 AM. & ENG. R. CAS. 234, *abstr.*

but it is a question for the jury, whether, under the circumstances, it shows a want of reasonable care. *Baltimore & Y. Turnpike Road* v. *Leonhardt*, 27 *Am. & Eng. R. Cas.* 194, 66 *Md.* 70, 5 *Atl. Rep.* 346.

A person who enters a car, the seats of which are all occupied, and stands, without objection from the conductor, and supports himself the best he can, is not chargeable with contributory negligence because he is thrown from the car while it is passing a curve. *Lapointe* v. *Middlesex R. Co.*, 28 *Am. & Eng. R. Cas.* 198, 144 *Mass.* 18, 10 *N. E. Rep.* 497.—DISTINGUISHING Wills *v.* Lynn & B. R. Co., 129 Mass. 351. QUOTING Meesel *v.* Lynn & B. R. Co., 8 Allen 234.

Although the driver of a street-car is somewhat negligent in starting his horses while a passenger is walking in the car, the latter is guilty of contributory negligence in walking there when she knows the car is about to start. *Dickson* v. *Broadway & S. A. R. Co.*, 41 *How. Pr.* (*N. Y.*) 151, 1 *J. & S.* 330; *appeal dismissed in* 47 *N. Y.* 507.

All the seats in a car were occupied, and plaintiff and other passengers were obliged to stand. The car ran off the track and came to a sudden stop, and plaintiff was thrown forward and received injuries from the fall and from other passengers being thrown on her. *Held*, that it could not be said as a matter of law that plaintiff was guilty of contributory negligence. *Griffith* v. *Utica & M. R. Co.*, 17 *N. Y. Supp.* 692, 63 *Hun* 626, *mem.*, 43 *N. Y. S. R.* 835; *affirmed in* 137 *N. Y.* 566, *mem.*, 50 *N. Y. S. R.* 933, 33 *N. E. Rep.* 339.—QUOTING Lehr *v.* Steinway & H. P. R. Co., 118 N. Y. 556, 23 N. E. Rep. 889.

Plaintiff sat upon a rear seat. Being crowded, as he testified, he attempted to step forward by using the step on the outside of the car, when he was struck by a post of an elevated railroad and injured. There was some evidence that there were seats near plaintiff which he could have taken. *Held*, that, after instructing generally as to negligence, it was error to refuse an instruction that if plaintiff left his seat unnecessarily and voluntarily, not requesting that the car be stopped, and swung himself out on the step and was injured thereby, he could not recover. *Coleman* v. *Second Ave. R. Co.*, 39 *Am. & Eng. R. Cas.* 456, 114 *N. Y.* 609, 21 *N. E. Rep.* 1064, 24 *N. Y. S. R.* 566; *reversing* 41 *Hun* 380, 1 *N. Y. S. R.* 580.

Where a husband and wife enter a crowded car, and there is but one vacant seat, and he surrenders that to his wife, who is physically unable to stand, he is not chargeable with contributory negligence because he stands up. *Lehr* v. *Steinway & H. P. R. Co.*, 118 *N. Y.* 556, 23 *N. E. Rep.* 889, 30 *N. Y. S. R.* 1; *affirming* 44 *Hun* 627, 8 *N. Y. S. R.* 813.—QUOTED IN Norris *v.* Brooklyn City R. Co., 53 N. Y. S. R. 332; Griffith *v.* Utica & M. R. Co, 17 N. Y. Supp. 692.

Plaintiff testified that while a passenger on one of defendant's summer cars, furnished with transverse seats, he arose to signal the conductor to stop, and tripped upon the sheathing of the wheel, extending above the floor but leaving ample room to enter and leave the car, and was thus injured. *Held*, that it was not error to enter judgment of nonsuit. *Farley* v. *Philadelphia Traction Co.*, 132 *Pa. St.* 58, 18 *Atl. Rep.* 1090.—REVIEWING Spear *v.* Philadelphia, W. & B. R. Co., 119 Pa. St. 61.

378. Getting on overcrowded car.*—It is contributory negligence for one to get on a street-car that is already crowded. Plaintiff got on a car when there was no room except on the front platform, but after the car had started the crowd moved up and he was pushed off. *Held*, that he could not recover. *Tregear* v. *Dry Dock, E. B. & B. R. Co.*, 14 *Abb. Pr. N. S.* (*N. Y.*) 49.

Defendant company ran what was [illegible] a stage sleigh, with a running [illegible] along the side, which was, in its construction, intended for a step and a fender, but it appeared that passengers were in the habit of riding thereon when the sleigh was crowded. Plaintiff entered the sleigh, but on account of the crowd could not get inside and was compelled to stand on the step, with full knowledge of the danger, where he was injured by another vehicle in the street. *Held*, that his own imprudence in taking such a position would prevent a recovery. *Spooner* v. *Brooklyn City R. Co.*, 31 *Barb.* (*N. Y.*) 419; *reversed in* 54 *N. Y.* 230.

Plaintiff was riding on an open horse-car, and on account of its crowded condition stood on the foot-board at the side of

* Injury to street-car passenger by being pushed off car platform. When negligence and contributory negligence questions for the jury, see 44 AM. & ENG. R. CAS. 424, *abstr.*

the car, and was injured by being struck by another car passing on the next track, which was being driven rapidly on a down grade. *Held*, that the questions whether plaintiff was negligent in riding in such a place, how far he had notice of the danger of the position, whether he used proper precautions to secure his safety, and whether the speed at which the car was driven contributed to the injury, were properly submitted to the jury. *Geitz* v. *Milwaukee City R. Co.*, 72 *Wis.* 307, 39 *N. W. Rep.* 866.

379. Going on car while intoxicated.—There was evidence that plaintiff was drunk at the time of the accident, and had been in that condition for the preceding twenty-four hours; that he had no recollection of taking the car or of any of the facts connected with the accident, and first came to a realization of his injuries at the hospital; that shortly before the accident he was standing on the front platform with his hands on the guard rail and his body swaying back and forth; that the rate of speed was moderate, being four or five miles an hour, and that, although the up and down motion of the car was such at the time plaintiff went off as to throw another passenger against the driver, there was no evidence of any defect in the rails or in the roadbed. *Held*, that the jury would not have been warranted in finding that plaintiff exercised due care, or that his intoxication did not contribute to the injury. *Holland* v. *West End St. R. Co.*, 155 *Mass.* 387, 29 *N. E. Rep.* 622.

380. Exposing person beyond the car. — Plaintiff sat with his elbow a few inches out of a car window. While the car was on a curve his arm was struck and broken by another car, belonging to the same company, coming the other way on the other track. *Held*, that plaintiff was not guilty of contributory negligence, and that the company was liable for the injury. *Summers* v. *Crescent City R. Co.*, 34 *La Ann.* 139, 44 *Am. Rep.* 419.—DISTINGUISHED IN Moore *v.* Edison Elec. Illuminating Co., 43 La. Ann. 792. FOLLOWED IN Schneider *v.* New Orleans & C. R. Co., 54 Fed. Rep. 466. REVIEWED IN Francis *v.* New York Steam Co., 114 N. Y. 380, 21 N. E. Rep. 988, 23 N. Y. S. R. 543.

A passenger who is injured in the nighttime by putting his head out of a window of a street-car to ascertain the color of the car and identify it must show that he had a legitimate and pressing object in view, which could not be otherwise accomplished, and that his head struck against an obstacle which the company had no right to place where it was when the accident occurred, knew to be dangerous, gave no warning of, and negligently kept there. *Moore* v. *Edison Elec. Illuminating Co.*, 43 *La. Ann.* 792, 9 *So. Rep.* 433.—DISTINGUISHING Summers *v.* Crescent City R. Co., 34 La. Ann. 139.

Where a passenger, while in the act of taking his seat, rests his hand on and partially over the base of an open window, and is immediately struck and injured by upright sewer planks standing in close proximity to the passing car the question of contributory negligence is for the jury. *Dahlberg* v. *Minneapolis St. R. Co.*, 18 *Am. & Eng. R. Cas.* 202, 32 *Minn.* 404, 21 *N. W. Rep.* 545.—REVIEWED IN Francis *v.* New York Steam Co., 114 N. Y. 380, 21 N. E. Rep. 988, 23 N. Y. S. R. 543.

Plaintiff sat in a street-car in the summertime with his arm lying on the window-sill, wholly within the car, as he testified, but partly without, as the conductor and driver testified, when he was injured by coming in contact with planks that had been set up where a trench was dug in the street. There was nothing to show that plaintiff had reason to anticipate danger, and those in charge of the car gave no warning. *Held*, that the question of his contributory negligence was for the jury. *Francis* v. *New York Steam Co.*, 114 *N. Y.* 380, 21 *N. E. Rep.* 988, 23 *N. Y. S. R.* 543, *affirming* 13 *Daly* 510, 1 *N. Y. S. R.* 261.—REFERRING to Holbrook *v.* Utica & S. R. Co., 16 Barb. 113, 12 N. Y. 244. REVIEWING Dale *v.* Delaware, L. & W. R. Co., 73 N. Y. 468; Hallahan *v.* New York, L. E. & W. R. Co., 102 N. Y. 194; Breen *v.* New York C. & H. R. R. Co., 109 N. Y. 297; Dahlberg *v.* Minneapolis St. R. Co., 32 Minn. 404; Summers *v.* Crescent City R. Co., 34 La. Ann. 139.

Riding in such position in a horse-car is not negligence *per se*. *Miller* v. *St. Louis R. Co.*, 5 *Mo. App.* 471. *Germantown Pass. R. Co.* v. *Brophy*, 16 *Am. & Eng. R. Cas.* 361, 105 *Pa. St.* 38.

If, without reasonable cause, a passenger places his person on the outside of the car in which he is riding while it is in motion, he assumes the hazards of so doing. *Coleman* v. *Second Ave. R. Co.*, 39 *Am. & Eng. R. Cas.* 456, 114 *N. Y.* 609, 21 *N. E. Rep.* 1064,

24 *N. Y. S. R.* 566; *reversing* 41 *Hun* 380, 1 *N. Y. S. R.* 580.

381. Imputed negligence. — The rights or responsibilities of a passenger injured in a street-railway collision are not affected by the negligence of the driver of the car in which he is riding. *Kuttner* v. *Lindell R. Co.*, 29 *Mo. App.* 502.—DISAPPROVING Thorogood *v.* Bryan, 8 C. B. 115.

The driver of a horse-car is not the agent of a passenger so as to render such passenger chargeable for the negligence of such driver *Bennett* v. *New Jersey R. & T. Co.*, 36 *N. J. L.* 225, 12 *Am. Ry. Rep.* 79.—APPROVED IN Little *v.* Hackett, 116 U. S. 366; Covington Transfer Co. *v.* Kelly, 36 Ohio St. 86. FOLLOWED IN Noyes *v.* Boscawen, 64 N. H. 361; New York, L. E. & W. R. Co. *v.* Steinbrenner, 23 Am. & Eng. R. Cas. 330, 47 N. J. L. 161.

Where a street-car collides with a locomotive of an ordinary railroad so as to injure a passenger on the street-car, in an action against the railroad company, the plaintiff is not chargeable with the negligence of the driver or conductor of the street-car. *McCallum* v. *Long Island R. Co.*, 38 *Hun* (*N. Y.*) 569; *affirmed in* 103 *N. Y.* 686, *mem.*, 7 *N. Y. S. R.* 863, *mem.*

382. Assisting in getting car past an obstruction.* — Where a passenger assists in moving a car around an obstruction, at the request of the driver, and is injured by the negligent manner in which a car going in the opposite direction is moved, the question whether he contributed to his own injury is for the jury. His negligence cannot be declared as a matter of law. *Stastney* v. *Second Ave. R. Co.*, 46 *N. Y. S. R.* 537 18 *N. Y. Supp.* 800, 29 *J. & S.* 104; *affirmed in* 138 *N. Y.* 609, *mem.*, 51 *N. Y. S. R.* 932, *mem.*, 33 *N. E. Rep.* 1082, *mem.*

383. Trespasser — Unlawful entry on car.—The court is not prepared to hold that a party is a trespasser after he gets upon a horse-car, even though no fare has been collected of him before he meets with an injury, simply because he has violated a rule of the company as to the mode of his getting on. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.—DISTINGUISHING Chicago, B. & Q. R. Co. *v.* Mehlsack, 131 Ill. 61.

384. Failing to hold to car handle, or other object, while getting on or off.—It is a question for the jury whether plaintiff's intestate was negligent in riding on a platform without holding to the car for the purpose of supporting himself. *Matz* v. *St. Paul City R. Co.*, 52 *Minn.* 159, 53 *N. W. Rep.* 1071.

After signaling a car to stop, and as plaintiff was in the act of stepping on, the conductor signaled it to start, and plaintiff was thrown down and injured by a car passing in the opposite direction on an adjoining track. The evidence showed that the platform was crowded, which prevented his getting hold of the hand rail. *Held*, that the question of his contributory negligence was for the jury. *Black* v. *Brooklyn City R. Co.*, 13 *N. Y. S. R.* 645, 1 *Silv. App.* 580.

It is not negligence *per se* for a passenger to step aboard a standing street-car, when the platform is unoccupied, without taking hold of the railings to guard against the sudden movement of the car, and particularly when the person in charge of the car has been notified that the passenger is in the act of entering. *Gainard* v. *Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 692, 2 *N. Y. Supp.* 470, 50 *Hun* 22; *affirmed in* 121 *N. Y.* 661, *mem.*, 24 *N. E. Rep.* 1092, *mem.*—FOLLOWING Filer *v.* New York C. R. Co., 49 N. Y. 47; Keating *v.* New York C. R. Co., 3 Lans. 469; Totten *v.* Phipps, 52 N. Y. 354. REVIEWING Fordham *v.* London, B. & S. C. R. Co., L. R. 4 C. P. 619; Coleman *v.* South Eastern R. Co., 4 H. & C. 699.

It is not contributory negligence, as a matter of law, for a female passenger to fail to take hold of the arms at the ends of the seats on leaving the car. *Chase* v. *Jamestown St. R. Co.*, 38 *N. Y. S. R.* 954, 60 *Hun* 582, *mem.*, 15 *N. Y. Supp.* 35; *affirmed in* 133 *N. Y.* 619, *mem.*, 30 *N. E. Rep.* 1150, *mem.*, 44 *N. Y. S. R.* 931, *mem.*

A woman, with her child on her left arm, slipped and fell in alighting from a street-car. There was evidence that when there was ample room for all in the car, a passenger was permitted to stand on the platform in such a position that she could not get hold of the dasher of the car, and also that there was ice on the steps of the car, formed the previous day; that she knew of the ice, and that had she carried her child on her right arm she could have taken hold of the handle of the car with her left hand. *Held*, that it was error for the court to grant a

* See also *ante*, **361.**

compulsory nonsuit. *Neslie* v. *Second & T. St. Pass. R. Co.*, 27 *Am. & Eng. R. Cas.* 180, 113 *Pa. St.* 300, 6 *Atl. Rep.* 72.—DISTINGUISHED IN Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122.

385. Where passenger is put in sudden peril.—Plaintiff was riding on a car which was uncoupled on a grade and allowed to run rapidly backward free from control. There was great excitement among the passengers, and plaintiff either jumped off or was pulled off, and was injured. *Held*, that the excitement, surprise, or bewilderment could only be taken into account in determining the quality of plaintiff's acts, and their quality in respect to care or negligence presented a question for the jury. *Joliet St. R. Co.* v. *McCarthy*, 42 *Ill. App.* 49.

In such case there was evidence tending to show that plaintiff was pulled or crowded off the car without her consent. *Held*, that, if the jury should so find, then the fact that plaintiff was surprised, excited, or bewildered, and that the company caused such condition, would not affect the intervening agency that pulled or crowded her off. *Joliet St. R. Co.* v. *McCarthy*, 42 *Ill. App.* 49.

The fact that one contributes to a personal injury, if he was not in fault in so doing, does not affect his right to recover therefor. One who, through the negligence or fault of another, is put in a position of immediate danger, is not bound to exercise all the prudence and care that ordinarily characterize the conduct of a prudent man. He has no right, however, upon the happening of some occurrence such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it. The question is properly submitted to the jury whether, under the circumstances, plaintiff acted rashly and under an undue apprehension of danger. *South Covington & C. St. R. Co.* v. *Ware*, 27 *Am. & Eng. R. Cas.* 206, 84 *Ky.* 267, 1 *S. W. Rep.* 493.—QUOTING Stokes *v.* Saltonstall, 13 Pet. (U. S.) 191.

An instruction that if plaintiff was put in a position of peril by the sudden starting of a car, and jumped off, and that if a person of ordinary prudence might have done the same thing it would not be contributory negligence, is not erroneous. *Piper* v. *Minneapolis St. R. Co.*, 52 *Minn.* 269, 53 *N. W. Rep.* 1060.

386. Entering open cars from side.—Where a company uses chains upon the sides of open cars so as to prevent passengers from entering their way, the fact that the chains are down on the side next to another track is an invitation to passengers to enter the car on that side. *Gaffney* v. *Brooklyn City R. Co.*, 6 *Misc.* 1, 58 *N. Y. S. R.* 119, 25 *N. Y. Supp.* 996.

At a transfer station plaintiff was about to get upon the car step, the chains being down on both sides, when a car came down on the other track at a rapid rate and struck her. *Held*, that a verdict for plaintiff should be affirmed. *Gaffney* v. *Brooklyn City R. Co.*, 6 *Misc.* 1, 58 *N. Y. S. R.* 119, 25 *N. Y. Supp.* 996.

387. Entering or leaving car heavily encumbered.—It is contributory negligence for a passenger upon a street-car to attempt to alight while it is in motion, and while he is carrying a keg of lead weighing about fifty pounds. *Ricketts* v. *Birmingham St. R. Co.*, 37 *Am. & Eng. R. Cas.* 12, 85 *Ala.* 600, 5 *So. Rep.* 353.—REVIEWED IN Central R. & B. Co. *v.* Miles, 41 Am. & Eng. R. Cas. 149, 88 Ala. 256, 6 So. Rep. 696.

Carrying a plank measuring in length about six feet, on the shoulder, on a principal thoroughfare, is not wrongful, but the person carrying it should be more than ordinarily careful. If an accident happens to him when attempting to board a steam street-car and the company is not at fault, damages will not be allowed. *Byrd* v. *New Orleans City & L. R. Co.*, 43 *La. Ann.* 822, 9 *So. Rep.* 565.

Where it is shown that plaintiff was injured by the negligence of defendant in starting its street-car just as she was about to alight therefrom, the company cannot exculpate itself by showing that she was so encumbered with baggage that she could not avail herself fully of the means provided for alighting, or that she waited two minutes before getting up from her seat, the car having gone beyond the place where she was to get off. *Cawfield* v. *Asheville St. R. Co.*, 111 *N. Car.* 597, 16 *S. E. Rep.* 703.

The court was requested to charge that "it is contributory negligence to step off a moving car while encumbered with bundles weighing fifty pounds," but instead charged that "it would have been contributory negligence for plaintiff to have stepped off the car with bundles which so encumbered him

that he could not control his movements as well as he could without the bundles." *Held*, that the company could not complain of the instruction, as it was more favorable than it was entitled to. *Richmond* v. *Second Ave. R. Co.*, 27 *N. Y. Supp.* 780.

Plaintiff received his injuries in attempting, with one of his arms encumbered, to board defendant's car while it was in motion, his foot slipping from the step from a jolt of the car. *Held*, that it was not error to enter judgment of nonsuit. *Reddington* v. *Philadelphia Traction Co.*, 132 *Pa. St.* 154, 19 *Atl. Rep.* 28.—DISTINGUISHED IN Ober *v.* Crescent City R. Co., 44 La. Ann. 1059.

388. Failure to use hold-straps.—An instruction authorizing a recovery, without stating the whole of the affirmative defense of contributory negligence, will not cause a reversal where such defense is properly presented by other instructions. Thus where a passenger is charged with contributory negligence in not properly using the hold-straps, an instruction is not objectionable which calls attention to his duty in that regard, where there are other instructions covering the whole subject of his conduct, and other acts charged as negligent. *Dougherty* v *Missouri R. Co.*, 34 *Am. & Eng. R. Cas.* 488; *see also* 37 *Am. & Eng. R. Cas.* 206, 97 *Mo.* 647, 15 *West. Rep.* 235, 8 *S. W. Rep.* 900, 11 *S. W. Rep.* 251.

Where a female passenger sues to recover for being thrown down while standing in a crowded car, it is proper to instruct the jury that when plaintiff entered the car and consented to stand, she assumed all the risks naturally incident to that mode of travel; that she was bound to use all guards and appliances furnished for the protection of passengers, if she could reasonably do so; that if with ordinary convenience she could reach the straps and hold on to the same, she was bound to do so; but if she could not, then she was bound to use such care and caution in other ways to protect herself as a prudent and cautious woman would exercise under like circumstances. *Whipple* v. *West Phila. Pass. R. Co.*, 11 *Phila.* (*Pa.*) 345.

389. Stepping in space between car and platform.—Every passenger riding on a street-car is bound to know that some space must exist between the platform and the car, and it is the duty of each one to take proper precautions not to step therein. *Fox* v. *Mayor, etc., of N. Y.*, 70 *Hun* 181, 53 *N. Y. S. R.* 902, 24 *N. Y. Supp.* 43.

Where a company maintains a station with a space of fourteen inches between it and cars on the track, the question of the contributory negligence of a passenger who steps in the space at night when it is poorly lighted, without being warned, and without knowledge of the situation, is for the jury. *Boyce* v. *Manhattan R. Co.*, 118 *N. Y.* 314, 23 *N. E. Rep.* 304.

As some space between cars and the platform is necessary, a passenger cannot recover for an injury received in carelessly stepping in the space, unless it is wider than necessary. *Ryan* v. *Manhattan R. Co.*, 121 *N. Y.* 126, 23 *N. E. Rep.* 1131.

390. Violating rule by placing baskets, etc., on car. — If an accident occurs in consequence of violating a regulation of the company which prohibits the conveyance of baskets or parcels unaccompanied by a passenger, the person participating in such violation, and so sustaining injury, will be debarred from recovering therefor, if it be shown that he had knowledge of such regulation. *Baltimore City Pass. R. Co.* v. *Wilkinson*, 30 *Md.* 224.

391. Colliding with object near track soon after starting.—In an action by a passenger to recover for a personal injury received by being propelled against a telegraph pole near the track while getting on a car in motion, the defendant asked the court to instruct the jury that under the ordinance of the city the company had no right to stop its cars except on the further crossing of street intersections, which was refused. *Held*, not error, it being immaterial whether defendant had the right to stop its cars at the further crossing or not, there being no claim that the driver refused to stop the car at the place where plaintiff got on it. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.

It appeared that plaintiff was a man twenty-six years old, able-bodied, and unincumbered; he waited for one of defendant's open cars upon a crosswalk and motioned for it to stop; when it had nearly stopped he put his foot on the step on the side and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street.

Held, that a refusal to nonsuit was error; that it was plaintiff's duty to see, before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of plaintiff. *Moylan* v. *Second Ave. R. Co.*, 128 *N. Y.* 583, *mem.*, 3 *Silv. App.* 461, 27 *N. E. Rep.* 977, 37 *N. Y. S. R.* 871; *affirming* 59 *Hun* 619, *mem.*, 35 *N. Y. S. R.* 644, 13 *N. Y. Supp.* 494.

392. Getting on from wrong side or between tracks.—A company is not liable for an injury that results from a passenger attempting to enter a car from between parallel tracks, without observing the approach of a car on the adjoining track. *Schreiner* v. *St. Louis R. Co.*, 5 *Mo. App.* 596.

Plaintiff crossed one track and stopped between the two tracks, where there was a space of but thirty inches when a car was on each track. He saw a car approaching on each track in opposite directions, and while attempting to get on one was struck by the horses of the other. He had time to pass to the outside, where there would have been no danger. *Held*, that he was guilty of contributory negligence, as a matter of law. *Halpin* v *Third Ave. R. Co.*, 8 *J. & S.* (*N. Y.*) 175.

A person attempting to enter a car from between tracks is not negligent, as a matter of law, where the injury results from his being dragged along, by a sudden start of the car when he is in the act of getting on, until he is struck by a car on the adjoining track. The question of his negligence is for the jury. *Dale* v. *Brooklyn City, H. P. & P. P. R. Co.*, 1 *Hun* (*N. Y.*) 146, 3 *T. & C.* 686; *affirmed in* 60 *N. Y.* 638, *mem.*—DISTINGUISHING Phillips *v.* Rensselaer & S. R. Co., 49 N. Y. 177.

Plaintiff, in attempting to board a street-car, crossed over and placed himself between the tracks, instead of remaining on the outer side. He saw a car coming on the other track, fifty or seventy-five feet away, as he was getting on; but paid no more attention to it until struck by it. *Held*, that he was guilty of contributory negligence. *Davenport* v. *Brooklyn City R. Co.*, 100 *N. Y.* 632, *mem.*, 3 *N. E. Rep.* 305.—REVIEWED IN Scott *v.* Third Ave. R. Co., 41 N. Y. S. R. 152, 61 Hun 627, mem., 16 N. Y. Supp. 350.

In an action for damages, for injuries received while boarding a street-car, the court charged that the plaintiff "started to get on the one car when the other car was coming (and one of the witnesses says that he had to turn out of his course a little because the horses hesitated a moment or stood still); and that, choosing between the risks, when the cars were so near together, he was caught between the two cars and was hurt. Now if that was the way it happened, as I should suppose you would infer from the testimony of these witnesses—if the plaintiff did take that risk—taking the risk, he must suffer the consequences. * * * A man cannot take such risks with passenger-railway cars, and then if he gets hurt ask the company to pay him damages." *Held*, not erroneous. *Rose* v. *West Phila. R. Co.*, (*Pa.*) 12 *Atl. Rep.* 78.

393. In getting on or off moving car, generally.* — Where one hails a street-car, the conductor and driver have a right to assume that he desires the car stopped to enable him to get on, and that he does not intend to get on while it is in motion. *Holohan* v. *Washington & G. R. Co.*, 8 *Mackey* (*D. C.*) 316.

Even if they believe that he intends getting on the car while it is in motion, and they doubt his ability to do so, they owe him no such duty as to warn him off; he is the best judge of the risk of such an act, and the responsibility for it rests solely upon him. *Holohan* v. *Washington & G. R. Co.*, 8 *Mackey* (*D. C.*) 316.

Although a person may get upon a horse-car while it is in motion, in violation of a rule of the company, yet if it is made to appear from the evidence that such rule has been waived or revoked in his favor, he will nevertheless be entitled to his action for injuries suffered from any want of care on the part of the company. If the conductor sees that the passenger gets aboard while the car is in motion, and makes no objection or warning, a fair question is presented for the jury to find, from all the circumstances, whether the rule has not been waived. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.

Where a person attempts to board a car in a manner so obviously reckless and careless as to amount in itself to contributory negligence, he is not to be regarded as a

* Passengers getting on and off cars in motion, see notes, 3 AM. & ENG. R. CAS. 431; 30 *Id.* 632.

passenger and entitled to protection as such simply because when discovered by defendant's conductor he is clinging to the car in an endeavor to enter it, the duty of the conductor toward him not being that of the utmost diligence but only such reasonable care and caution as are due to a person not a passenger. *Baltimore Traction Co.* v. *State*, 58 *Am. & Eng. R. Cas.* 200, 78 *Md.* 409, 28 *Atl. Rep.* 397.

Where the testimony tends to show that plaintiff, in leaving a car, had reached a point where it would be difficult to turn back before the bell was rung as a signal for starting (she being about to put her foot upon the step, which was a board running along the side of the car), and that the car started at that very instant, plaintiff cannot be held guilty of negligence in continuing her descent from the car. *Lacas* v. *Detroit City R. Co.*, 92 *Mich.* 412, 52 *N. W. Rep.* 745.

A person desiring to get upon a train drawn by a locomotive may, without the imputation of negligence, run by the side of it when in motion, if he keep far enough from it, so as not to expose himself to injury. Much more safely may he do this by the side of a street-car drawn by horses. *Mowrey* v. *Central City R. Co.*, 66 *Barb.* (*N. Y.*) 43; *affirmed in* 51 *N. Y.* 666, *mem.*

A passenger who attempts to get on a street-car, especially if it is in motion and the conductor is inside, must be held to a reasonable degree of care. *Picard* v. *Ridge Ave. Pass. R. Co.*, 147 *Pa. St.* 195, 23 *Atl. Rep.* 566.

394. Getting on slowly moving car.—Plaintiff was a man accustomed to getting on and off street-cars in motion. His evidence tended to show that he signaled the driver of an approaching car propelled by electricity to stop; that the driver saw him and made a motion with the motor crank, and as the speed was slackening he put his right hand on the platform railing to get on, but the car, which had not come "to a dead stop," shot forward, and he fell to the ground and received the injuries complained of. *Held*, that there was evidence for the jury whether plaintiff was in the exercise of due care. *Corlin* v. *West End St. R. Co.*, 154 *Mass.* 197, 27 *N. E. Rep.* 1000.—REVIEWED IN Beal *v.* Lowell & D. St. R. Co., 157 Mass. 444.

On a similar state of facts a motion for a nonsuit was properly denied. *Eppendorf* v. *Brooklyn City & N. R. Co.*, 69 *N. Y.* 195, 18 *Am. Ry. Rep.* 97; *affirming* 51 *How. Pr.* 475.—REVIEWED IN Morison *v.* Broadway & S. A. R. Co., 28 N. Y. S. R. 498, 8 N. Y. Supp. 436; Saffer *v.* Dry Dock, E. B. & B. R. Co., 53 Hun 629, mem., 24 N. Y. S. R. 210.

Defendant offered to show that plaintiff was in the habit of jumping on its cars when in motion. *Held*, that the evidence was properly excluded. *Eppendorf* v. *Brooklyn City & N. R. Co.*, 69 *N. Y.* 195, 18 *Am. Ry. Rep.* 97; *affirming* 51 *How. Pr.* 475.

It is not always contributory negligence for a party to attempt to get on the rear platform of a car after he has signaled the driver to stop the car and it has slowed up, where it appears that the accident was caused by the sudden starting of the car after he had attempted to board it. *Seits* v. *Dry Dock, E. B. & B. R. Co.*, 16 *Daly* 264, 10 *N. Y. Supp.* 1, 32 *N. Y. S. R.* 56.—FOLLOWING Morison *v.* Broadway & S. A. R. Co., 8 N. Y. Supp. 436.

Where a man of seventy years, without anything in his hands, attempts to get on a car that has slowed up but that starts again with a sudden jerk, and his feet are thereby thrown from the step, and he is dragged along for a distance and injured, the questions of negligence and of contributory negligence are properly submitted to the jury. The fact that the car was moving slowly when plaintiff attempted to get on did not establish contributory negligence as matter of law. *Morrison* v. *Broadway & S. A. R. Co.*, 130 *N. Y.* 166, 29 *N. E. Rep.* 105, 41 *N. Y. S. R.* 248; *affirming* 55 *Hun* 608, *mem.*, 28 *N. Y. S. R.* 498.—DISTINGUISHING Hayes *v.* Forty-second St. & G. S. F. R. Co., 97 N. Y. 259.—FOLLOWED IN Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465.

395. Getting on car moving at rapid rate, or four miles an hour.—Trying to board a street-car while it is in rapid motion is negligence. *Chicago City R. Co.* v. *Delcourt*, 33 *Ill. App.* 430.

The court cannot say as matter of law that an attempt to enter a horse-car which is moving at about the rate of four miles an hour is negligence, even if no signal is known to have been given to the driver. *Briggs* v. *Union St. R. Co.*, 37 *Am. & Eng. R. Cas.* 204, 148 *Mass.* 72, 19 *N. E. Rep.* 19.

Where the plaintiff testified that he was sixty-eight years old and weighed over 190 pounds, that he signaled to the driver and the car slowed up, that while it was going about four miles an hour he attempted to

enter it at the rear platform, when his foot slipped, that the car had started off and was going at increased speed, and that he made two other attempts to get on, and failing, was thrown down and injured, it is for the jury to say whether the plaintiff was guilty of contributory negligence. *Briggs* v. *Union St. R. Co.*, 37 *Am. & Eng. R. Cas.* 204, 148 *Mass.* 72, 19 *N. E. Rep.* 19.

It is not, as a matter of law, negligence for a passenger to attempt to enter a street-car while the same is moving, irrespective of the rate of speed or other qualifying circumstances. It is presumptively negligent to do so if the car is moving at its ordinary rate of speed, or with accelerated speed, and especially if the attempt is made between cars, or at the front instead of the rear of a car. It is ordinarily a question for the jury depending upon the circumstances of each case. *Sahlgaard* v. *St. Paul City R. Co.*, 48 *Minn.* 232, 51 *N. W. Rep.* 111.

396. Negligence per se.— A person who attempts to get upon a horse-car while it is in motion after being directed to wait until the car stops, and who persists in attempting to get on and is injured by running against the arm of a passenger on the car step, cannot maintain an action against the company owning the car. *Gallagher* v. *West End St. R. Co.*, 52 *Am. & Eng. R. Cas.* 520, 156 *Mass.* 157, 30 *N. E. Rep.* 480.

The court will take notice that an attempt to board a moving street-car, especially by its front platforms, is dangerous under any circumstances, and if an intending passenger in attempting to get upon a moving car is injured simply by his slipping down, he cannot recover for the injury. *Woo Dan* v. *Seattle Elec. R. & P. Co.*, 58 *Am. & Eng. R. Cas.* 195, 5 *Wash.* 466, 32 *Pac. Rep.* 103.

It is the duty of a person seeking to take passage on a street-car to signal the person in charge, and if without signaling he attempts to board a moving car he cannot recover for the injury thereby sustained. *Woo Dan* v. *Seattle Elec. R. & P. Co.*, 58 *Am. & Eng. R. Cas.* 195, 5 *Wash.* 466, 32 *Pac. Rep.* 103.

397. Getting on moving car not negligence per se or in law.—Whether a person in getting upon a horse-car while it is in motion is chargeable with want of ordinary care is a question for the jury under all the circumstances of the case. It is not negligence *per se* for a person to get on or off a street-car drawn by horses while it is in motion, and it is not error to refuse an instruction that such act is such conclusive evidence of contributory negligence as to bar a recovery by him. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.—QUOTING Schacherl *v.* St. Paul City R. Co., 42 Minn. 42; McDonough *v.* Metropolitan R. Co., 137 Mass. 210; Briggs *v.* Union St. R. Co., 148 Mass. 72; Eppendorf *v.* Brooklyn City & N. R. Co., 69 N. Y. 195; Chicago City R. Co. *v.* Mumford, 97 Ill. 560.

It is not negligence as a matter of law for a person to get on or off a horse-car while it is in motion, but the question of negligence depends upon the circumstances of each particular case, such as the speed of the car, the activity or infirmity of the person, and the like. *Ober* v. *Crescent City R. Co.*, 52 *Am. & Eng. R. Cas.* 576, 44 *La. Ann.* 1059, 11 *So. Rep.* 818.—APPROVING Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. Rep. 837; McDonough *v.* Metropolitan R. Co., 137 Mass. 210.

It is not, under all circumstances, negligence as matter of law for a person to get upon a street-car that is in motion. In exceptional cases, where the conditions are unfavorable, it may be so, but ordinarily it is a question of fact for the jury. *Eppendorf* v. *Brooklyn City & N. R. Co.*, 69 *N. Y.* 195, 18 *Am. Ry. Rep.* 97; *affirming* 51 *How. Pr.* 475.—QUOTED IN North Chicago St. R. Co. *v.* Williams, 140 Ill. 275; Gilbert *v.* Third Ave. R. Co., 22 J. & S. (N. Y.) 270. — *Valentine* v. *Broadway & S. A. R. Co.*, 14 *Daly* 540, 4 *N. Y. Supp.* 481, 16 *N. Y. S. R.* 602. *Gilbert* v. *Third Ave. R. Co.*, 22 *J. & S.* 270, 8 *N. Y. S. R.* 152.—QUOTING Eppendorf *v.* Brooklyn City & N. R. Co., 69 N. Y. 195.

398. —— a question for the jury.— Whether the conduct of a passenger in seizing the rail of the rear dasher and trying to pull himself up to the car after he had lost his hold upon the rail attached to the body of the car was such conduct as to preclude the recovery of damages is a question for the jury. *Briggs* v. *Union St. R. Co.*, 37 *Am. & Eng. R. Cas.* 204, 148 *Mass.* 72, 19 *N. E. Rep.* 19.

The question whether a person attempting to get on a street-car while it was in motion is negligent is for the jury, where there is evidence that he signaled the car to

slow up, which it did, but suddenly started again as he was getting on, before he had time to secure a footing. *Morison* v. *Broadway & S. A. R. Co.*, 28 *N. Y. S. R.* 498, 8 *N. Y. Supp.* 436, 55 *Hun* 608; *affirmed in* 130 *N. Y.* 166, 41 *N. Y. S. R.* 248, 29 *N. E. Rep.* 105.—REVIEWING Eppendorf *v.* Brooklyn City & N. R. Co., 69 N. Y. 195.

Whether a passenger, in getting off while a car is in motion, is guilty of negligence, is ordinarily a question for the jury. *Munroe* v. *Third Ave. R. Co.*, 18 *J. & S.* (*N. Y.*) 114.

399. Getting off moving cars, generally.*—A passenger who voluntarily jumps on or off a moving street-car does so at his peril, and that construction of the car cannot be said to be defective which is only unsafe in view of such conduct. *Werbowlsky* v. *Ft. Wayne & E. R. Co.*, 86 *Mich.* 236, 48 *N. W. Rep.* 1097.

The failure of a driver to stop a car will not justify a passenger in leaving it while it is in rapid motion. *Ginnon* v. *New York & H. R. Co.*, 3 *Robt.* (*N. Y.*) 25.

The fact that multitudes daily step in safety from cars while they are in motion does not necessarily relieve such act from the charge of negligence, even when done with care. If there be no danger in such act unless carelessly done, and the constant practice of mankind is proof thereof, the servant of the company will still be justified in recommending a passenger not to descend while the car is in motion, although the latter asks him to stop. *Ginnon* v. *New York & H. R. Co.*, 3 *Robt.* (*N. Y.*) 25.

Considering the fact that a passenger on a street-car can always alight within a short distance, it is contributory negligence on his part to jump from the moving car because the conductor has not immediately complied with his request to stop the car and let him off. *Hagan* v. *Philadelphia & G. F. R. Co.*, 15 *Phila.* (*Pa.*) 278.—DISTINGUISHING Crissey *v.* Hestonville M. & F. Pass. R. Co., 75 Pa. St. 83. REVIEWING Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147.

400. —— when in rapid motion.—It is gross negligence in a passenger to jump from a car when it is going at a speed of twenty miles an hour, whether he knows or does not know that the car is going so fast. That a city ordinance restricts the speed of the car to seven miles an hour makes no difference. *Masterson* v. *Macon City & S. St. R. Co.*, 88 *Ga.* 436, 14 *S. E. Rep.* 591.

There was a conflict of evidence as to whether plaintiff was thrown from car steps when preparing to alight, by a sudden increase of the speed, or whether he stepped off while the car was still moving. *Held*, that he was guilty of contributory negligence if he stepped off while the car was in rapid motion, and he was not entitled to recover if any act of his in getting off contributed to the injury. *Saffer* v. *Dry Dock, E. B. & B. R. Co.*, 24 *N. Y. S. R.* 210, 53 *Hun* 629, 2 *Silv. Sup. Ct.* 343, 5 *N. Y. Supp.* 700.

401. —— when horses are running away.—Where the horses of a street-car are running away, and the car is liable to leave the track and be thrown over an embankment, and it may be that by keeping her seat the life of a passenger may be saved, or it may be that she may save her life by jumping, she is not necessarily chargeable with contributory negligence if she jumps. *Dimmey* v. *Wheeling & E. G. R. Co.*, 27 *W. Va.* 32,

Just as a railroad man would be held to greater care in the management of a car than would a farmer, so a passenger is only expected to exercise the care, to avoid injury, of careful, prudent persons of his class. So where a female passenger is injured in jumping from a car when the horses are running away, it is proper to instruct the jury that she was only required to do what "ordinarily prudent and careful persons of the same class would have done under similar circumstances." *Dimmey* v. *Wheeling & E. G. R. Co.*, 27 *W. Va.* 32.

402. —— when negligence per se, or in law.*—Where a train did not stop at a suitable place for a passenger to get off, and upon its starting again he rang the bell, to which the driver responded and the cars slowed up, this act of his and his attempt to leave the car while it was still in motion were gross negligence. *Blodgett* v. *Bartlett*, 50 *Ga.* 353.—QUOTED IN Chicago & N. W. R. Co. *v.* Rielly, 40 Ill. App. 416.

It is not negligence *per se* for a person to get on or off a street-car while it is in motion, but the question is ordinarily one of

* Jumping from and boarding moving street-cars, see note, 30 AM. & ENG. R. CAS. 632; 44 *Id.* 423, *abstr.*

* Alighting from or boarding moving street-car not *per se* a negligent act, see note, 21 AM. & ENG. R. CAS. 357.

fact for the jury. *Schacherl* v. *St. Paul City R. Co.*, 41 *Am. & Eng. R. Cas.* 233, 42 *Minn.* 42, 43 *N. W. Rep.* 837.—APPROVED IN Ober *v.* Crescent City R. Co., 44 La. Ann. 1059. QUOTED IN North Chicago St. R. Co. *v.* Williams, 140 Ill. 275.—*Duncan* v. *Wyatt Park R. Co.*, 48 *Mo. App.* 659.—FOLLOWING Taylor *v.* Missouri Pac. R. Co., 26 Mo. App. 336; Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Doss *v.* Missouri, K. & T. R. Co., 59 Mo. 37; Richmond *v.* Quincy, O. & K. C. R. Co., 49 Mo. App. 104. RECONCILING Clotworthy *v.* Hannibal & St. J. R. Co., 80 Mo. 223; Nelson *v.* Atlantic & P. R. Co., 68 Mo. 593.

Where plaintiff's evidence shows that when alighting from a street-car while it was in motion he stepped off from the front platform with his back to the horses, and was dragged down while holding on to the dashboard, the court is authorized to declare it contributory negligence *per se*, and to order a compulsory nonsuit. *Beattie* v. *Citizen's Pass. R. Co.*, (*Pa.*) 1 *Atl. Rep.* 574.

The court cannot rule that when a street-car has stopped or is about to stop at the signal of an alighting passenger, another passenger who wishes to alight at the same time is guilty of negligence as a matter of law in not giving notice of his wish. When such other passenger in alighting while the car was stopped or about stopping, is injured by a fall caused by the acceleration of the car's movement, the question of contributory negligence is rightly left to the jury. *Rathbone* v. *Union R. Co.*, 13 *Am. & Eng. R. Cas.* 58, 13 *R. I.* 709.—DISTINGUISHING Nichols *v.* Middlesex R. Co., 106 Mass. 463; Cram *v.* Metropolitan R. Co., 112 Mass. 38.

403. —— when for jury. — Whether the act of stepping from a street-car when it is moving slowly is contributory negligence is a question for the jury under all the circumstances of the case. *Fortune* v. *Missouri R. Co.*, 10 *Mo. App.* 252.—DISTINGUISHED IN Dunn *v.* Cass Ave. & F. G. R. Co., 21 Mo. App. 188.

Whether alighting from a moving street-car constitutes negligence or not is a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case. *Omaha St. R. Co.* v. *Craig*, 58 *Am. & Eng. R. Cas.* 208, 39 *Neb.* 601, 58 *N. W. Rep.* 209.—NOT FOLLOWING Hagan *v.* Philadelphia & G. F. R. Co., 15 Phila. (Pa.) 278; Harmon *v.* Washington & G. R. Co., 30 Am. & Eng. R. Cas. 627, 6 Mackey (D. C.) 64; Stager *v.* Ridge Ave. Pass. R. Co., 33 Am. & Eng. R. Cas. 540, 119 Pa. St. 70; Reddington *v.* Philadelphia Traction Co., 132 Pa. St. 154.

404. Stepping off on adjacent track. — While it may not be, as matter of law, negligent for one to leave a street-car while it is in motion, or to attempt to cross a street-car track without looking to see whether a car is approaching, yet neither of these acts is evidence of due care; and where the undisputed testimony shows that, in spite of warnings from those in his immediate vicinity, a passenger on a street-railway car suddenly, without precaution, alighted therefrom, and was struck by another car and killed, his administratrix cannot maintain an action against the company under Mass. St. of 1886, ch. 140. *Creamer* v. *West End St. R. Co.*, 52 *Am. & Eng. R. Cas.* 558, 156 *Mass.* 320, 31 *N. E. Rep.* 391, 16 *L. R. A.* 490.—QUOTING Chaffee *v.* Boston & L. R. Corp., 104 Mass. 108.

Where the evidence shows that plaintiff jumped from a car directly in front of one going in the opposite direction, which ran over him, and that the driver could not see him until he was struck by the horses, it is proper to refuse an instruction that he might recover, notwithstanding he was negligent in getting in front of the car, if the driver could have seen him in time to have stopped before he was injured. *Dunn* v. *Cass Ave. & F. G. R. Co.*, 98 *Mo.* 652, 11 *S. W. Rep.* 1009.

405. Illustrations of contributory negligence in getting on or off. — In an action by a female passenger for personal injuries, the plaintiff is not entitled to recover where the injuries were received in consequence of her attempting to get off a car while it was in motion, in violation of the rules of the company, and without any of its employés having done or said anything to cause her to take the step. *Calderwood* v. *North Birmingham St. R. Co.*, 96 *Ala.* 318, 11 *So. Rep.* 66.

If a car has started before the plaintiff has commenced to descend, or is on the point of descending, she is negligent in attempting to alight without notifying the conductor and waiting until the car stops. *Wheaton* v. *North Beach & M. R. Co.*, 36 *Cal.* 590.

Where there is evidence tending to show that plaintiff rang the bell herself, and attempted to get off before the car stopped, it

is error to refuse to instruct the jury that "it was the duty of plaintiff to have notified some one in charge of the car, if she desired to get off, and if she got off without such notice, or without the knowledge of those in charge of the car, she did so at her peril," and could not recover. *Nichols* v. *Middlesex R. Co.*, 106 *Mass.* 463, 8 *Am. Ry. Rep.* 47.—DISTINGUISHED IN Rathbone *v.* Union R. Co., 13 Am. & Eng. R. Cas. 58, 13 R. I. 709. EXPLAINED IN Murphy *v.* Union R. Co., 118 Mass. 228.

Plaintiff, a female passenger, alleged that she was injured by the sudden starting of a car before she could get off, whereby she was thrown to the paved street and injured. The evidence tended to show that she had reached the rear door when the car started, which threw her on the platform against the dashboard, but that she recovered her feet, and afterward either stepped or jumped off, of her own volition, while the car was in motion. *Held*, that a judgment in her favor should be set aside. *Dickson* v. *Broadway & S. A. R. Co.*, 41 *How. Pr.* (*N. Y.*) 151, 1 *J. & S.* 330; *appeal dismissed in* 47 *N. Y.* 507.

Plaintiff, a boy seventeen years old, attempted to alight from a car by the front platform, but fell under it and was injured. Plaintiff testified that the car had come to a full stop, at his request, and he was thrown down by its suddenly starting while he was getting off. He was supported by another witness, but one who did not give a clear account of the transaction. The conductor, driver, and five disinterested witnesses testified that the car had not slackened its speed, and the conductor and driver testified that no request had been made to stop it. It was further proven that plaintiff had several times admitted, soon after the accident, that he jumped off the car while it was in motion. *Held*, that a verdict in favor of plaintiff should be set aside. *Bernstein* v. *Dry Dock, E. B. & B. R. Co.*, 25 *N. Y. Supp.* 669, 72 *Hun* 46, 55 *N. Y. S. R.* 341.

In an action against a street-car company for personal injuries, the plaintiff is properly nonsuited when he testifies as follows: "I was standing at the lookout corner * * * and I signaled the driver to stop. He stopped the car; by the time it came to me it had a little speed, but was moving so little that it would not be noticed. I was facing the left-hand side of the car coming down, placed my left hand on the hand rail and my right foot on the step, when I heard the brake go off, and before I had firm footing the car moved, pulled me along and broke my arm; I was dragged a short distance." *Picard* v. *Ridge Ave. Pass. R. Co.*, 147 *Pa. St.* 195, 23 *Atl. Rep.* 566.

406. Particular instructions as to. —In an action for a personal injury, the defendant must prevail if it appear that when plaintiff signaled the conductor to stop the car the conductor rang the bell for that purpose, and the car immediately began to slow down, and that plaintiff, without waiting for the car to stop, undertook to and did step from the car while it was still in motion. It is, therefore, error to refuse an instruction involving this proposition, if based upon evidence in the case. *Harmon* v. *Washington & G. R. Co.*, 30 *Am. & Eng. R. Cas.* 627, 6 *Mackey* (*D. C.*) 57, 8 *Cent. Rep.* 738.

In an action to recover for a personal injury received in attempting to alight from a car, defendant asked the court to instruct the jury to find for defendant, if they found that plaintiff, while the car was still in motion, without ringing the bell, and without notice to the driver of his intention, alighted from the car, and in so doing was thrown to the ground by a jerk of the car, and injured. *Held*, that the instruction was properly refused, as the motion of the car might have been barely perceptible, in which case the driver would have no right to start the car by a sudden jerk without looking to see if passengers were in the act of alighting, and that the act of plaintiff in such case could not be regarded as negligence. *Chicago City R. Co.* v. *Mumford*, 3 *Am. & Eng. R. Cas.* 312, 97 *Ill.* 560.—QUOTED IN North Cliicago St. R. Co. *v.* Williams, 140 Ill. 275.

Plaintiff alone testified that she signaled the conductor to stop, and that the car came to a "dead stop," when she placed her right foot on the step with her left on the platform, and when she was just making the step to the ground, the car started suddenly and threw her off. The court charged that if after the car started she could have retained her position on it, but instead of doing so she elected to step from the car after it started, then she could not recover. *Held*, that this could not be considered prejudicial to plaintiff, when there was no evidence that she could have retained her position on the car after it started, and that instead of doing so she stepped off. *Mc-*

Laughlin v. *Atlantic Ave. R. Co.*, 36 *N. Y. S. R.* 87, 12 *N. Y. Supp.* 453.

Plaintiff testified that she rang the bell, and as the car stopped she was about to step off, when it suddenly started again and threw her down. Defendant introduced witnesses who were officers of the company or otherwise connected with it, who testified that plaintiff had said that she alighted from the car before it stopped. The court charged that even if the jury found that the car came to a standstill, still it was a question of fact for them whether plaintiff was guilty of contributory negligence or not; and if they found she was not, assuming that the car was moving slowly, and that the company was guilty of negligence, then plaintiff was entitled to recover. The court refused to charge, at the request of defendant, that it was negligence *per se* for a person to get off a moving car, and that plaintiff could not recover, if the injury resulted from mere accident. *Held*, that there was no error, and that a judgment for plaintiff should be affirmed. *Conley* v. *Forty-second St., M. & St. N. A. R. Co.*, 2 *N. Y. Supp.* 229, 24 *J. & S.* 607.

407. Entering car by front platform.—A company is only liable for gross negligence where a person is injured while attempting to board a car by way of the front platform while in motion. *Basch* v. *North Chicago St. R. Co.*, 40 *Ill. App.* 583.

It is not negligence *per se* for one to get on to the front platform of a horse car while the car is moving slowly. Whether the act is negligent depends on circumstances. *McDonough* v. *Metropolitan R. Co.*, 21 *Am. & Eng. R. Cas.* 354, 137 *Mass.* 210.—APPROVED IN Ober *v.* Crescent City R. Co., 44 La. Ann. 1059. QUOTED IN North Chicago St. R. Co. *v.* Williams, 140 Ill. 275.

If a street-car is at rest, or on the point of rest, although some motion remains, it is not contributory negligence, as a matter of law, to enter by the front platform. *Maher* v. *Central Park, N. & E. R. R. Co.*, 7 *J. & S.* (*N. Y.*) 155; *affirmed in* 67 *N. Y.* 52.

It is not contributory negligence *per se* for a passenger to board a street-car by the front platform, when the car is moving at such a slow rate of speed that a person of reasonable prudence, in the exercise of ordinary care, would not hesitate to attempt to board it; but the question is for the jury to determine on all the evidence. *Stager* v. *Ridge Ave. Pass. R. Co.*, 33 *Am. & Eng. R. Cas.* 540, 119 *Pa. St.* 70, 12 *Atl. Rep.* 821, 21 *W. N. C.* 131, 11 *Cent. Rep.* 427.—FOLLOWED IN Pitcher *v.* People's St. R. Co., 154 Pa. St. 560.

An attempt to board the front platform of a street-car running at the rate of seven or eight miles an hour is such negligence as will preclude recovery for an injury thereby sustained; and an instruction to that effect is not prejudicial to a plaintiff who contends that the car slowed down in response to his signal, and that when he was about to jump on the rate of speed was suddenly increased to its usual rate, since if its rate was not reduced and the car was proceeding at its ordinary speed there was no negligence on the part of the company, and the injuries must have been sustained by the attempt to board a car moving so rapidly. *Woo Dan* v. *Seattle Elec. R. & P. Co.*, 58 *Am. & Eng. R. Cas.* 195, 5 *Wash.* 466, 32 *Pac. Rep.* 103.

408. Violating rule of company by getting on or off by front platform.—A regulation of a company, prohibiting passengers from getting on or off the front end of any car, and requiring them to enter and descend by the rear platform only, is a reasonable regulation; and knowingly to violate it, without the compulsion of some existing necessity, is conclusive evidence of negligence on the part of the passenger, so that should he sustain an injury in consequence thereof, he will have no right of action against the company, notwithstanding the driver may also have been negligent. *Baltimore City Pass. R. Co.* v. *Wilkinson*, 30 *Md.* 224.—DISTINGUISHED IN Baltimore & O. R. Co. *v.* State, 36 Md. 366. REVIEWED IN Baltimore & Y. Turnpike Road *v.* Cason, 72 Md. 377.

The fact that a driver or conductor may have given permission thus to use the platform is immaterial, for the company cannot be bound by the act of its servant in attempting to dispense with a known and positive regulation. *Baltimore City Pass. R. Co.* v. *Wilkinson*, 30 *Md.* 224.

The facts that a notice of the regulation requiring passengers to enter and leave the cars by the rear platform only was put up inside of all the cars, and was legible to all who entered them, and that plaintiff had often previously ridden in the cars, were evidence from which it might be inferred

that he had notice of its existence. *Baltimore City Pass. R. Co.* v. *Wilkinson*, 30 *Md.* 224.

Plaintiff gave up his seat in a street-car to an elderly lady, and while standing on the front platform the car ran off the track. At the request of the driver plaintiff got off and assisted in getting the car on the track again, and while plaintiff was in the act of again getting on the front platform the driver started the horses, without signal or warning, and plaintiff was thrown down, and after being dragged some distance was injured by the wheel. Notices were posted in the car requiring passengers to enter and leave only by the rear platform. *Held*, that, even if it be conceded that plaintiff was negligent in entering by the front platform, it still remained a question whether, by the exercise of proper care, injury could not have been avoided after the danger was seen; and if the injury could have been thus avoided, the company was liable. *People's Pass. R. Co.* v. *Green*, 6 *Am. & Eng. R. Cas.* 168, 56 *Md.* 84.

409. Missouri act to prevent getting on or off front platform. — The effect and intention of Mo. Act of Jan. 16, 1860, concerning street railroads, is that when the injury to the passenger is occasioned by his getting on or off the car at the forward platform it shall be presumed as a matter of law that the negligence of the passenger himself contributed to produce the injury. *McKeon* v. *Citizens' R. Co.*, 42 *Mo.* 79.

But the above statute does not apply to a case where the passenger at the time of the injury is not getting on or off but is riding on the steps of the platform with the knowledge and by the direction of the driver. *Seymour* v. *Citizens' R. Co.*, 58 *Am. & Eng. R. Cas.* 395, 114 *Mo.* 266, 21 *S. W. Rep.* 739.—QUOTING Muehlhausen *v.* St. Louis R. Co., 91 Mo. 347.

410. Riding on front platform. — In an action for personal injuries occasioned by plaintiff falling under a moving horse-car, his evidence tended to show that he was pushed off the front platform by the driver; the defendant's evidence that he was intoxicated and made a lunge towards the car, and that the driver tried to prevent his going under it. Defendant offered in evidence a rule forbidding its drivers to allow intoxicated persons on the front platform, and a notice posted in the car prohibiting passengers from riding on the front platform. There was no evidence that plaintiff had any knowledge either of the rule or of the notice, except that it appeared that he had ridden in the cars before. *Held*, that the rule and the notice were properly admitted in evidence. *O'Neill* v. *Lynn & B. R. Co.*, 155 *Mass.* 371, 29 *N. E. Rep.* 630.

As matter of law, the fact that a street-railway passenger voluntarily puts himself on the front platform of a car, when there is room inside, will not absolve the company from liability for injuries there received by him. *Burns* v. *Bellefontaine R. Co.*, 50 *Mo.* 139, 3 *Am. Ry. Rep.* 490.—QUOTING McKeon *v.* Citizens' R. Co., 42 Mo. 79. — DISTINGUISHED IN Ashbrook *v.* Frederick Ave. R. Co., 18 Mo. App. 290.

Plaintiff entered a car by the front platform and was soon afterwards injured by a collision in the street. The evidence showed that he had ample time to have passed into the car, but having discovered his wife inside, stopped and was bowing to her. *Held*, that this was a commendable act of gallantry, and an admirable performance for a husband, but could not render the company liable for damages. *Ashbrook* v. *Frederick Ave. R. Co.*, 18 *Mo. App.* 290. — DISTINGUISHING Clark *v.* Eighth Ave. R. Co., 36 N. Y. 137; Huelsenkamp *v.* Citizens' R. Co., 37 Mo. 537; Burns *v.* Bellefontaine R. Co., 50 Mo. 139.

It is not necessarily negligence for a passenger to ride on the front platform of a moving car. *Nolan* v. *Brooklyn City & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 463, 87 *N. Y.* 63, 41 *Am. Rep.* 345.—DISTINGUISHING Phillips *v.* Rensselaer & S. R. Co., 49 N. Y. 177; Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135; Ward *v.* Central Park, N. & E. R. R. Co., 11 Abb. Pr. N. S. 411; Solomon *v.* Central Park, N. & E. R. R. Co., 1 Sweeny 298. —DISTINGUISHED IN Hayes *v.* Forty-second St. & G. S. F. R. Co., 21 Am. & Eng. R. Cas. 358, 97 N. Y. 259. QUOTED IN Goodrich *v.* Pennsylvania & N. Y. C. & R. Co., 29 Hun (N. Y.) 50. REVIEWED IN Hourney *v.* Brooklyn City R. Co., 27 N. Y. S. R. 49, 7 N. Y. Supp. 602.—*Hourney* v. *Brooklyn City R. Co.*, 7 *N. Y. Supp.* 602, 27 *N. Y. S. R.* 49; *affirmed in* 130 *N. Y.* 641, *mem.*, 29 *N. E. Rep.* 1033, *mem.*—APPLYING Nolan *v.* Brooklyn City & N. R. Co., 87 N. Y. 63.

Plaintiff entered a street-car at night, when it was too dark to see the lettering on the outside. There was no conductor, and

he passed through the car to the front door to ask the driver as to its destination, and while awaiting an answer the car jumped a switch, became derailed, and plaintiff was injured. *Held*, that he had a right to inquire as to the destination of the car, and he was not guilty of negligence in standing where he did until he received an answer. *Farrell* v. *Houston, W. S. & P. F. R. Co.*, 21 *N. Y. S. R.* 84, 51 *Hun* 640, *mem.*, 4 *N. Y. Supp.* 597.

Plaintiff testified that he was riding on the front platform, and not on the guard rail in front of the car, but this was contradicted by two witnesses for defendant. *Held*, that the question of his position was for the jury. *Hourney* v. *Brooklyn City R. Co.*, 7 *N. Y. Supp.* 602, 27 *N. Y. S. R.* 49; *affirmed in* 130 *N. Y.* 641, *mem.*, 29 *N. E. Rep.* 1033, *mem.*

Plaintiff was voluntarily riding on the step of the front platform of a car at the time he was injured. Plaintiff's contention was that though he may have been negligent in riding where he did, still the company was liable because the driver did not stop when requested and let him off, and that the accident happened after such refusal. *Held*, that the failure to stop, not being the cause of plaintiff's occupying the position he did, would not render the company liable. *Solomon* v. *Central Park, N. & E. R. R. Co.*, 1 *Sweeny* (*N. Y.*) 298.

Where the measure of duty on the part of a passenger is ordinary and reasonable care, and the standard shifts with the circumstances of the case, the question of contributory negligence is for the jury. So standing on the step of the front platform of a crowded street-railway car, with the implied assent of the conductor and driver, is not contributory negligence *per se*. *Germantown Pass. R. Co.* v. *Walling*, 2 *Am. & Eng. R. Cas.* 20, 97 *Pa. St.* 55, 37 *Am. Rep.* 711, *n.*—QUOTING Meesel *v.* Lynn & B. R. Co., 8 Allen (Mass.) 234. — QUOTED IN North Chicago St. R. Co. *v.* Williams, 140 Ill. 275; Topeka City R. Co. *v.* Higgs, 34 Am. & Eng. R. Cas. 529, 38 Kan. 375.

411. —— when the car is crowded. —A person who, desiring to enter a street-car, finds several persons standing on the platforms, and through the window sees several others standing up in the aisles, while all the seats appear to be occupied, is not guilty of negligence because he stands on the front platform; and his knowledge of a rule of the company forbidding passengers to stand on the platforms does not make him guilty of negligence as matter of law, when the conductor accepted his fare without objection, and there is evidence tending to show that the position was not obviously dangerous, and that the injury he received was caused by the speed of the car while passing around a curve. On these facts the question of negligence *vel non* is properly left to the jury. *Highland Ave. & B. R. Co.* v. *Donovan*, 52 *Am. & Eng. R. Cas.* 568, 94 *Ala.* 299, 10 *So. Rep.* 139.

A passenger who, by reason of the crowded condition of a street-car and of the rear platform, is obliged to ride on the front platform, has a right to do so in the absence of regulations to the contrary, and is not guilty of negligence in so doing. *Archer* v. *Ft. Wayne & E. R. Co.*, 48 *Am. & Eng. R. Cas.* 50, 87 *Mich.* 101, 49 *N. W. Rep.* 488.

It is a question for the jury whether such manner of riding is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent passengers from being thrown from the car, and the question of the negligence of a passenger while so riding, and of the company, should be submitted to the jury under proper instructions. *Archer* v. *Ft. Wayne & E. R. Co.*, 48 *Am. & Eng. R. Cas.* 50, 87 *Mich.* 101, 49 *N. W. Rep.* 488.

Plaintiff was riding on a horse-car, the inside of which was full of passengers, and both platforms were crowded. He stood on the front platform, holding on, when the violence of a sudden jerk, caused by the driver whipping his horses, threw him off. Plaintiff was sworn and gave evidence in the cause. The company called witnesses and introduced evidence to contradict the testimony of plaintiff. The president of the company was not allowed to give in evidence a statement made in writing by the conductor of the car after the accident. *Held*, that it was not error to refuse to nonsuit. *North Hudson County R. Co.* v. *May*, 27 *Am. & Eng. R. Cas.* 151, 48 *N. J. L.* 401, 5 *Atl. Rep.* 276; *reversed on other grounds in* 49 *N. J. L.* 445, 9 *Atl. Rep.* 688.

Plaintiff got on a crowded car at night, and for want of room elsewhere, rode on the front platform, from which he was pushed, after the car was in motion, by the crowd. *Held*, that he was guilty of contributory negligence, and could not main-

tain an action for the injuries sustained. *Tregear* v. *Dry Dock, E. B. & B. R. Co.*, 14 *Abb. Pr. N. S. (N. Y.)* 49.

A notice was posted inside of a car that passengers must enter and leave at the rear platform, and must not stand on the car steps. Plaintiff, who was a stranger, was permitted to get on and to stand on the front platform, or the steps, when the car was so crowded that he could not get any better place, and the usual fare was collected from him. *Held*, that he was not guilty of contributory negligence, as a matter of law, whether he knew of the notice or not. *Hadencamp* v. *Second Ave. R. Co.*, 1 *Sweeny (N. Y.)* 490.—FOLLOWING Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135; Edgerton *v.* New York & H. R. Co., 39 N. Y. 227.

Plaintiff, standing on the front platform of a crowded car, was thrown off by a jolt and injured, but it did not appear whether he was holding on to the iron rail on the platform or not. *Held*, that the fact of plaintiff not proving affirmatively that he was so holding on was not a ground for nonsuit. *Cornish* v. *Toronto St. R. Co.*, 23 *U. C. C. P.* 355.

412. —— when there is room inside. —Plaintiff, while riding on the front platform of a car, fell or slipped off, and his foot was crushed by the rear wheel. The car was in good repair, and neither the conductor nor the driver was negligent in any particular. There was no unusual or extraordinary motion of the car at the time of the injury. In the car, as in the other cars of the company, there was a printed notice in large type, forbidding passengers to stand or sit on the front platform. Plaintiff, who rode the cars frequently, and was able to read, testified that he had never read the notice. There was ample standing room inside the car when the accident happened. *Held*, that the conduct of plaintiff, in being on the front platform of the car, a perilous position, in violation of a reasonable regulation of the company, directly contributed to the injury, and he was not entitled to recover. *Baltimore & Y. Turnpike Road* v. *Cason*, 72 *Md.* 377, 20 *Atl. Rep.* 113.—QUOTING Baltimore & O. R. Co. *v.* State, 63 Md. 144; Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 368. REVIEWING Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 232; Pennsylvania R. Co. *v.* Zebe, 33 Pa. St. 318; Hickey *v.* Boston & L. R. Co., 14 Allen 432.

Standing on the front platform of a horse-car when there is room inside is not conclusive evidence that the person was not in the exercise of due care. Whether he was is for the jury. *Maguire* v. *Middlesex R. Co.*, 115 *Mass.* 239.

Plaintiff rode on the front platform, as defendant allowed smoking only there and he was smoking. The conductor took fare from him and allowed him to remain without objection. There was abundant room inside. By a jolt of the car he was thrown off and injured. The statute of New York relieves railroad companies from liability where they post notices on their cars warning against riding on the platform and furnish seats to passengers in the cars. Defendant had posted this notice: "Passengers are forbidden to get on or off the car while in motion, or on or off the front platform, or on or off the side except nearest the sidewalk." *Held:* (1) that, the notice of defendant not forbidding passengers to ride on the platform, the statute did not relieve defendant from liability; (2) that independently of the mandate of the statute it is not, even in the case of steam cars, negligence *per se* for a passenger to stand on the front platform of a moving car. *Nolan* v. *Brooklyn City & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 463, 87 *N. Y.* 63, 41 *Am. Rep.* 345.—EXPLAINED IN Worthington *v.* Central Vt. R. Co., 64 Vt. 107.

413. Leaving car by front platform.—Plaintiff, at night, entered a street-car for the purpose of putting on her child as a passenger, intending to leave the car herself at once. The rear platform was so crowded that she had to get on the front platform, which was not an unusual thing for passengers to do. She testified that as she entered she told the driver that she was only putting her child on the car and would then get off. When in the act of stepping down the driver whipped up the mules, without any notice, and the sudden jerk threw plaintiff to the ground, and her arm was crushed under the car wheel. Defendant introduced several witnesses who testified that plaintiff stepped off while the car was moving, without any request that the car stop. *Held*, that there was sufficient evidence to sustain a verdict for plaintiff. *Coast Line R. Co.* v. *Boston*, 83 *Ga.* 387, 9 *S. E. Rep.* 1108.

It is not contributory negligence for a passenger to alight from a street-car by the front platform, in the absence of any notice

to the contrary; nor to request the driver, instead of the conductor, to stop the car. *Mulhado* v. *Brooklyn City R. Co.*, 30 *N. Y.* 370.

The fact that a passenger left a car by the front platform, in violation of a known regulation of the road, did not make her guilty of contributory negligence. *Platt* v. *Forty-second St. & G. S. F. R. Co.*, 4 *T. & C.* (*N. Y.*) 406, 2 *Hun* 124.

There was a conflict of evidence as to whether a street-car was stopped at the request of plaintiff's decedent and again negligently started while he was in the act of getting off. *Held*, that the case should be left to the jury, though there was evidence tending to show that the decedent was unnecessarily upon the front platform and attempted to alight therefrom. *Lax* v. *Forty-second St. & G. S. F. R. Co.*, 14 *J. & S.* (*N. Y.*) 448.—FOLLOWING Ginna *v.* Second Ave. R. Co., 67 N. Y. 596: Maher *v.* Central Park, N. & E. R. R. Co., 67 N. Y. 52. QUOTING Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135.

414. Riding on platform.*— Plaintiff was standing on the rear platform of a street-car, steadying himself by holding the rail of the platform, when his hand was injured by being struck by the wheel of defendant's dray, which was passing in the rear of the car. *Held*, that the court could not say, as a matter of law, that plaintiff was guilty of contributory negligence in standing where he did. *Seigel* v. *Eisen*, 41 *Cal.* 109.

In an action by one injured while getting on a horse-car or standing on the running board or platform seeking a seat, defendant asked the court to instruct the jury, as a matter of law, that if they believed, from the evidence, that plaintiff had no right to be where he was at the time of the accident, then defendant was not liable for the injury, unless it was done wilfully, which was refused. *Held*, no error, as it was obscure and calculated to confuse the jury, and failed to state any facts upon which he had no right to be where he was at the time of the accident. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.

A company has the right to carry passengers on its car platforms, and if a passenger be injured while standing there, without objection from the company, the question of his contributory negligence is for the jury. *Topeka City R. Co.* v. *Higgs*, 34 *Am. & Eng. R. Cas.* 529, 38 *Kan.* 375, 16 *Pac. Rep.* 667.

The court cannot say, on a bill of exceptions, that riding upon the outside platform of a horse-car is such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom. *Meesel* v. *Lynn & B. R. Co.*, 8 *Allen* (*Mass.*) 234.—DISTINGUISHING Gavett *v.* Manchester & L. R. Co., 16 Gray 501; Todd *v.* Old Colony & F. R. R. Co., 3 Allen 18, 7 Allen 207; Gahagan *v.* Boston & L. R. Co., 1 Allen 187; Lucas *v.* New Bedford & T. R. Co., 6 Gray 64.—DISTINGUISHED IN Wills *v.* Lynn & B. R. Co., 129 Mass. 351. QUOTED IN Topeka City R. Co. *v.* Higgs, 34 Am. & Eng. R. Cas. 529, 38 Kan. 375; Lapointe *v.* Middlesex R. Co., 28 Am. & Eng. R. Cas. 198, 144 Mass. 18; Germantown Pass. R. Co. *v.* Walling, 2 Am. & Eng. R. Cas. 20, 97 Pa. St. 55, 37 Am. Rep. 711, *n.*

It is a question of fact for the jury. *Briggs* v. *Union St. R. Co.*, 37 *Am. & Eng. R. Cas.* 204, 148 *Mass.* 72, 19 *N. E. Rep.* 19. —QUOTED IN North Chicago St. R. Co. *v.* Williams, 140 Ill. 275.

It is the duty of a passenger boarding a street-car to occupy a safe position therein, when there is room for him inside; and where he voluntarily occupies a position on the step of the platform and remains there during the transit, he assumes all the risks of danger ordinarily incident to his position, but he does not assume a risk of danger created by the negligence of the carrier, e. g., running the car at a dangerous and unusual rate of speed. Such speed, if it causes the passenger to lose his hold and to fall from the car, will be deemed the proximate cause of the injury. *Willmott* v. *Corrigan Con. St. R. Co.*, 106 *Mo.* 535, 17 *S. W. Rep.* 490.—REVIEWED IN Seymour *v.* Citizens' R. Co., 114 Mo. 266.

It is not negligence *per se* on the part of a passenger on a horse car to ride on the platform, and this is true regardless of the question of room in the car. *Seymour* v. *Citizens' R. Co.*, 114 *Mo.* 266, 21 *S. W. Rep.* 739.—QUOTING Geitz *v.* Milwaukee City R. Co., 72 Wis. 307. REVIEWING Willmott *v.* Corrigan Con. St. R. Co., 106 Mo. 535.

* Riding on platform of cars, see notes, 18 AM. & ENG. R. CAS. 201; 16 *Id.* 374; 2 *Id.* 26; 6 *Id.* 460; 47 *Id.* 584, *abstr.*

Contributory negligence of passenger in riding on street-car platform, see notes, 37 AM. REP. 710; 41 *Id.* 347; 12 L. R. A. 129.

The mere fact of riding on a platform of a street-car is not conclusive proof of negligence. *City R. Co.* v. *Lee*, 34 *Am. & Eng. R. Cas.* 566, 50 *N. J. L.* 435, 7 *Am. St. Rep.* 798, 14 *Atl. Rep.* 883, 13 *Cent. Rep.* 273. *Dickson* v. *Ridge Ave. Pass. R. Co.*, 19 *Phila.* (*Pa.*) 430.

It is not negligence *per se* for one riding upon the platform of the car to omit to take hold of the iron bar or rail to prevent being thrown from the platform. *Ginna* v. *Second Ave. R. Co.*, 67 *N. Y.* 596, *mem.*; *affirming* 8 *Hun* 494.—FOLLOWED IN Lax *v.* Forty-second St. & G. S. F. R. Co., 14 J. & S. (N. Y.) 448. REVIEWED IN Goodrich *v.* Pennsylvania & N. Y. C. & R. Co., 29 Hun (N. Y.) 50.

The act of a passenger in riding upon the rear platform of a crowded street-railway car is not contributory negligence, where he was struck and injured by the pole of a following car, although the accident would not have happened except for his position. That position was a condition but not a cause of the injury; and the court properly withdrew from the jury the question of contributory negligence. *Thirteenth & F. St. Pass. R. Co.* v. *Boudrou*, 2 *Am. & Eng. R. Cas.* 30, 92 *Pa. St.* 475, 37 *Am. Rep.* 707.

415. —— when the car is crowded. —Where a street-car is so crowded that a passenger cannot find a place inside without great discomfort, and the conductor accepts his fare without insisting on his finding a place inside, the fact of his riding on the platform will not of itself prevent a recovery for an injury received. His conduct presents a question for the jury. *Ginna* v. *Second Ave. R. Co.*, 67 *N. Y.* 596; *affirming* 8 *Hun* 494. *Walling* v. *Railroad Co.*, 12 *Phila.* (*Pa.*) 309.

It is not of itself negligence, either on the part of the passenger or on the part of a street-railway company, that an adult, or a person reasonably competent to take care of himself, should occupy by permission a platform of a crowded passenger-car. *Sandford* v. *Hestonville, M. & F. Pass. R. Co.*, 136 *Pa. St.* 84, 20 *Atl. Rep.* 799.

The carrier, however, is bound to higher care and vigilance when the platform is crowded, in proportion as that place is more dangerous than a seat inside the car; and, in case of injury, this fact, with all the circumstances, will be considered in determining the carrier's responsibility. *Sandford* v. *Hestonville, M. & F. Pass. R. Co.*, 136 *Pa. St.* 84, 20 *Atl. Rep.* 799.

416. —— when there is room inside.—Where there is abundant standing room inside of a car in which there are pendent straps which a passenger may hold while standing, he is guilty of contributory negligence who rides upon the platform, and if an injury results to him which would not have occurred had he been inside, he cannot maintain an action. *Andrews* v. *Capitol, N. O. St. & S. W. R. Co.*, 2 *Mackey* (*D. C.*) 137.

Standing on the rear platform of a moving street-car, even when there is room inside, is not, under ordinary circumstances, negligence *per se*, at least in the absence of any published rule of the carrier forbidding it. *Matz* v. *St. Paul City R. Co.*, 52 *Minn.* 159, 53 *N. W. Rep.* 1071.

The fact that a passenger on a street-car stands upon the outer platform when there is opportunity to take a seat in the car, while it will ordinarily constitute a defense in an action against the railroad company, is not a defense in an action against another party to recover damages for negligence causing injury to the passenger. *Connolly* v. *Knickerbocker Ice Co.*, 39 *Am. & Eng. R. Cas.* 441, 114 *N. Y.* 104, 21 *N. E. Rep.* 101, 22 *N. Y. S. R.* 675; *affirming* 8 *N. Y. S. R.* 901.—FOLLOWING Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135.

417. —— against rule of company.* —Plaintiff sat on the front platform of a street-car, with his feet on the step, against the rules of the company and the warning of the driver, and without any reasonable excuse therefor. *Held*, that he did not exercise such care as would enable him to maintain an action against the company for an injury received. *Wills* v. *Lynn & B. R. Co.*, 2 *Am. & Eng. R. Cas.* 27, 129 *Mass.* 351.—DISTINGUISHING Meesel *v.* Lynn & B. R. Co., 8 Allen 234.—DISTINGUISHED IN Lapointe *v.* Middlesex R. Co., 28 Am. & Eng. R. Cas. 198, 144 Mass. 18.

It is within the power of street-railway companies to prohibit passengers from riding upon the platforms of cars, or to give notice that those who ride there do so at their own risk, or to limit the number of passengers which each car shall carry, and require them to ride inside. Until they adopt some such regulation, and notify the public, it is but reasonable to hold them

* Rule "to keep off platforms" not applicable to one who goes there in apprehension of danger, see 47 AM. & ENG. R. CAS. 585, *abstr.*

liable for injuries, resulting from their own negligent acts, to their patrons, who are themselves in the exercise of reasonable care, whether riding upon the platforms or within the cars. *Upham* v. *Detroit City R. Co.*, 85 *Mich.* 12, 48 *N. W. Rep.* 199.

In the absence of a regulation forbidding riding on the platforms of street-cars, contributory negligence cannot be imputed to a passenger from the fact of his being injured while riding on the platform. *Hunt* v. *Missouri R. Co.*, 14 *Mo. App.* 160; *reversed on other grounds in* 89 *Mo.* 607.

418. Standing on very edge of platform.—To stand upon the outer edge of a car platform, without holding on to anything, where the street is in a bad condition and the car is liable to jolt or jerk, and to maintain such a position after an opportunity to occupy a place of comparative safety, is such negligence as to bar a recovery for an injury, no matter how negligent the company may have been. *Ward* v. *Central Park, N. & E. R. R. Co.*, 1 *J. & S.* (*N. Y.*) 392, 42 *How. Pr.* 289, 11 *Abb. Pr. N. S.* 411.—REVIEWING Hadencamp *v.* Second Ave. R. Co., 1 Sweeny (N. Y.) 490; Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135; Sheridan *v.* Brooklyn City & N. R. Co., 36 N. Y. 39.

419. New York Act against riding on platform.—As to whether the provision of N. Y. General Railroad Act of 1850, ch. 140, § 46, relieving a railroad company from liability for injuries received by a passenger on the platform of a car when it posts a notice in the car warning passengers against so riding, and furnishes a seat in the car for the passenger, applies to street railways, *quære*. *Hayes* v. *Forty-second St. & G. S. F. R. Co.*, 21 *Am. & Eng. R. Cas.* 358, 97 *N. Y.* 259; *reversing* (?) 26 *Hun* 534.—DISTINGUISHING Nolan *v.* Brooklyn City & N. R. Co., 87 N. Y. 63.

The above statute does not apply to street-railroad companies. *Lax* v. *Forty-second St. & G. S. F. R. Co.*, 14 *J. & S.* (*N. Y.*) 448. *Vail* v. *Broadway R. Co.*, 6 *Misc.* 20, 26 *N. Y. Supp.* 59, 58 *N. Y. S. R.* 124.—QUOTING In re Washington St. A. & P. R. Co., 115 N. Y. 447.

By a rule of defendant company, smoking was permitted on the front platforms of its cars. *Held*, that it should not be permitted to shield itself from liability as a common carrier behind the provisions of the General Railroad Act, § 46. *Vail* v. *Broadway R. Co.*, 6 *Misc.* 20, 26 *N. Y. Supp.* 59, 58 *N. Y. S. R.* 124.

420. Going to platform for purpose of leaving car.—A passenger in a street-car, after signaling to the conductor to stop the car, left his seat and stood for a moment, while the car was in motion, on the rear platform, expecting that the car would stop so that he could alight. Although an accumulation of snow and ice rendered the platform slippery, he omitted to take hold of the rail. The car jolted, and he was thrown off. *Held*, that whether he was guilty of such negligence as to preclude his maintaining an action for the injuries thereby received was a question for the jury, and not of law for the court. *Fleck* v. *Union R. Co.*, 16 *Am. & Eng. R. Cas.* 372, 134 *Mass.* 480.—DISTINGUISHING Wills *v.* Lynn & B. R. Co., 129 Mass. 351. FOLLOWING Treat *v.* Boston & L. R. Corp., 131 Mass. 371.

The car on which plaintiff rode was an open one, having seats crosswise, and on either side a platform on which persons stepped in entering or leaving the car. At the end of each seat was an upright provided with a handhold. Plaintiff testified that on entering the car she informed the conductor that she wished to alight at a certain street, to which he answered "Yes, ma'am"; that when the car reached the street, she rang the bell; that the gripman applied the brake and brought the car almost to a standstill; that, thinking every instant it would stop—without using the handhold—she stepped to the platform, preparatory to stepping to the street when the car came to a full stop, and while in that position, and seen by the gripman, he released the brake, and suddenly accelerated the speed, with a jerk which threw plaintiff to the street. *Held*: (1) that whether plaintiff was guilty of contributory negligence in stepping to the platform of the car while it was in motion, and in not using the handholds, were questions for the jury; (2) that the jury's finding that plaintiff was thrown from the platform by the cause and in the manner she testified would not be set aside, as not supported by the evidence, because two witnesses testified that she stepped from the platform to the street, nor because two witnesses swore there was no sudden acceleration of the speed of the car, and three witnesses swore that they did not observe any. *Omaha St. R. Co.* v. *Craig*, 58 *Am.*

& Eng. R. Cas. 208, 39 *Neb.* 601, 58 *N. W. Rep.* 209.

421. Riding on car step.—If a passenger merely uses the step for the purpose of ascending into the car, he is where he has a right to be; and if he stand upon the step too long, it cannot be said that he is thereby such a trespasser as to relieve the company from any liability other than that for a wilful injury. The mere fact of riding on a platform of a street-car is not conclusive proof of negligence. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.

A passenger on a street-car who, on the invitation of a person in charge, or without objection from him, stands on the step of the car outside of a gate is not negligent *per se*, as the danger of such a position is not so obvious that it could be said that a reasonable man would disobey the invitation or direction. *Seymour* v. *Citizens' R. Co.*, 58 *Am. & Eng. R. Cas.* 395, 114 *Mo.* 266, 21 *S. W. Rep.* 739.

Where a passenger knew, from passing it daily on his way to work, that a derrick was in use near the track, but did not know that the track had been moved toward it on the morning of the day of the accident, and he was struck by it while riding on the step of the car, he is not guilty of contributory negligence as a matter of law. *Seymour* v. *Citizens' R. Co.*, 58 *Am. & Eng. R. Cas.* 395, 114 *Mo.* 266, 21 *S. W. Rep.* 739.

That riding upon the steps of a street-car is less safe than a seat inside requires no proof; it is obviously so. *Ashbrook* v. *Frederick Ave. R. Co.*, 18 *Mo. App.* 290.—QUOTING Clark *v.* Eighth Ave. R. Co., 36 N. Y. 137.

Plaintiff mounted the step of a moving car, and, instead of passing within, remained on the step and was struck therefrom by a standing post, with the position of which he was familiar. *Held*, that he was guilty of contributory negligence. *Aikin* v. *Frankford & S. P. City Pass. R. Co.*, 142 *Pa. St.* 47, 21 *Atl. Rep.* 781.

Although the testimony as to whether the platform was so crowded that he could not enter the car where there was abundant room was contradictory, yet it was not error to instruct the jury to return a verdict for defendant. *Aikin* v. *Frankford & S. P. City Pass. R. Co.*, 142 *Pa. St.* 47, 21 *Atl. Rep.* 781.

Plaintiff, while standing on the platform or step of a street-car, was injured by a passing load of wood. The immediate cause of the accident was the conductor's want of vigilance in failing to stop the car, as he might have done in time to prevent the collision. *Held*, that the company was responsible. The fact that plaintiff was standing on the platform did not relieve defendant from responsibility, inasmuch as he was permitted to stand there by the conductor, who had collected fare from him while he was in that position. *Wilscam* v. *Montreal St. R. Co.*, 4 *Montr. Super.* 193; *affirmed in* 5 *Montr. L. R.* 340.

422. —— against rule of company.—It is proper to refuse to charge that, if plaintiff wilfully violated a rule of the company, and rode on the step while the car was in motion, and was injured in consequence, he cannot recover, where there is no evidence of any wilful violation of the rule. *Medler* v. *Atlantic Ave. R. Co.*, 36 *N. Y. S. R.* 89, 12 *N. Y. Supp.* 930; *affirmed in* 126 *N. Y.* 669, *mem.*, 37 *N. Y. S. R.* 963, 27 *N. E. Rep.* 854.

423. Going to step for purpose of leaving car.—When a passenger is on the step of a car and about to alight, and the conductor fails to observe whether or not he has alighted, or, knowing that he has not, negligently starts the car too soon, thus throwing the passenger to the ground, contributory negligence is not chargeable to him from the fact of his being on the step. *Washington & G. R. Co.* v. *Harmon*, 58 *Am. & Eng. R. Cas.* 380, 147 *U. S.* 571, 13 *Sup. Ct. Rep.* 557.

If a passenger, for the purpose of alighting, gets upon the step while the car is slowing, but, instead of stopping, it suddenly starts again with a jerk by reason of which the passenger is thrown from the car and injured, he is not to be charged with contributory negligence by being upon the step while the car was in motion, for he had a right to anticipate that the car would stop, and there was, in contemplation of law, no risk that the car would start again, either with a sudden jerk or otherwise, until he had alighted. *Harmon* v. *Washington & G. R. Co.*, 7 *Mackey* (*D. C.*) 255.

A declaration against a street-railway company which alleges that plaintiff, a passenger, requested the car to be stopped, and, in the confident belief that it would be, got upon the lower step of the rear platform

to be in position to alight, when he was, by the negligence of the driver, thrown from the car and injured, is not demurrable as showing contributory negligence. *Bowie* v. *Greenville St. R. Co.*, 69 *Miss.* 196, 10 *So. Rep.* 574.

Plaintiff was riding on a street-car, carrying a bundle of carpenter's tools. When near his place to alight he stepped to the running step at the side of the car, and while reaching over for his tools was struck by the hub of a wagon on the street. There was barely room for the car to pass the wagon, which lapped considerably over the car step. There was a conflict of evidence as to whether plaintiff had warning, and also as to the speed of the car. *Held*, that the questions of negligence and of contributory negligence were properly left to the jury. *Bleier* v. *Bushwick R. Co.*, 9 *N. Y. S. R.* 706.

Shortly before reaching the place where plaintiff would leave the car, he stepped to the lower step, while the car was running about six miles an hour, and stood there without taking hold of the car with either hand, until there was a sudden jerk, when he attempted to take hold of the rod at the corner of the car and sit down, but failed to do so, and was thrown to the ground. *Held*, that the evidence as to contributory negligence was sufficient to sustain a verdict for defendant. *Tanner* v. *Buffalo R. Co.*, 25 *N. Y. Supp.* 242, 72 *Hun* 465, 54 *N. Y. S. R.* 776.—APPLYING Coleman *v.* Second Ave. R. Co., 114 N. Y. 609, 21 N. E. Rep. 1064.

In such case the court instructed the jury that "if plaintiff voluntarily and unnecessarily placed himself on the step outside the car, before it came to a stop, and while going at the rate of six miles an hour, whereby his injury was made possible, then he cannot recover." *Held*, that the instruction was correct, as applied to the case, the question being left to the jury to say whether the conduct of plaintiff was negligence or not, and the instruction not excluding the question of contributory negligence. *Tanner* v. *Buffalo R. Co.*, 25 *N. Y. Supp.* 242, 72 *Hun* 465, 54 *N. Y. S. R.* 776.

424. —— to allow other passengers to enter.—Plaintiff's evidence was to the effect that he went upon defendant's street-car and stood upon the front platform, although there were vacant seats inside. The car stopped to receive other passengers, who entered by the front platform; to facilitate their entry, plaintiff stepped down upon the front step; as he was stepping up again, as he testified, "the car gave a sudden movement and pulled up," and he was thrown off and injured. It appeared that, after starting, the car did not stop until after the accident. *Held*, that the evidence failed to show any negligence on defendant's part, and that a refusal to nonsuit was error. *Hayes* v. *Forty-second St. & G. S. F. R. Co.*, 21 *Am. & Eng. R. Cas.* 358, 97 *N. Y.* 259; *reversing* (?) 26 *Hun* 534.—DISTINGUISHED IN Morrison *v.* Broadway & S. A. R. Co., 130 N. Y. 166, 28 N. Y. S. R. 498, 8 N. Y. Supp. 436; Medler *v.* Atlantic Ave. R. Co., 36 N. Y. S. R. 89, 12 N. Y. Supp. 930. QUOTED IN De Soucey *v.* Manhattan R. Co., 39 N. Y. S. R. 79, 15 N. Y. Supp. 108.

425. Right of passenger to prepare to leave car. — Failure of plaintiff to notify the conductor that she wished to leave the car is a matter of no consequence, where it appears that her injury was caused by the starting of the car while she was in the act of descending. *Wheaton* v. *North Beach & M. R. Co.*, 36 *Cal.* 590.

While it is a reasonable safeguard against accidents to forbid departure from a car while it is in motion, a passenger on the upper floor of a horse-car does not violate this regulation in walking, the car being in motion, toward the rear end for the purpose of descending to the lower platform. *Baltimore & Y. Turnpike Road* v. *Leonhardt*, 27 *Am. & Eng. R. Cas.* 194 [illegible] *Md.* 70, 5 *Atl. Rep.* 346.

Though passengers have no right to jump off horse-cars while in motion, or to make an attempt to do so, yet they are authorized to prepare to leave when there is evidence of an intention to stop, or any signal given for such a purpose. The mere preparation to leave a car, while it is in motion, is not of itself negligence. *Nichols* v. *Sixth Ave. R. Co.*, 38 *N. Y.* 131; *affirming* 10 *Bosw.* 260. —APPLIED IN Morrison *v.* Erie R. Co., 56 N. Y. 302. FOLLOWED IN Gainard *v.* Rochester City & B. R. Co., 18 N. Y. S. R. 692, 2 N. Y. Supp. 470. QUOTED IN Colwell *v.* Manhattan R. Co., 57 Hun 452, 32 N. Y. S. R. 991, 10 N. Y. Supp. 636.

426. Riding on foot board on side of open car.—Plaintiff stood on the step running along the entire length of a horse-car, and the driver of another car belonging to defendant drove his horses against plaintiff, knocking him off and injuring him.

It appeared that all the seats were occupied and the rear platform was crowded. *Held*, that in standing upon the step plaintiff was not guilty of contributory negligence as matter of law, but it was properly submitted to the jury. *Bruno* v. *Brooklyn City R. Co.*, 5 *Misc.* 327, 25 *N. Y. Supp.* 507, 55 *N. Y. S. R.* 215.

A person who voluntarily undertakes to pass along the side of an open street-car on the side step cannot recover against the company for an injury received by coming in contact with the support or pillar of an elevated railroad. *Vroman* v. *Houston, W. S. & P. F. R. Co.*, 27 *N. Y. Supp.* 257, 57 *N. Y. S. R.* 871, *mem.*, 7 *Misc.* 234.

Though there is some peril attendant upon riding on the foot board of a horse-car, it is not negligence *per se*. *Geits* v. *Milwaukee City R. Co.*, 72 *Wis.* 307, 39 *N. W. Rep.* 866.—QUOTED IN Seymour *v.* Citizens' R. Co., 114 Mo. 266.

427. —— when the car is crowded. —Plaintiff was a passenger on an open car on which there was only standing room on the foot board along the outside of the car. Other passengers occupied this foot board besides plaintiff. At the point where plaintiff embarked there was only a single track. Further on, where the track was double, a car of like form, carrying passengers upon the foot board, passed the car upon which plaintiff was, but the space between the cars was not sufficient to allow them to pass with safety when persons were standing upon the foot boards of both cars, and plaintiff was injured by coming in contact with a passenger standing on the foot board of the other car. Plaintiff was not familiar with the construction of the road. *Held*, that there was no evidence justifying a nonsuit on the ground of contributory negligence. *City R. Co.* v. *Lee*, 34 *Am. & Eng. R. Cas.* 566, 50 *N. J. L.* 435, 7 *Am. St. Rep.* 798, 14 *Atl. Rep.* 883, 13 *Cent. Rep.* 273.—REVIEWED IN Seymour *v.* Citizens' R. Co., 114 Mo. 266.

Where a company runs a vehicle, provided with foot boards with guards on the sides, where passengers usually ride when all the seats inside are taken, a passenger who thus rides when there is no seat accessible to him, and pays his fare, without objection from those in charge, is not thereby guilty of negligence *per se*, but the question of negligence is for the jury. *Spooner* v. *Brooklyn City R. Co.*, 54 *N. Y.* 230, 6 *Am. Ry. Rep.* 198; *reversing* 36 *Barb.* 217, 31 *Barb.* 419.—QUOTED IN Blackmore *v.* Toronto St. R. Co., 38 U. C. Q. B. 172.

Where a passenger is compelled by the crowded condition of the car to stand upon the foot board, it being a common thing for passengers upon defendant's cars to ride in that way, he is not guilty of negligence contributing to injuries received by being struck by a heavy plank which projected a few feet above the roadbed. *Cogswell* v. *West St. & N. E. Elec. R. Co.*, 52 *Am. & Eng. R. Cas.* 500, 5 *Wash.* 46, 31 *Pac. Rep.* 411.

428. —— when there is room inside.—Plaintiff was injured by a collision while riding on the foot board of an open street-car. The jury found that there was room inside, that plaintiff knew he was in a dangerous place, and that he was guilty of negligence contributing to the injury. *Held*, that he could not recover, the negligence of the carrier not being gross or wilful. *Schoenfeld* v. *Milwaukee City R. Co.*, 74 *Wis.* 433, 43 *N. W. Rep.* 162.

429. Riding on driving bar. — It is contributory negligence for a passenger of ordinary common sense to sit on the driving bar of a street-car, even at the driver's invitation, if there is room for him inside the car. *Downey* v. *Hendrie*, 8 *Am. & Eng. R. Cas.* 386, 46 *Mich.* 498, 9 *N. W. Rep.* 828, 41 *Am. Rep.* 347, *n.*

e. When Question of Negligence for Jury—Nonsuit.

430. When case should go to jury. —Where a company is sued by a passenger to recover for personal injuries, and contributory negligence is relied upon as a defense, and there is some evidence to establish it, an instruction is erroneous which in effect tells the jury that before they can find for defendant they must find that such contributory negligence was the sole cause of the injury. *Central Pass. R. Co.* v. *Stevens*, (*Ky.*) 22 *S. W. Rep.* 312.

It is a matter of right in the plaintiff to have the issue of negligence submitted to the jury, when it depends upon conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair difference of opinion among intelligent men. *Wolfkiel* v. *Sixth Ave. R. Co.*, 38 *N. Y.* 49.—FOLLOWING Ernst *v.* Hudson River R. Co., 35 N.

Y. 10.—FOLLOWED IN Tinker *v.* New York, O. & W. R. Co., 71 Hun (N. Y.) 431.—*Lehr* v. *Steinway & H. P. R. Co.*, 118 *N. Y.* 556, 23 *N. E. Rep.* 889, 30 *N. Y. S. R.* 1; *affirming* 44 *Hun* 627, *mem.*, 8 *N. Y. S. R.* 813.—DISTINGUISHING Putnam *v.* Broadway & S. A. R. Co., 55 N. Y. 108.—QUOTED IN Griffith *v.* Utica & M. R. Co., 43 N. Y. S. R. 835; Norris *v.* Brooklyn City R. Co., 4 Misc. (N. Y.) 294.

Plaintiff and her daughter testified that they both entered a car and told the conductor that plaintiff was not a passenger, and that she turned at once to leave the car, and as she was stepping from the platform to the street the conductor rang the bell which caused the car to move forward and threw her down. There was other evidence as to the place where the conductor stood and the direction in which he was looking, which might tend to negative negligence. *Held*, that the case should have been left to the jury. *Rott* v. *Forty-second St. & G. S. F. R. Co.*, 24 *J. & S.* 151, 1 *N. Y. Supp.* 518.

A street-car ran off the track and threw a female passenger, who was *enciente*, to the floor, causing, as she claimed, a miscarriage. She testified that prior thereto she had been in good health. The company denied this, and produced evidence that she had been treated for various diseases for twenty years. *Held*, that it was properly left to the jury to determine the condition of plaintiff's health at the time of the accident. *Reading City Pass. R. Co.* v. *Eckert*, (*Pa.*) 4 *Atl. Rep.* 530.

431. When defendant's negligence is properly left to jury. — Plaintiff was a passenger on a street-car which crossed a drawbridge, and was injured by the falling of the key which was used in opening the bridge. Plaintiff claimed that the driver was going at an undue rate of speed, which caused the bridge to oscillate and the key to fall; but the evidence of the rate of speed was somewhat conflicting, and the driver admitted that he had been afraid for some time of an accident. *Held*, that the question of defendant's negligence was properly left to the jury. *Catalanotto* v. *Coney Island & B. R. Co.*, 27 *N. Y. S. R.* 47, 7 *N. Y. Supp.* 628.

A street-car was going down grade at the rate of seven miles an hour, with plaintiff and others on the platform, when the driver suddenly, and without any apparent reason, applied the brake with such force as to give the car a jerk which threw plaintiff off. *Held*, that the question of negligence was properly left to the jury. *Murray* v. *Brooklyn City R. Co.*, 27 *N. Y. S. R.* 280, 7 *N. Y. Supp.* 900.

Plaintiff was riding on the platform of a street-car, and as it approached the crossing of the track of another company a car was approaching thereon on a down grade at about twice its usual speed, the brake being out of order and the driver unable to control it. As they approached he shouted to the driver of the car on which plaintiff was riding, who whipped up his horses with the view of crossing the track in front of the other car, but the two cars collided and plaintiff was injured. *Held*, that the question of the negligence of both companies was properly left to the jury. *Schneider* v. *Second Ave. R. Co.*, 39 *N. Y. S. R.* 370, 15 *N. Y. Supp.* 556, 27 *J. & S.* 536; *affirmed in* 133 *N. Y.* 583, 44 *N. Y. S. R.* 680, 30 *N. E. Rep.* 752.—REVIEWING Palmer *v.* Delaware & H. Canal Co., 120 N. Y. 170, 30 N. Y. S. R. 817.

Plaintiff was injured by a street-car leaving the track in passing a curve. There was evidence for the plaintiff that the driver was looking at some quarreling boys in the street at the time, and not giving his attention to the horse, which tended to support plaintiff's theory that the car left the track for want of proper guidance of the horse. The company proved that its track was constructed in the best manner, and in good condition, but no explanation was given as to the cause of the accident. *Held*, that the question of the company's negligence was properly left to the jury. *Pollock* v. *Brooklyn & C. T. R. Co.*, 39 *N. Y. S. R.* 568, 60 *Hun* 584, 15 *N. Y. Supp.* 189; *affirmed in* 133 *N. Y.* 624, *mem.*, 30 *N. E. Rep.* 1150, 44 *N. Y. S. R.* 932.

Plaintiff gave up his seat to a lady and stood with one foot in the car and the other on the platform, which was crowded, some of the passengers standing on the guard rail. The platform gave way and injured plaintiff. The car had been in use twelve years; there was an unusual number of passengers, and the conductor did not use proper efforts to prevent them from getting on. *Held*, that the question of defendant's negligence was properly left to the jury. *Norris* v. *Brooklyn City R. Co.*, 53 *N. Y. S. R.* 332.—QUOTING Lehr *v.* Steinway & H. P. R. Co., 118 N. Y. 556, 30 N. Y. S. R. 1.

432. When contributory negligence is properly left to jury.—Where the evidence shows that plaintiff was injured while alighting from a car, but is conflicting as to the side of the street on which the car was stopped, one side only being a lawful stopping place; and that the conductor was not in his place at the time, and that the train stopped in the street in apparent response to a pull of the bell by plaintiff, and she had reasonable ground to believe that it stopped for the purpose of allowing her to alight, although it had not reached the proper stopping place; the question of contributory negligence *vel non* is properly left to the jury. *North Birmingham St. R. Co.* v. *Calderwood*, 89 *Ala.* 247, 7 *So. Rep.* 360.—APPLIED IN Highland Ave. & B. R. Co. *v.* Burt, 92 Ala. 291.

Where the company is in default for not giving proper warning, the questions whether the deceased was guilty of contributory negligence in passing the street crossing, and whether his negligence was the proximate cause of the injury, are of fact for the jury; and where there is a conflict of evidence as to the actual conduct of the deceased, and the circumstances under which he acted, and there is sufficient evidence to warrant the jury in finding that deceased was not negligent, a verdict against the company will not be disturbed upon appeal. *Driscoll* v. *Market St. Cable R. Co.*, 97 *Cal.* 553, 32 *Pac. Rep.* 591.

The court instructed the jury that in order to recover plaintiff must be free from negligence which contributed to the injury; but further on said that the evidence fairly established the fact that plaintiff was not guilty of contributory negligence, and went on to give reasons, based upon the evidence, why; but before leaving the question said, "If this be answered in the affirmative, then you come to the next question," which was that of defendant's negligence. *Held*, that this was but the expression of an opinion, and did not take the question of contributory negligence from the jury. *Griffith* v. *Utica & M. R. Co.*, 43 *N. Y. S. R.* 835, 63 *Hun* 626, 17 *N. Y. Supp.* 692; *affirmed in* 137 *N. Y.* 566, *mem.*, 50 *N. Y. S. R.* 933, 33 *N. E. Rep.* 339.—QUOTING Massoth *v.* Delaware & H. Canal Co., 64 N. Y. 524; Bowen *v.* New York C. R. Co., 18 N. Y. 411; Deyo *v.* New York C. R. Co., 34 N. Y. 11.

433. Sufficiency of evidence to support verdict.—Plaintiff sued for an injury sustained, which, as she and nobody else testified, occurred by the starting of a car while she was in the act of stepping off, after it had stopped on her signal. The car was south bound; the place where she said it stopped, the north line of a street coming to but not crossing the street on which the car ran. There was a conflict among other witnesses whether the car stopped at the south line of the cross street, but none that it did not stop at the north line, and that plaintiff got off and fell while the car was in motion. To this manner of the accident the driver, conductor, and two passengers testified. *Held*, that a judgment for plaintiff must be reversed, as being contrary to evidence. *North Chicago St. R. Co.* v. *Lotz*, 44 *Ill. App.* 78.

In an action for personal injuries received while alighting from a street-car, it was assumed that the fair construction of the testimony of defendant's witnesses was that in slowing up and coming to a stop the car made no sudden start forward; but plaintiff testified that the car did make a sudden start just as she put her foot to the ground. *Held*, that if the jury believed her statement, and also believed the testimony of defendant's witnesses that plaintiff got off while the car was slowing up and before it had stopped, they would properly find that she was injured by the sudden starting of the car after it had begun to slow up, and before it had come to a full stop, and that, although no witnesses had testified that while the car was coming to a stop it was started up with a jerk, there was evidence from which the jury could find that such was the fact. *Hill* v. *West End St. R. Co.*, 158 *Mass.* 458, 33 *N. E. Rep.* 582.

Plaintiff's uncorroborated testimony that he fell from a car, caused by its suddenly starting while he was in the act of alighting, was contradicted by his account of the accident, made under oath to the company soon after the accident, in which he stated that he stepped off while the car was in motion, and also by the conductor's written report, made at the time, and by the testimony of a number of other witnesses. *Held*, that a verdict for plaintiff should be set aside as against the evidence. *Shultz* v. *Third Ave. R. Co.*, 15 *Daly* 95, 2 *N. Y. Supp.* 693, 19 *N. Y. S. R.* 917.—APPLYING Molloy *v.* New York C. & H. R. R. Co., 10 Daly 453; McCarthy *v.* Christopher & T. St. R. Co., 10 Daly 540.

Plaintiff was injured by the car in which he was riding colliding with a furniture van. Defendant's horses were driven rapidly, and the collision occurred by the car hitting the rear end of the van as it was leaving the track, and seemed to be caused solely because the driver would not slacken his speed so as to permit the van to pass over the track. Plaintiff was riding in the car with the window open, and his arm resting on the sill of the same, but entirely within the car. *Held*, that a verdict for plaintiff was sustained by the evidence. *Franklin* v. *Forty-second St. & G. S. F. R. Co.*, 21 *N. Y. S. R.* 944, 3 *N. Y. Supp.* 229, 50 *Hun* 605, *mem.*; *affirmed in* 121 *N. Y.* 673, *mem.*, 24 *N. E. Rep.* 1095, *mem.*

Plaintiff testified that while standing between tracks waiting for a car, with a baby in her arms and a little girl beside her, two cars approached, one of them very swiftly; that she motioned the driver to stop, but he did not do so, and she was knocked down and injured. Defendant offered evidence that both cars came to a stop and that plaintiff, in crossing the track, ran into the car, and was thus injured. *Held*, that a verdict for plaintiff was supported by her testimony, and would not be disturbed. *O'Toole* v. *Central Park, N. & E. R. R. Co.*, 12 *N. Y. Supp.* 347, 35 *N. Y. S. R.* 591, 58 *Hun* 609, *mem.*; *affirmed in* 128 *N. Y.* 597, *mem.*, 28 *N. E. Rep.* 251, *mem.*

434. Evidence not sufficient to show negligence.*—Plaintiff was riding in defendant's street-car; a wagon loaded with lumber was moving in the opposite direction, using the rails of another track. The driver of the wagon, after it had passed the driver of the street-car and when it was abreast of the car, suddenly turned off the track; the lumber which projected beyond the wagon was, by the movement, thrust through a window of the car, and struck plaintiff, inflicting the injury complained of. The car driver happening to look up in his mirror saw the wagon driver in the act of turning out, and he at once set the brake and stopped the car. It was claimed that the car was traveling at an unusual rate of speed. *Held*, that the evidence failed to show any negligence on the part of defendant, and the submission of the question to the jury was error; that assuming the rate of speed was unusual, it had nothing to do with the accident. *Alexander* v. *Rochester City & B. R. Co.*, 48 *Am. & Eng. R. Cas.* 46, 128 *N. Y.* 13, 27 *N. E. Rep.* 950, 38 *N. Y. S. R.* 254; *reversing* 35 *N. Y. S. R.* 701, 12 *N. Y. Supp.* 685.—DISTINGUISHING Hill *v.* Ninth Ave. R. Co., 109 N. Y. 239.

As a driver was bringing the horses from one end of a street-car to the other, they, from some unexplained cause, suddenly took fright, broke away from the driver, ran into the rear end of another car on which plaintiff was riding, and injured him. The evidence showed that the horses had been regularly worked for six weeks, with entire satisfaction, and were considered perfectly safe. At the time, the driver held the reins in one hand, and did what he could to prevent their running away. The evidence showed that he was not then in good health, although there was nothing to show the nature of his disability, or that he was unfitted for his work; and the evidence also tended to show that no man could have held the horses at the time. *Held*, that there was not sufficient evidence of negligence to warrant submitting the question to the jury, and a nonsuit should have been granted. *Quinlan* v. *Sixth Ave. R. Co.*, 4 *Daly* (*N. Y.*) 487.

435. Where nonsuit is properly ordered. — Plaintiff testified that she got upon the car platform and offered her fare to the conductor, who said: "She is drunk and does not know what she is about; I do not do business in that way"; and that she saw his hand go up to the bell, and that she felt a touch of a hand on her shoulder, and went "flying" into the street. She admitted that she could not tell whether she fell or was pushed, or whether the conductor or some one else touched her, and there was no other evidence to explain the doubt. *Held*, that the case should have been dismissed. *Pixley* v. *Third Ave. R. Co.*, 1 *J. & S.* (*N. Y.*) 406.

Plaintiff, without signaling either the conductor or driver, stepped on the foot rail of an open street-car when it started, and his body came in contact with a red truck which he had seen as he approached the car. There was no evidence that the driver or conductor saw either the truck or plaintiff, or perceived the danger. In an action to recover for the injuries sustained —*held*, that plaintiff was properly nonsuited. *Littmann* v. *Dry Dock, E. B. & B. R. Co.*, 6

*See also *post*, **483.**

Misc. 34, 25 *N. Y. Supp.* 1002, 55 *N. Y. S. R.* 514.

Where a passenger is injured while attempting to get on a moving street-car it is incumbent on him to show positive negligence on the part of the company or its servants; and unless he can show such positive negligence, the trial court will properly direct a judgment of nonsuit. *Stager* v. *Ridge Ave. Pass. R. Co.*, 33 *Am. & Eng. R. Cas.* 540, 119 *Pa. St.* 70, 12 *Atl. Rep.* 821, 21 *W. N. C.* 131, 11 *Cent. Rep.* 427.

Plaintiff was by occupation a conductor on the road, but being off duty at the time, he was riding on the front platform as a passenger. The car stopped at a transfer stand and was facing west; the east-bound track was on the south, and so close that the space between the cars was about six inches. The car being crowded, plaintiff climbed over the dasher on the south side of the car, backward, in order to secure a footing, so that he could not see what was passing upon the south track, and, upon reaching the ground, he was struck and injured by an east-bound car approaching "at a good trot." *Held*, that a nonsuit was properly granted. In descending from the front platform in a place known to be dangerous, he was guilty of contributory negligence. *Fry* v. *People's Pass. R. Co.*, 17 *Phila.* (*Pa.*) 61.—FOLLOWING Lackawanna & B. R. Co. *v.* Chenewith, 52 Pa. St. 390. QUOTING Creed *v.* Pennsylvania R. Co., 86 Pa. St. 145. REVIEWING Gray *v.* Scott, 66 Pa. St. 345.

f. Procedure.

436. Sufficiency of complaint.—In a suit against a street-car company, a count alleged that plaintiff was "on" a car, and thereby it became the duty of the company "to guard, protect, and secure" plaintiff while leaving the car. *Held*, that the count was bad, as it failed to show any facts giving rise to such duty. Plaintiff might have been on the car as a trespasser. *Breese* v. *Trenton Horse R. Co.*, 41 *Am. & Eng. R. Cas.* 230, 52 *N. J. L.* 250, 19 *Atl. Rep.* 204.

A count charging in general terms that the car of defendant, by the carelessness of the management of those having it in charge, ran over the body and arm of plaintiff, was sustained. *Breese* v. *Trenton Horse R. Co.*, 41 *Am. & Eng. R. Cas.* 230, 52 *N. J. L.* 250, 19 *Atl. Rep.* 204.

437. Evidence, admissibility of.—Where a company is sued for injury to a passenger caused by his being thrown down by a sudden jerk or starting of the car, and contributory negligence is set up as a defense, it is proper to prove the crowded condition of the car, both as tending to show whether the conductor should have exercised a greater degree of care, and also as affecting the question of contributory negligence. *Metropolitan R. Co.* v. *Jones*, 1 *App. Cas.* (*D. C.*) 200.

In an action by a female passenger against a company, she stated in her evidence that the conductor took hold of her and tried to throw her off the car, whereupon the statement was stricken out by the court and the witness told to state what the conductor did and not what he tried to do. *Held*, that its introduction at first was no ground for reversal of a judgment against the company. *King* v. *Second Ave. R. Co.*, 75 *Hun* 17, 26 *N. Y. Supp.* 973.

438. —— sufficiency of. — In an action against the proprietors of a railroad car for an accident that happened to the plaintiff in consequence of the carelessness of one of their drivers, an averment in the declaration that the contract was "to carry safely" is supported by proof that the accident arose from the driver's want of care and skill. *Thompson* v. *Macklem*, 2 *U. C. Q. B.* 300.

439. Commenting on evidence. — In an action for damages caused by defendant's negligence in starting a car while plaintiff was alighting, an instruction to the effect that certain acts of plaintiff were "all that the law required of her, so far as diligence on her part in getting off the car was concerned," and that under such circumstances the starting of the car was "an act of negligence on the part of the defendant," is erroneous, as being a comment on the evidence. *Blair* v. *Mound City R. Co.*, 31 *Mo. App.* 224. — QUOTING Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74.

440. Variance.—If a complaint alleges that the injury occurred on the west side of the street, where cars were accustomed to stop for passengers, and where they might lawfully stop, while the proof shows that it occurred on the east side, where they were forbidden to stop, the variance is fatal. *North Birmingham St. R. Co.* v. *Calderwood*, 89 *Ala.* 247, 7 *So. Rep.* 360. — DISTINGUISHING Western R. Co. *v.* Sistrunk, 85

Ala. 352.—QUALIFIED IN Kansas City, M. & B. R. Co. *v.* Crocker, 95 Ala. 412.

441. Where mere proof of an injury casts the burden on defendant. —When plaintiff sues for personal injuries caused by the negligence of defendant's servants, the *onus* is on him to prove the negligence, and that it was the proximate cause of the injury; but when his evidence shows that the injuries were received while alighting from defendant's car, and were caused by the driver starting the car with a jerk as he was in the act of alighting, this establishes a *prima facie* case of negligence, and imposes on the defendant the burden of disproving it. *Birmingham Union R. Co.* v. *Hale*, 90 *Ala.* 8, 8 *So. Rep.* 142.

Mere proof of the accident by which the injury was inflicted may be sufficient to throw the burden on the carrier to show that he used due care; and when there is an absence of *vis major*, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury that defendant acted negligently, and even if such presumption is one of negligence generally, and not of any specific negligence, it will be sufficient to throw upon a defendant the burden of rebutting the specific negligence alleged. *North Chicago St. R. Co.* v. *Cotton*, 52 *Am. & Eng. R. Cas.* 238, 140 *Ill.* 486, 29 *N. E. Rep.* 899; *affirming* 41 *Ill. App.* 311. *Chicago City R. Co.* v. *Engel*, 35 *Ill. App.* 490.

Proof that a street-car was thrown from the track over an embankment, whereby a passenger was injured, raises a presumption of negligence and casts upon the company the burden of showing that the injury was not caused by its fault, or the fault of its servants. *Louisville & P. R. Co.* v. *Smith*, 2 *Duv.* (*Ky.*) 556.—REVIEWED IN Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. Rep. 441.—*Wilkerson* v. *Corrigan Con. St. R. Co.*, 26 *Mo. App.* 144.

An instruction that the burden of proof rests upon the defendant to show that the injury was caused by something not under its control, and not from the use of unsuitable or skittish horses, or careless or unskilful management of the car, and that by the exercise of the utmost human foresight, skill, and care such injury could not have been prevented, states too broadly the degree of care incumbent upon the defendant. *Dougherty* v. *Missouri R. Co.*, 34 *Am. & Eng. R. Cas.* 488; *see also* 37 *Am. & Eng. R. Cas.* 206, 97 *Mo.* 647, 15 *West. Rep.* 235, 8 *S. W. Rep.* 900, 11 *S. W. Rep.* 251.—EXPLAINED IN Smith *v.* Chicago & A. R. Co., 108 Mo. 243. RECONCILED IN Furnish *v.* Missouri Pac. R. Co. 102 Mo. 438.

442. When plaintiff must show negligence and absence of contributory negligence.* — In an action by a passenger for an injury received in consequence of a sudden jerk of the car, it is not incumbent on plaintiff to show affirmatively the immediate connection between the injury and the misconduct of the carrier, it appearing that the car was under the control of the carrier or its servant, and that the accident was such as, under the ordinary course of things, would not have occurred had those who had the management of the car used proper care. *Dougherty* v. *Missouri R. Co.*, 21 *Am. & Eng. R. Cas.* 497, 81 *Mo.* 325, 51 *Am. Rep.* 239; *affirming* 9 *Mo. App.* 478.

In an action by a passenger to recover for a personal injury, the burden of showing negligence is on the plaintiff. So it is proper to charge that the mere fact that plaintiff sustained an injury while a passenger does not entitle him to a verdict. He must show that the injury was caused by a lack of due care on the part of the company. *Buck* v. *Manhattan R. Co.*, 10 *N. Y. Supp.* 107, 15 *Daly* 550, 32 *N. Y. S. R.* 51; *affirmed in* 134 *N. Y.* 589, *mem.*, 31 *N. E. Rep.* 628, *mem.*

A passenger on a street-car was struck and injured by a passing load of hay. *Held*, that to make the company liable the passenger must prove not only that he was without fault but that the company was negligent. *Federal St. & P. V. R. Co.* v. *Gibson*, 11 *Am. & Eng. R. Cas.* 142, 96 *Pa. St.* 83.

443. Plaintiff injured while riding in place of danger has the burden of disproving negligence. — When it appears that a passenger is riding on a car in a place of danger, his negligence is *prima facie* proved, and the *onus* is on him to rebut the presumption. *Clark* v. *Eighth Ave. R. Co.*, 36 *N. Y.* 135, 34 *How. Pr.* 315; *affirming* 32 *Barb.* 657. — APPROVED IN Ward *v.* Central Park, N. & E. R. R. Co., 11 Abb. Pr. N. S. (N. Y.) 411. DISTIN-

* See also *post*, **516.**

GUISHED IN Ashbrook *v.* Frederick Ave. R. Co., 18 Mo. App. 290. FOLLOWED IN Connolly *v.* Knickerbocker Ice Co., 39 Am. & Eng. R. Cas. 441, 114 N. Y. 104, 21 N. E. Rep. 101, 22 N. Y. S. R. 675; Solomon *v.* Central Park, N. & E. R. R. Co., 1 Sweeny (N. Y.) 298. QUOTED IN Barrett *v.* Third Ave. R. Co., 8 Abb. Pr. N. S. (N. Y.) 205. REVIEWED AND FOLLOWED IN Ward *v.* Central Park, N. & E. R. R. Co., 1 J. & S. (N. Y.) 392, 42 How. Pr. 289.

But the presumption of negligence against a passenger who rides in a place of danger is rebutted by proof that a car was stopped for him when it was so full that he could only ride on the steps, and that while so riding the conductor called upon him and received his fare. *Clark* v. *Eighth Ave. R. Co.*, 36 *N. Y.* 135, 34 *How. Pr.* 315; *affirming* 32 *Barb.* 657.—DISTINGUISHED IN Nolan *v.* Brooklyn City & N. R. Co., 3 Am. & Eng. R. Cas. 463, 87 N. Y. 63, 41 Am. Rep. 345. FOLLOWED IN Hadencamp *v.* Second Ave. R. Co., 1 Sweeny (N. Y.) 490. QUOTED IN Pool *v.* Chicago, M. & St. P. R. Co., 8 Am. & Eng. R. Cas. 360, 56 Wis. 227.

Proof of the above facts is sufficient to authorize a jury in finding that plaintiff was invited by those in charge of the car to ride on the step, and that an implied assurance was thereby given that it was a safe and suitable place. *Clark* v. *Eighth Ave. R. Co.*, 36 *N. Y.* 135, 34 *How. Pr.* 315; *affirming* 32 *Barb.* 657.—APPLIED IN Ward *v.* Central Park, N. & E. R. R. Co., 11 Abb. Pr. N. S. (N. Y.) 411. QUOTED IN Lax *v.* Forty-second St. & G. S. F. R. Co., 14 J. & S. (N. Y.) 448. REVIEWED IN Goodrich *v.* Pennsylvania & N. Y. C. & R. Co., 29 Hun (N. Y.) 50.

444. Measure of damages, generally. — In an action by a passenger to recover against a street railway for a personal injury, the company asked the court to charge the jury that no recovery could be had for medical services, there being no evidence of the cost thereof. The court said: "You will not take that into consideration unless there is doubt"—leaving the sentence incomplete. *Held*, no cause for reversal. *Washington & G. R. Co.* v. *Varnell*, 98 *U. S.* 479.

In such case the company further requested the court to charge the jury that in fixing plaintiff's damages they must consider his advanced age as lessening his capacity to earn money. In answer, the court said that the damages must be reasonable, as the jury could not tell whether a man would live one, two, or five years. *Held*, that the instruction was no ground for reversal, though not very instructive. *Washington & G. R. Co.* v. *Varnell*, 98 *U. S.* 479.

Where a street-car company is only charged with ordinary negligence in injuring a passenger, it is proper to instruct the jury that they can only allow compensatory damages, such as will compensate plaintiff for his expense and suffering, physically and mentally, in his present condition, and decreased capacity to earn a living, and that punitive or vindictive damages are not allowable, and that the law permits no one but the jury to measure the damages. *City & S. R. Co.* v. *Findley*, 76 *Ga.* 311.

Where a passenger is injured through negligence, without any circumstances of aggravation, only compensatory damages are allowable; but a large discrimination is left to the jury in estimating the compensatory damages. Each case is to be governed by its own peculiar facts; and unless the finding is outrageous, or shows that something has been added by way of punishment, the verdict should not be disturbed. *Louisville & P. R. Co.* v. *Smith*, 2 *Duv.* (*Ky.*) 556.—QUOTED AND REVIEWED IN Louisville & N. R. Co. *v.* Fox, 11 Bush (Ky.) 495.

An action was instituted by a street-car passenger to recover for the gross neglect of defendants, and no special damage was alleged other than the fact of the injury, the pain and suffering of plaintiff, his expenses, loss of time, and permanent injury. The jury were instructed that if the verdict was for plaintiff they should assess such damages, within the amount claimed, as would reasonably compensate him for his loss of time, necessary expenditures, and for permanent injury or disability, if any, and for the injury sustained by him in his bodily and mental suffering, if any there was resulting directly from said injuries. The court also propounded this special interrogatory: "What sum in damage will reasonably compensate the plaintiff for the injuries sustained by him?" To which the jury responded: "Five thousand dollars." *Held*, that the jury were properly instructed as to the measure of damages. *Central Pass. R. Co.* v. *Kuhn*, 32 *Am. & Eng. R. Cas.* 16, 86 *Ky.* 578, 6 *S. W. Rep.* 441.

The court charged that the jury might take into consideration, upon the subject of

the permanency of the injury, plaintiff's liability to suffer more from other ailments than she would have suffered had it not been for the injury. *Held*, no error, where it appeared that the results of the accident would be permanent, and that if plaintiff was sick from other causes the result of the injury would complicate them. *Crank* v. *Forty-second St. & St. N. A. R. Co.*, 25 *N. Y. S. R.* 53, 6 *N. Y. Supp.* 229, 53 *Hun* 425; *affirmed in* 127 *N. Y.* 648, *mem.*, 27 *N. E. Rep.* 856, *mem.*

In an action to recover compensatory damages for injuries caused by the sudden starting of a car when plaintiff was about to alight, evidence as to what occurred when plaintiff got on the car, tending to prove malice on the part of the driver, is not admissible. *Grisim* v. *Milwaukee City R. Co.*, 84 *Wis.* 19, 54 *N. W. Rep.* 104.

445. Amount of damages. — Before plaintiff was injured she washed and ironed for a living, averaging $35 a month above expenses. She lost some six months' time by the injury, and then went to service at $12 a month, but could not do the work, and her wages were reduced to $8 or $10 a month, and she remained subject to some disability and suffering for life. *Held*, that a verdict for $1250 was not excessive. *Coast Line R. Co.* v. *Boston*, 83 *Ga.* 387, 9 *S. E. Rep.* 1108.

It was alleged that plaintiff was pushed off a car in front of the wheels, while the car was in rapid motion; that he caught the railing and held on, after those in charge knew of his perilous position, for a length of time sufficient to enable them to stop the car; this they neglected to do, and his hold finally giving way, the wheels ran over his arm. *Held*, that $3000 damages were not excessive. *Chicago W. D. R. Co.* v. *Hughes*, 69 *Ill.* 170.

The small bone of plaintiff's leg was fractured at the ankle and some of the ligaments were ruptured. In consequence of this he was laid up, not more than eight weeks. The fracture has united perfectly and will never trouble him; the ligaments have not healed entirely, but will not trouble him save in going up or down hill, or when there is a change of weather, and then he will feel like one with a sprained ankle. No special damage was averred and no circumstances of aggravation were shown. *Held*, that a verdict for $4000 is disproportionate to the injury. *South Covington & C. St. R. Co.* v. *Ware*, 27 *Am. & Eng. R. Cas.* 206, 84 *Ky.* 267, 1 *S. W. Rep.* 493.

Plaintiff was a midwife by avocation, and had an extended, lucrative practice. By the injury she was permanently disabled, and deprived of the power of locomotion, and of following her avocation; and remained subject to constant, protracted physical suffering, necessitating regular attendance and treatment, with her life saddened with a gloomy prospect of an approaching death. *Held*, that a verdict for $5000 was not excessive. *Wardle* v. *New Orleans City R. Co.*, 13 *Am. & Eng. R. Cas.* 60, 35 *La. Ann.* 202.

Plaintiff's injuries were such as to necessitate the amputation of an arm, and his sufferings were great, and his expenses heavy, amounting to $2000. He was an expert telegraph operator, receiving, at the time of the injury, a salary of $144 per month, and sometimes earning $50 per month extra. It appeared that his usefulness as a telegraph operator was impaired to the extent of one half. *Held*, that a verdict for $12,000 was not excessive. *Dougherty* v. *Missouri R. Co.*, 34 *Am. & Eng. R. Cas.* 488; *see also* 37 *Am. & Eng. R. Cas.* 206, 97 *Mo.* 647, 15 *West. Rep.* 235, 8 *S. W. Rep.* 900, 11 *S. W. Rep.* 251.—REVIEWING Porter *v.* Hannibal & St. J. R. Co., 71 Mo. 66. REVIEWING AND QUOTING Waldhier *v.* Hannibal & St. J. R. Co., 87 Mo. 37.

Plaintiff having been disabled for several weeks and having suffered much pain from an injury to his hip caused by his being thrown down while alighting from a street-car, an award of $400 damages is not so excessive as to raise a presumption that the jury were actuated by prejudice, bias, or improper motive. *Knowlton* v. *Milwaukee City R. Co.*, 16 *Am. & Eng. R. Cas.* 330, 59 *Wis.* 278, 18 *N. W. Rep.* 17.

446. Amount of damages for jury. — Where the evidence shows that a passenger has received serious injuries, a request to instruct the jury that the evidence will justify no more than nominal damages is properly refused. It is for the jury to determine what damages plaintiff has sustained. *Morison* v. *Broadway & S. A. R. Co.*, 28 *N. Y. S. R.* 498, 8 *N. Y. Supp.* 436; *affirmed in* 130 *N. Y.* 166, 41 *N. Y. S. R.* 248, 29 *N. E. Rep.* 105.

In such case it is proper to direct the jury to compensate plaintiff for the injuries received by him, and to add no more than

such a compensation would amount to, but beyond that the amount is for the jury. *Morison* v. *Broadway & S. A. R. Co.*, 28 *N. Y. S. R.* 498, 8 *N. Y. Supp.* 436; *affirmed in* 130 *N. Y.* 166, 41 *N. Y. S. R.* 248, 29 *N. E. Rep.* 105.

447. Aggravation of injury.—Where the court has instructed the jury that plaintiff, who sues to recover for personal injuries caused by the sudden movement of a street-car, can only recover such damages as result "directly" from the injury, it is not error to refuse to instruct that he cannot recover for any aggravation of the injury caused by not obeying the instructions of his medical attendant, where no issue as to such aggravated damages is made by plea. *Central Pass. R. Co.* v. *Rose*, (*Ky.*) 22 *S. W. Rep.* 745.

Plaintiff, a female passenger, was pregnant when injured, and a few hours afterward a child was prematurely born. A few days later she was attacked with peritonitis. The medical witness testified that such an illness might be caused by other agencies, but no evidence was introduced to show that it was caused by another agency. *Held*, that a charge that if the peritonitis was caused by the negligence of the physician or nurse or was a consequence of her own poor health she could not recover for any injury caused thereby, was properly refused. *Pollock* v. *Brooklyn Crosstown R. Co.*, 39 *N. Y. S. R.* 568, 60 *Hun* 584, *mem.*, 15 *N. Y. Supp.* 189; *affirmed in* 133 *N. Y.* 624, *mem.*, 30 *N. E. Rep.* 1150, *mem.*, 44 *N. Y. S. R.* 932, *mem.*

4. *Injuries to Persons or Property in Street.*

a. In General.

448. Company entitled to exclusive use of street covered by tracks.—The cars of street railways have a preference in the streets, and while they must be managed with care, so as not negligently to injure persons in the streets, pedestrians must use reasonable caution to keep out of their way. *Fenton* v. *Second Ave. R. Co.*, 126 *N. Y.* 625, 26 *N. E. Rep.* 967, 36 *N. Y. S. R.* 385, 4 *Silv. App.* 380; *reversing* 56 *Hun* 99, 29 *N. Y. S. R.* 962, 9 *N. Y. Supp.* 162.—DISTINGUISHED IN Elze *v.* Baumann, 21 N. Y. Supp. 782, 2 Misc. 72. QUOTED IN Baker *v.* Eighth Ave. R. Co., 41 N. Y. S. R. 353, 62 Hun 39, 16 N. Y. Supp. 319. REVIEWED IN Scott *v.* Third Ave. R. Co., 41 N. Y. S. R. 152, 61 Hun 627, 16 N. Y. Supp. 350; Dudley *v.* Westcott, 18 N. Y. Supp. 130.

A street-car company has the right to the exclusive use of its track while its cars are passing, and an ordinary vehicle passing along the street must turn out to make way for the cars, and the driver of such vehicle cannot demand that a car shall stop, or do any other act to avoid a collision, if it can be avoided by his turning off the track. The right of passage for the cars grows out of the fact that they are limited to the track and cannot turn to the right or left as ordinary vehicles can. *Barker* v. *Hudson River R. Co.*, 4 *Daly* (*N. Y.*) 274.—DISTINGUISHED IN Louisville, N. A. & C. R. Co. *v.* Phillips, 31 Am. & Eng. R. Cas. 432, 112 Ind. 59.

449. —— but not at street crossings.—The trial court refused to charge that a company crossing a street with its car had the right of way, and the superior right in the street which the driver of a truck was bound to respect. *Held*, no error. *O'Neil* v. *Dry Dock, E. B. & B. R. Co*, 52 *Am. & Eng. R. Cas.* 573, 129 *N. Y.* 125, 29 *N. E. Rep.* 84, 41 *N. Y. S. R.* 107; *affirming* 27 *J. & S.* 123, 36 *N. Y. S. R.* 934, 15 *N. Y. Supp.* 84.

The rule giving to the cars of a street-railway corporation the preference and a superior right of way in the street where its tracks are laid does not apply to streets crossing the railway; at such crossings its cars have no rights superior to those of vehicles moving in the streets crossed. *O'Neil* v. *Dry Dock, E. B. & B. R. Co.*, 52 *Am. & Eng. R. Cas.* 573, 129 *N. Y.* 125, 29 *N. E. Rep.* 84, 41 *N. Y. S. R.* 107; *affirming* 27 *J. & S.* 123, 36 *N. Y. S. R.* 934, 15 *N. Y. Supp.* 84.

Street-car companies are entitled to a right of way as against other vehicles passing along their tracks; but as to vehicles merely crossing at street crossings, their rights are the same as the others. *Buhrens* v. *Dry Dock, E. B. & B. R. Co.*, 25 *N. Y. S. R.* 191, 6 *N. Y. Supp.* 224, 53 *Hun* 571; *affirmed in* 125 *N. Y.* 702, *mem.*, 26 *N. E. Rep.* 752.

450. Interest in street not exclusive.—Where an action is brought to recover damages for injuries sustained in a collision between a street-car and a buggy, an instruction that a company operating a street railway is entitled to the track on meeting foot passengers or other vehicles is misleading, as justifying the belief that

the company is not bound to exercise due and proper care to prevent collision with others using the same track. *Chicago W. D. R. Co. v. Ingraham*, 41 *Am. & Eng. R. Cas.* 243, 131 *Ill.* 659, 23 *N. E. Rep.* 350.

The right of a street-railway in a street is only an easement to use the highway in common with the public; it has no exclusive right of travel upon its track, and is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle. *Rascher* v. *East Detroit & G. P. R. Co.*, 90 *Mich.* 413, 51 *N. W. Rep.* 463.

And it is the duty of the company to exercise such watchful care as may prevent accidents or injury to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. *Gilmore* v. *Federal St. & P. V. Pass. R. Co.*, 153 *Pa. St.* 31, 25 *Atl. Rep.* 651. — QUESTIONED AND FOLLOWED IN Gibbons *v.* Wilkes-Barre & S. St. R. Co., 155 Pa. St. 279.

Street-railway companies have no exclusive right to that part of the street covered by their tracks; the duty results that they shall see that their tracks are clear as their cars pass over them. This obligation is as imperative and firmly fixed as is the duty of steam-railway companies to their passengers; both result from the hazard to human life of the employment, no less than from the contract for carriage. *Galveston City R. Co.* v. *Hewitt*, 67 *Tex.* 473, 3 *S. W. Rep.* 705.

451. Care company must exercise, generally.—The ordinary care required of a street-railroad company to avoid a collision is such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience; or such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise. Negligence is the failure to use such care and prudence. *Citizens' St. R. Co.* v. *Steen*, 19 *Am. & Eng. R. Cas.* 30, 42 *Ark.* 321.

The drivers of street-cars through a densely populated city ought always to have their teams under their immediate and absolute control, and are bound to drive in such a manner, if possible, as to injure no one. They may generally rely upon the instinct of self-preservation to induce every one to endeavor to avoid injury, and when, from infancy or other apparent cause, a person liable to be injured cannot be expected to exercise the usual degree of prudence in this respect, a greater degree of caution is necessary on the part of the driver. *Schierhold* v. *North Beach & M. R. Co.*, 40 *Cal.* 447.—QUOTED IN Wall *v.* Helena St. R. Co., 12 Mont. 44.

It is the duty of those operating street-cars, especially on crowded city streets, to use the utmost care and diligence to avoid collisions; but this does not relieve persons in the streets from also observing care and prudence. *Liddy* v. *St. Louis R. Co.*, 40 *Mo.* 506.

Ordinary care is required of a street-railroad company towards one crossing a street in front of its car. *Stanley* v. *Union Depot R. Co.*, 114 *Mo.* 606, 21 *S. W. Rep.* 832. *Ft. Worth St. R. Co.* v. *Witten*, 74 *Tex.* 202, 11 *S. W. Rep.* 1091.

A street-railway company is liable for injuries to a pedestrian occasioned by carelessness, negligence, or want of attention, and which are not simply the result of an accident which could not have been foreseen by the exercise of ordinary and reasonable care and prudence. *Wall* v. *Helena St. R. Co.*, 50 *Am. & Eng. R. Cas.* 474, 12 *Mont.* 44, 29 *Pac. Rep.* 721.

Or reasonable care. *Moroney* v. *Brooklyn City R. Co.*, 30 *N. Y. S. R.* 911, 9 *N. Y. Supp.* 546.

Must exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances of each case. *Kestner* v. *Pittsburgh & B. Traction Co.*, 158 *Pa. St.* 422, 27 *Atl. Rep.* 1048.

When one duty of the driver of a horse car was to collect the fare from passengers, it was erroneous to charge that the jury, in determining the care exercised by the driver at the time of a collision, might consider the fact that one of his duties was the collection of fares, when the evidence was uncontradicted that, at the time in question, there were no passengers from whom to collect fares. *Sheets* v. *Connolly St. R. Co.*, 54 *N. J. L.* 518, 24 *Atl. Rep.* 483.

452. —— the same as other vehicles. —Those operating ordinary street-cars are ordinarily governed, as to the care to be observed, by the same rules that apply to other vehicles. *Topeka City R. Co.* v. *Higgs*,

34 *Am. & Eng. R. Cas.* 529, 38 *Kan.* 375, 16 *Pac. Rep.* 667.

In general, the same degree of care as to pedestrians is required of street-cars as of the driver or owner of any other vehicle. *Memphis City R. Co.* v. *Logue*, 13 *Lea* (*Tenn.*) 32.—APPROVING Unger *v.* Forty-second St. & G. S. F. R. Co., 51 N. Y. 497.

453. —— to see that the track is clear.—In a large, populous city, where all descriptions of vehicles are constantly passing and repassing, as well as persons on foot, including the aged and infirm, and children who are young and wanting in prudence and discretion, it is the duty of drivers of cars not only to see that the track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track. *Baltimore City Pass. R. Co.* v. *McDonnell*, 43 *Md.* 534, 14 *Am. Ry. Rep.* 272.

The driver of a horse-car must sit or stand on the front platform or place provided for him, must maintain control of the horses and car, and must exercise a reasonable degree of care and watchfulness to prevent collisions and injury to persons crossing or traveling on the streets. *Brooks* v. *Lincoln St. R. Co.*, 37 *Am. & Eng. R. Cas.* 560, 22 *Neb.* 816, 36 *N. W. Rep.* 529.

A street-car company is bound to use such diligence as will enable it to know whether the track in front of a moving car is clear, and if necessary to use the highest degree of diligence to know that fact. The care necessary to avoid injury to one on the track before an advancing train embraces every degree of diligence. *Galveston City R. Co.* v. *Hewitt*, 67 *Tex.* 473, 3 *S. W. Rep.* 705.

It is the duty of a driver of a street-car to exercise the highest degree of care to avoid any collision or accident, especially at street crossings; his first and highest duty is to secure the sefety of his passengers, and for that purpose he should exercise all the care that prudence may suggest in looking about and listening so as to assure himself that his track is clear and safe, and for his failure to do so his employer is responsible. *Heucke* v. *Milwaukee City R. Co.*, 69 *Wis.* 401, 34 *N. W. Rep.* 243.

454. —— in operating cars.—The owners of street railroads are held to due care in the management of their lines; and if they exercise such care, they are not responsible to a pedestrian who, in a careless, reckless, or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. *Driscoll* v. *Market St. Cable R. Co.*, 97 *Cal.* 553, 32 *Pac. Rep.* 591.

An instruction in an action against a street-car company that "the defendant had no right so to occupy the street and use the same with its cars as to make it extremely dangerous to cross the street at all times" has relation to the manner of performing the car service on a street, and, fairly construed, does not mean that the defendant had no right to run so many cars as it did there. *McClain* v. *Brooklyn City R. Co.*, 40 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 459, 22 *N. E. Rep.* 1062, 27 *N. Y. S. R.* 549; *affirming* 42 *Hun* 657, *mem.*, 6 *N. Y. S. R.* 49.

455. May assume that track will not be suddenly obstructed.—The persons in charge of a street-car, upon a clear track, where there is no negligence on their part, have a right to assume that people will not suddenly cross in front of it. *Driscoll* v. *Market St. Cable R. Co.*, 97 *Cal.* 553, 32 *Pac. Rep.* 591.

456. Mutual rights of company and public in street.—A company may run its cars at any rate of speed convenient to it and not dangerous to passengers and the public along the track; and other parties have the right to drive along the street and cross and recross the track, using proper care and prudence to keep out of the way of the cars. *Citizens' St. R. Co.* v. *Steen*, 19 *Am. & Eng. R. Cas.* 30, 42 *Ark.* 321.

While a company has a right to run its cars on a public street, yet the public have also a right to travel thereon, and the company must exercise such care and precaution, for the purpose of avoiding accidents and endangering property or person, as a reasonable prudence would suggest. It has only an equal right with the traveling public to the use of the street where its track is laid, with a few exceptions, such as that the cars run on a track, and when a vehicle meets a car it must give way. A person is entitled to walk on a street-railroad track, using reasonable care and prudence to avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track does not show contributory negligence on his part,

Shea v. *Potrero & B. V. R. Co.*, 44 *Cal.* 414, 5 *Am. Ry. Rep.* 448.—APPROVED IN Memphis City R. Co. *v.* Logue, 13 Lea (Tenn.) 32.

An instruction that "no matter how many cars were in the street or where the point was, the plaintiff had a right to select any point to go across, but he was bound to exercise care commeasurable with the circumstances of the case," only imports that plaintiff's right to cross the street was no less at one than at another point, and that it was for him to determine where he would seek to exercise the right to do so, and is not erroneous as justifying the inference that plaintiff was at liberty to encounter apparent danger, or that his right upon the street was superior to that of defendant in the operation of its cars. *McClain* v. *Brooklyn City R. Co.*, 40 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 459, 22 *N. E. Rep.* 1062, 27 *N. Y. S. R.* 549; *affirming* 42 *Hun* 657, *mem.*, 6 *N. Y. S. R.* 49.

If one is on a street, where he has a legal right to be, in passing over it, it is the legal duty of the driver of a car approaching him to make a vigilant use of his senses to discover whether the party is in a position of peril, and to control the movement of his car, so far as possible, to avoid injury to him. *Watson* v. *Broadway & S. A. R. Co.*, 6 *N. Y. S. R.* 538, 43 *Hun* 636, *mem.*; *affirmed in* 110 *N. Y.* 677, *mem.*, 18 *N. E. Rep.* 482, *mem.*

In an action for negligently running a car into plaintiff's cab, it appeared that plaintiff's driver temporarily stopped on defendant's track to receive directions and while there met with the accident. There were snowbanks on each side of the street, which prevented a nearer approach to the sidewalk. Plaintiff's driver did not see the car and had no warning of its approach. *Held*, that it was a case for the jury, on the question of negligence, and as the verdict was sustained by the evidence, the damages inexcessive, and no errors committed, the judgment should be affirmed. *Mullen* v. *Central Park & E. R. R. Co.*, 49 *N. Y. S. R.* 80, 21 *N. Y. Supp.* 101, 1 *Misc.* 216.

A street railway and a person going on foot having each the right of way along a public highway, each is bound to be on the lookout for the other; but, as the car is necessarily confined to its track, the right thereon of the person on foot is subordinate to that of the company. *Warner* v. *People's St. R. Co.*, 141 *Pa. St.* 615, 21 *Atl. Rep.* 737.

457. Degree of care individual must exercise in crossing track. — The degree of care required at the crossing of a highway and an ordinary steam railroad is not the test of care required in crossing the track of a street railroad on a public street. Hence the rule in the former case that one approaching the crossing must look up and down the track before attempting to cross is not necessarily applicable to the latter. The failure to do so is not, as a matter of law, negligence. *Shea* v. *St. Paul City R. Co.*, 50 *Minn.* 395, 52 *N. W. Rep.* 902.

A person in attempting to cross a city street is bound to exercise reasonable care and caution, and it is the duty of a street-car company so to run its cars as to avoid, by the exercise of ordinary prudence and caution, injury to pedestrians. *Wall* v. *Helena St. R. Co.*, 50 *Am. & Eng. R. Cas.* 474, 12 *Mont.* 44, 29 *Pac. Rep.* 721.

A traveler upon a street on which is a street railway has a right to drive upon and along the railway, as well as to cross it at the intersection of streets; but he is bound to make way for the cars, and to be ready to do this when necessary, so as to cause no unnecessary hindrance. It is his duty, therefore, not only to turn off from the track when called upon by a servant of the railway company, but to listen to whatever signal there may be from an approaching car; and he should also look behind him from time to time, so that he may, if a car is near, turn off and allow it to pass without hindrance or undue slackening of ordinary speed. (Andrews, Earl, and Danforth, JJ., dissenting.) *Adolph* v. *Central Park, N. & E. R. R. Co.*, 76 *N. Y.* 530; *affirming* 11 *J. & S.* 199.— FOLLOWED IN Eastern Distilling Co. *v.* Long Island R. Co., 8 N. Y. S. R. 896, *mem.*

458. Colliding with teams. — It is proper to instruct a jury that if, by reason of inattention, carelessness, or incompetency, the driver of a street-car fails to avoid a collision with a wagon upon the track, the company is responsible for an injury thereby occasioned to the occupant of the wagon, if there is no contributory negligence upon the part of the occupant or the driver of the wagon. *Swain* v. *Fourteenth St. R. Co.*, 93 *Cal.* 179, 28 *Pac. Rep.* 829.

Where the driver of a street-car negligently runs against a horse and carriage in the street, the company is not relieved from

liability by the fact that the damages were increased by a movement of the horse after the collision. *Albert* v. *Bleecker St., etc., R. Co.*, 2 *Daly* (*N. Y.*) 389.

A company furnishing horses and a driver to move a car belonging to another company is liable for negligently colliding with a team on the street. *Weyant* v. *New York & H. R. Co.*, 3 *Duer* (*N. Y.*) 360.—FOLLOWING Laugher *v.* Pointer, 5 B. & C. 560; Quarman *v.* Burnett, 6 M. & W. 499; Rapson *v.* Cubitt, 9 M. & W. 710; Allen *v.* Hayward, 7 Q. B. 960.—APPLIED IN Ohio & M. R. Co. *v.* Davis, 23 Ind. 553.

459. Duty to light cars so they can be seen.*—A street-car ought to be lighted in the night-time, so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else by some signal give warning of its approach. *Rascher* v. *East Detroit & G. P. R. Co.*, 90 *Mich.* 413, 51 *N. W. Rep.* 463.

460. Defects in street. — A street-railroad corporation operating its road in a city street is under an implied obligation so to construct and maintain its tracks as that, by the exercise of reasonable care and supervision on its part, no danger may be occasioned to the public in its use of the street, whether the travel be on foot or in vehicles. *Schild* v. *Central Park, N. & E. R. R. Co.*, 133 *N. Y.* 446, 31 *N. E. Rep.* 327, 45 *N. Y. S. R.* 656; *affirming* 62 *Hun* 620, *mem.*, 41 *N. Y. S. R.* 795, 16 *N. Y. Supp.* 701.

A company which has accepted from a city a grant of a right of way over its streets, with the condition that the company shall keep all street crossings on streets used by it in good condition, is liable for a personal injury by reason of a defective crossing, and it is the proper party to be sued; and this is so though under its charter the city itself was not liable for injuries resulting from defective streets. *Houston City R. Co.* v. *Dawson*, 2 *Tex. Unrep. Cas.* 223.

461. Right to run cars as affecting liability. — In an action against a street-car company for injuring a person in the street there was an allegation that the track was unlawfully laid on the side of the street, the statute authorizing it only in the middle of the street. The company moved to strike out this allegation on the ground that it was irrelevant and immaterial. *Held*, that plaintiff had a right to make an issue on this point. If it was unlawfully running its cars on the street, this would have a material bearing on the question of its liability. *Schierhold* v. *North Beach & M. R. Co.*, 40 *Cal.* 447.

A tramway which occasions injury because its rail is out of place is not protected from liability for damages by reason of the permission of the city to operate its road. *Domingues* v. *Orleans R. Co.*, 35 *La. Ann.* 751.

462. Accidental injury. — A street-car company cannot be held liable for killing a person on a street where the company is free from negligence, and the death is caused solely by the person accidentally falling on the track. *Dorman* v. *Broadway R. Co.*, 117 *N. Y.* 655, 2 *Silv. App.* 422, 23 *N. E. Rep.* 162, 27 *N. Y. S. R.* 841; *reversing* 5 *N. Y. Supp.* 769, 25 *N. Y. S. R.* 1009.

Where the evidence shows that a boy was killed either through his own carelessness or by a pure accident in falling in front of a street-car, the company cannot be held liable in either event. *Fenton* v. *Second Ave. R. Co.*, 4 *Silv. App.* 380, 36 *N. Y. S. R.* 385, 26 *N. E. Rep.* 967.

463. Measure of damages. — The measure of damages for an injury from a collision of a street-car with a carriage is a fair pecuniary compensation for the injuries sustained by the occupant and his property; but if the injury be also wilful, or wanton, or attended by such gross negligence as manifests a careless disregard of the consequences to plaintiff, the jury may add such sum as they think proper under the circumstances as vindictive or exemplary damages, or as punishment for the wrongful conduct of the driver. *Citizens' St. R. Co.* v. *Steen*, 19 *Am. & Eng. R. Cas.* 30, 42 *Ark.* 321.

Where a company negligently injures a horse belonging to an expressman, he is entitled to a reasonable time in which to secure another horse, and his losses of profit in his business during that time are allowable as damages. What is a reasonable time is for the jury. *Albert* v. *Bleecker St., etc., R. Co.*, 2 *Daly* (*N. Y.*) 389.

464. Amount of damages.—A verdict for $7500 for damages alleged to have been sustained by plaintiff through the negligence of defendant in running its street-car against a police-patrol wagon, plaintiff being at the time an officer in charge of the wagon, in which he was con-

* See also *post*, **471.**

veying to a hospital a man with a broken leg, and being violently thrown to the ground by the collision and seriously injured, is not so excessive as to warrant a new trial. *Swain* v. *Fourteenth St. R. Co.*, 93 *Cal.* 179, 28 *Pac. Rep.* 829.

b. Negligence of Company.

465. In general. — Where the gist of an action is negligence in the servants of a company, whereby plaintiff was carelessly run over and injured, it is error to modify an instruction asked by defendant, submitting the question of negligence fairly to the jury, by submitting other matters of inducement merely, and not of the substance of the charge, and which, if true, would make a different cause of action, especially where there was no proof of such other matter. *Chicago W. D. R. Co.* v. *Hughes*, 69 *Ill.* 170.

Where the action is for damages occasioned by a collision with a street-car, the evidence will not warrant a submission to the jury where the right of recovery is predicated on the theory that defendant's driver could have stopped the car in time to avert the injury after he saw, or by the exercise of ordinary diligence could have seen, the perilous position of plaintiff, and there is no evidence whatsoever of the space within which the car could have been stopped, nor as to the distance of plaintiff from the car when plaintiff's peril could first have been observed. *Zurfluh* v. *People's R. Co.*, 46 *Mo. App.* 636.

A charge that the highest degree of care is required of a driver who sees a child lying helpless on the track in front of the vehicle is not reversible error, where it does not appear that the driver saw the child at all until after the accident. *Giraldo* v. *Coney Island & B. R. Co.*, 42 *N. Y. S. R.* 915, 16 *N. Y. Supp.* 774, 62 *Hun* 620, *mem.*; *affirmed in* 135 *N. Y.* 648, *mem.*, 48 *N. Y. S. R.* 931, *mem.*

If an adult person be seen on the track, the person operating a car may assume (as long as the danger of injuring him by a moving car does not appear imminent, but no longer) that he will leave the track before the car reaches him. When the danger is imminent, then the duty on the part of the carrier is to use the highest degree of care to avert it. A failure to do this is culpable negligence, in the absence of contributory negligence. *Galveston City R. Co.* v. *Hewitt*, 67 *Tex.* 473, 3 *S. W. Rep.* 705.

466. Duty of driver to keep vigilant lookout ahead.—It is the duty of a driver of a street-car to observe what is in the road before him, so as to avoid inflicting injuries upon others if practicable; and he is guilty of negligence if he omits, without apparent excuse, to look ahead and observe whether or not the track is clear. *Swain* v. *Fourteenth St. R. Co.*, 93 *Cal.* 179, 28 *Pac. Rep.* 829.

The driver of a street-car should be in a place and in a condition to exercise a reasonable degree of care and vigilance in watching and observing the street ahead of him, so as to prevent collisions and avoid injury to pedestrians, children as well as adults, who may be upon the public way. *Anderson* v. *Minneapolis St. R. Co.*, 43 *Am. & Eng. R. Cas.* 294, 42 *Minn.* 490, 44 *N. W. Rep.* 518.

A driver may have been performing his duty to his employer, such as making change for a passenger, at a time when he should have been watchful of the rights and careful of the safety of others; but such fact will not relieve the employer from a charge of negligence where it appears that, had not the driver's attention been engrossed by the duty imposed by his employer, he could have avoided the accident. The duty which a car company and its employés owe to the public is paramount to that which they owe each other. *Anderson* v. *Minneapolis St. R. Co.*, 43 *Am. & Eng. R. Cas.* 294, 42 *Minn.* 490, 44 *N. W. Rep.* 518.

Reasonable care requires a driver to keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons to use all reasonable efforts to avoid injuring them. *Senn* v. *Southern R. Co.*, 108 *Mo.* 142, 18 *S. W. Rep.* 1007.

The driver of a street-car should not drive along the streets of a city without looking out for persons in the street. If he fails to look and an accident happens in consequence, he is chargeable with negligence. He is bound to be vigilant to discover any one exposed to danger, and to control his team so as to avoid danger; and the necessity of making change for passengers will not excuse an omission of this duty. *Hyland* v. *Yonkers R. Co.*, 15 *N. Y. S. R.* 824, 48 *Hun* 617, 1 *N. Y. Supp.* 363.

When a city ordinance under which a street-car company is incorporated makes it the duty of the driver of a car to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger, a failure to perform this duty, followed by injury to one near the track, is of itself an act of negligence. *Hays* v. *Gainesville St. R. Co.*, 34 *Am. & Eng. R. Cas.* 97, 70 *Tex.* 602, 8 *S. W. Rep.* 491.—DISTINGUISHED IN Fath *v.* Tower Grove & L. R. Co., 105 Mo. 537.

If a company imposes upon its drivers other duties which materially interfere with their performance of the duty of keeping a constant watch of the track and of people approaching it, in order to prevent accidents, and if an injury results which could otherwise have been avoided, it is negligence. *Dahl* v. *Milwaukee City R. Co.*, 65 *Wis.* 371, 27 *N. W. Rep.* 185.

467. —— but not at either side or rear.—The evidence tended to show that the driver of a street-car was on the lookout and kept a very close watch on the track, and all obstructions; but a child approached the car diagonally from the rear, and fell under it, and the hind wheel passed over her, killing her instantly. The driver stood on the front platform and could not see the position of the child. *Held*, that he had discharged his duty, and that a nonsuit was properly allowed. *Bulger* v. *Albany R. Co.*, 42 *N. Y.* 459.

It is not actionable negligence in the driver of a horse-car to fail to prevent a horse from approaching, unseen by him, the side of the car, after the front part of the car has passed, so as to receive injuries from the rear wheel of the car on that side. *Lawrence* v. *Pendleton St. R. Co.*, 1 *Cin. Super. Ct.* 180.—REVIEWING Bulger *v.* Albany R. Co., 42 N. Y. 459.

But if, as the car is passing, the driver sees a horse loose in the street, dangerously near to and approaching the track backward, retreating from a boy who is endeavoring to get control of him, it is his duty to stop the car; and if he goes on, and the horse is injured by the rear wheel of the car, the company is liable unless plaintiff has been guilty of contributory negligence; in such a case it is a question for the jury to decide whose negligence actually caused the injury. *Lawrence* v. *Pendleton St. R. Co.*, 1 *Cin. Super. Ct.* 180.

468. Defects in track.*—In an action to recover for a personal injury received by being thrown from a wagon in attempting to cross defendant's track, defendant having permitted its rails to remain too high above the level of the street, an instruction that plaintiff could not recover unless the injury was inflicted "wilfully" is error. *Stratton* v. *Central City Horse R. Co.*, 1 *Am. & Eng. R. Cas.* 115, 95 *Ill.* 25.

In an action for injuries sustained while driving in the streets by the dangerous condition of a street-railway track, plaintiff's evidence was sufficient to sustain a verdict in his favor. *Lowe* v. *Minneapolis St. R. Co.*, 37 *Minn.* 283, 34 *N. W. Rep.* 33.

Plaintiff's sleigh was upset by striking against a switch maintained by defendant, laid in a public city street, and rising above the level of the abutting street pavement. The evidence tended to show that accidents had not infrequently happened to vehicles passing there, and that by putting salt on its track defendant had caused slush from melted snow to run down to and cover the switch from sight. *Held*, that this was sufficient to warrant the submission of the question of defendant's negligence to the jury. *Wooley* v. *Grand St. & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 398, 83 *N. Y.* 121.—DISTINGUISHING Lowery *v.* Brooklyn City & N. R. Co., 76 N. Y. 28.—QUOTED IN Fitts *v.* Cream City R. Co., 15 Am. & Eng. R. Cas. 462, 59 Wis. 323.

It was shown that the switch was maintained by defendant, which had the direction and duty whether it should be changed or altered in its relation to the surrounding pavement. Defendant's counsel requested the court to charge that if the switch was properly put down defendant was not chargeable. The request was refused, but the court charged that if the switch was skilfully put down and was in itself no obstruction which a person could not, with ordinary care and prudence, avoid, the proposition would be correct. *Held*, no error; that the request should have included the condition of defendant's keeping the switch in a safe condition. *Wooley* v. *Grand St. & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 398, 83 *N. Y.* 121.

Plaintiff, in crossing defendant's track, struck his foot against one of the rails, fell,

* Injuries to vehicles caused by defective street-railway tracks, see 46 AM. & ENG. R. CAS. 205, *abstr.*

and was injured. Plaintiff's evidence was to the effect that the top of the rail was over two inches above the surface of the street. Defendant gave evidence to the effect that the track, when laid, which was about ten years prior to the accident, was level with the street. *Held*, that the question as to defendant's negligence was properly submitted to the jury; and that the fact that it did not appear that any complaint had been made to defendant or to the public authorities did not release it from liability. *Schild* v. *Central Park, N. & E. R. R. Co.*, 133 *N. Y.* 446, 31 *N. E. Rep.* 327, 45 *N. Y. S. R.* 656; *affirming* 62 *Hun* 620, 41 *N. Y. S. R.* 795, 16 *N. Y. Supp.* 701.

A company is liable for injuries caused to a person driving along the track by an upturned rail which has become loose through failure to keep the track in proper repair. *Bradwell* v. *Pittsburgh & W. E. Pass. R. Co.*, 153 *Pa. St.* 105, 25 *Atl. Rep.* 623; *former appeal* 139 *Pa. St.* 404, 20 *Atl. Rep.* 1046.

Where plaintiff is rightfully driving on a street across a track, and in so doing exercises due care, and is injured by reason of the negligence of the company in the construction of its track, or in suffering it to become out of repair and dangerous, the company is liable, notwithstanding the city had directed and agreed to such negligence and approved it. *Houston City St. R. Co.* v. *Delesdernier*, 84 *Tex.* 82, 19 *S. W. Rep.* 366.

469. —— and highway.—In an action to recover for personal injuries caused by the dangerous condition of a turnpike road occupied by defendant's tracks, it is proper to submit the case to the jury, where there is evidence that the repairs of the road were under the immediate charge of the officers of defendant, although paid for by the turnpike company, and that the railway was in actual operation by the company at the time of the accident. *Wagner* v. *Pittsburgh & W. E. Pass. R. Co.*, 158 *Pa. St.* 419, 27 *Atl. Rep.* 1008.

Where street-cars are run over a turnpike road that is out of repair, it is the duty of the company to give adequate warning to the public of the dangerous condition of the road. *Wagner* v. *Pittsburgh & W. E. Pass. R. Co.*, 158 *Pa. St.* 419, 27 *Atl. Rep.* 1008.

470. Defects in cars.—If a person on the street is injured through a defect in a street-car, the company using it cannot avoid liability by showing that it belonged to another company. *Jetter* v. *New York & H. R. Co.*, 2 *Abb. App. Dec.* (*N. Y.*) 458, 2 *Keyes* 154. — REVIEWED IN Gottlieb *v.* New York, L. E. & W. R. Co., 24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344.

471. Failure to light cars.* — Plaintiff's testator was found dead on a street-car track where a sewer was in process of construction. There were no eyewitnesses to the occurrence, but the circumstances tended to show that he had fastened his horse, and was groping in the dark to find a safe passage when he was struck by defendant's car, which was running without lights or bells. *Held*, that there was sufficient evidence of negligence to justify the court in refusing a nonsuit and submitting the case to the jury. *Johnson* v. *Hudson River R. Co.*, 20 *N. Y.* 65; *affirming* 6 *Duer* 633.—APPROVED IN Memphis City R. Co., *v.* Logue, 13 Lea (Tenn.) 32.

It is not error in such a case to charge that, to exonerate the defendant, the negligence of the plaintiff must be such as contributed directly to the injury. The word "directly," under the circumstances, is insignificant. *Johnson* v. *Hudson River R. Co.*, 20 *N. Y.* 65; *affirming* 6 *Duer* 633.—DISTINGUISHED IN Weber *v.* New York C. & H. R. R. Co., 58 N. Y. 451.

A company is bound to exercise such care and caution to avoid accidents to persons and property on the street as reasonable prudence may suggest; but a court is not authorized in instructing a jury that it is bound "to furnish lights on its cars at night such as will enable its drivers to see objects ahead on the track, with the aid of the street lights, in time to avoid an accident." This imposes a higher duty than the law requires. *Memphis City R. Co.* v. *Logue*, 13 *Lea* (*Tenn.*) 32.—QUOTING Louisville & N. R. Co. *v.* Melton, 2 Lea 262.

472. Employing incompetent or drunken driver.—Where plaintiff claims that his injury was caused by the negligent management of a car, due to the driver's intoxication, it is competent to prove other acts of carelessness on the same trip, tending to show that he was intoxicated such as that he missed a switch at one place, drove at a rapid speed, and failed to respond to the conductor's signal to stop at another. Such evidence is often the best proof of intoxication; but it is also competent to prove

* See also *ante*, **459.**

that he was seen to drink at a saloon just before starting. *Pyne* v. *Broadway & S. A. R. Co.*, 46 *N. Y. S. R.* 662, 19 *N. Y. Supp.* 217; *affirmed in* 138 *N. Y.* 627, 51 *N. Y. S. R.* 934, 33 *N. E. Rep.* 1083. — QUOTING Reichman *v.* Second Ave. R. Co., 15 N. Y. S. R. 928.

In an action for personal injuries sustained through the negligence of a driver in defendant's employ, an instruction that if any one is injured by the failure of defendant to employ skilful and prudent drivers, defendant is liable, but that the fact that a driver might have been careless or imprudent at other times would not render the company liable unless, on the occasion of the injury sued for, such driver was careless, reckless, or imprudent, is argumentative and improper. *Hays* v. *Gainesville St. R. Co.*, 34 *Am. & Eng. R. Cas.* 97, 70 *Tex.* 602, 8 *S. W. Rep.* 491.

473. Colliding with teams.*—Where the action is to recover damages caused by a street-car colliding with plaintiff's wagon, and the evidence as to the negligence charged on both sides is conflicting, the jury are the proper persons to fix the negligence, and their verdict will not be interfered with. *Chicago City R. Co.* v. *Brady*, 35 *Ill. App.* 460.

In an action against a company by the driver of a dray, to recover damages for personal injuries, the testimony of plaintiff showed no negligence on the part of the company's employés, but merely a miscalculation of distance on the part of both plaintiff and the driver of the car. *Held*, that it was not error to enter a judgment of nonsuit. *Patton* v. *Philadelphia Traction Co.*, 132 *Pa. St.* 76, 20 *Atl. Rep.* 682.

The evidence for plaintiff tended to show that he hitched his horse and wagon near a curbstone where there was not room enough for a car to pass without hitting the wagon, and that a motorman, disregarding his signal to stop the car until he could unhitch his horse, drove the car into the wagon, and caused the injuries complained of. The evidence for defendant tended to show that there was sufficient room for the car to pass, but that the horse became frightened, and turned the wagon so that it was struck. *Held*, that the case was for the jury. *Kestner* v. *Pittsburgh & B. Traction Co.*, 158 *Pa. St.* 422, 27 *Atl. Rep.* 1048.

A jury is not authorized to infer negligence on the part of a street-car company from mere proof that plaintiff's team collided with a car. *North Side St. R. Co.* v. *Want*, 4 *Tex. App.* (*Civ. Cas.*) 237, 15 *S. W. Rep.* 40.

474. —— while driving along track.*—Where it appears that plaintiff's wagon and defendant's horse-car were approaching each other on the same track, and several witnesses testify that the car was being driven at an unusual rate of speed, and that the car driver was not looking at the track, but had his head turned away, and that he was so inattentive that, although one witness called to him, and his hand was on the brake, he made no effort whatever to check the speed of the car, and the driver contradicts such testimony, the case ought to be left to the jury upon the conflicting evidence. *North Hudson County R. Co.* v. *Isley*, 34 *Am. & Eng. R. Cas.* 94, 49 *N. J. L.* 468, 10 *Atl. Rep.* 665, 9 *Cent. Rep.* 122.

Plaintiff was injured while driving on defendant's tracks. He testified that while turning out to allow a car to pass, the rear of his cart was struck by the car, and he was thrown out and injured; that he looked for the car shortly before, and was listening for it up to the time he became aware of its approach. Defendant's driver testified that he saw plaintiff when thirty-five feet distant and called to him, put on the brakes fifteen feet away, but was unable to avoid a collision on account of the down grade and the condition of the tracks. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury. *Quinn* v. *Atlantic Ave. R. Co.*, 34 *N. Y. S. R.* 801, 12 *N. Y. Supp.* 223; *affirmed in* 134 *N. Y.* 611, *mem.*, 45 *N. Y. S. R.* 935, *mem.*, 31 *N. E. Rep.* 629, *mem.*—FOLLOWED IN Witte *v.* Brooklyn City R. Co., 53 N. Y. S. R. 334.

Plaintiff was driving a wagon along the tracks of defendant, and while in the act of turning off therefrom, an electric car coming from behind struck the hind wheel of his wagon and overturned it, causing the injuries complained of. A verdict was rendered for plaintiff. *Held*, that the case

* Liability of street-car companies for colliding with vehicles. Duty of driver, see 56 AM. & ENG. R. CAS. 608, *abstr.*

* Duty to avoid injuries to other vehicles and pedestrians, see note, 19 AM. & ENG. R. CAS. 127.

was properly submitted to the jury. It was the duty of plaintiff to turn off seasonably to avoid the car approaching from the rear, and while so doing, the motorman was bound to exercise proper care to avoid a collision. *Witte* v. *Brooklyn City R. Co.*, 23 *N. Y. Supp.* 1028, 4 *Misc.* 286; *affirmed in* 143 *N. Y.* 667, *mem.*, 39 *N. E. Rep.* 22.

475. —— or crossing track. — Plaintiff was driving along a track, and aimed to turn out just where the track crossed the track of a steam railroad, but his wagon wheel caught in the end of the rail and he was thrown out. The evidence showed that the end of defendant's rail was cut away so as to allow the wheels of the steam-car to pass, and was broken under at an acute angle, and when the wagon was stopped the rail was found to be raised up some six inches and resting against the wheel. *Held*, that the question of the company's negligence as to the manner of constructing the crossing was properly left to the jury. *Cook* v. *Union R. Co.*, 125 *Mass.* 57.

Plaintiff's coach was being driven along a city street, and while crossing defendant's track in a slanting direction, a collision occurred between the coach and defendant's car. There was a decided conflict of testimony as to the facts of the collision, and which party was responsible. *Held*, that a verdict for plaintiff would not be disturbed. *Gallagher* v. *Coney Island & B. R. Co.*, 24 *N. Y. S. R.* 746, 4 *N. Y. Supp.* 870.

In such case, it was the duty of the car driver to take all reasonable precautions to avoid a collision, and he was not justified in taking any risks on the assumption that because the coach driver could turn in any direction, and the car was confined to the track, it was the business of the coach driver to get out of the way or to take the consequences. *Gallagher* v. *Coney Island & B. R. Co.*, 24 *N. Y. S. R.* 746, 4 *N. Y Supp.* 870.

Plaintiff, the driver of a beer wagon, the weight of which and the weight of the horses rendered speed impossible, after looking up and down the street and seeing no cars in sight, crossed one of defendant's tracks in safety, and had nearly crossed the last, when the rear wheels were struck by a car, and he was thrown out and injured. It appeared that plaintiff's horses were actually on the last track when defendant's car was sixty to seventy feet away. *Held*, that the question whether or not plaintiff exercised his right to cross the track in a careful or careless manner was for the jury, and a verdict in plaintiff's favor would not be disturbed. The finding of the jury that defendant was negligent was justified by the evidence. *Witzel* v. *Third Ave. R. Co.*, 52 *N. Y. S. R.* 521, 3 *Misc.* 561; *reversed in* 6 *Misc.* 635, *mem.*

Plaintiff was driving on a street when his progress was stopped by a blockade of trucks, and he was compelled to stop with the hind wheels of his vehicle on defendant's street-car track. The driver of a car approached and asked him to get off, when plaintiff told him to wait a minute and he would be able to move forward. Thereupon the driver cursed him, and said, "I will get you off some way or other," and as plaintiff was preparing to move forward the car struck the hind wheels of the vehicle and turned it over, injuring plaintiff. *Held*, that this was not such a wilful or malicious act, or so far out of the ordinary business of the driver, as to relieve the company from liability. *Cohen* v. *Dry Dock, E. B. & B. R. Co.*, 8 *J. & S.* (*N. Y.*) 368; *affirmed in* 69 *N. Y.* 170.—DISTINGUISHING Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122.—DISTINGUISHED IN Hoffman *v.* New York C. & H. R. R. Co,, 12 J. & S. 1.

Plaintiff sued for damages resulting from the collision of a street-car with her carriage while she was attempting to cross the track in front of an approaching car. It was shown that the driver of the car was, at the time, looking up and down the street to see if any passengers desired to board the car. But it also appeared that his attention was not unnecessarily, or for any unreasonable time, withdrawn from a view of the track. There was no evidence that he neglected to apply the brakes promptly, or that he failed to do anything which he might have done to avoid a collision. *Held*, that it was error to submit the question of such driver's negligence to the jury. *Thomas* v. *Citizens' Pass. R. Co.*, 46 *Am. & Eng. R. Cas.* 196, 132 *Pa. St.* 504, 19 *Atl. Rep.* 286.

476. Injuries to foot passengers while crossing track.* — It was in dis-

* Liability of street-railway company for injury to persons walking on streets, see notes, 13 L. R. A. 74; 56 AM. & ENG. R. CAS. 454; 46 *Id.* 193, *abstr.*

Negligence of drivers, see note, 50 AM. & ENG. R. CAS. 490.

pute between plaintiff and defendant company whether plaintiff was injured while attempting to cross the street in front of a car, or whether he ran along the side of the car from the rear, and received his injuries in that way. Plaintiff testified that when he was in the middle of the track the car horse stumbled against him and he grasped the dashboard, but lost his hold and fell under the car. Defendant offered evidence tending to show that plaintiff was a trespasser, and was injured while trying to climb over the front dashboard. The car was being driven by a passenger at the time, and the brake was only half on. *Held*, that a verdict for plaintiff would not be disturbed. *Manahan* v. *Steinway & H. P. R. Co.*, 30 *N. Y. S. R.* 362, 55 *Hun* 610, *mem.*, 8 *N. Y. Supp.* 935, *mem.*; *reversed in* 125 *N. Y.* 760, *mem.*, 35 *N. Y. S. R.* 813, 26 *N. E. Rep.* 736.

Plaintiff testified that just as she stepped from the sidewalk to the crosswalk she looked to the left and saw a car about 125 feet away, and she then looked to the right and saw another car nearer than the first car. She kept her eye on the latter car until she was struck and knocked down by the horses of the first car seen. It appeared that the driver of the car which struck her saw her, called several times to her, and made every effort to stop the car, and succeeded in doing so just as she was struck. *Held*, that there was not sufficient evidence to justify a finding that the company was negligent. *Ewing* v. *Atlantic Ave. R. Co.*, 34 *N. Y. S. R.* 113, 11 *N. Y. Supp.* 626.

Defendant's car stopped three or four feet below a crossing to permit a passenger to alight. While plaintiff was attempting to cross the street in the rear of the car, she was struck and injured by the car suddenly moving backwards as the driver relaxed the brakes. Defendant gave no evidence; the court denied plaintiff's request to go to the jury and dismissed the complaint. *Held*, error; whether there was negligence on the part of defendant or its servant should have been submitted to the jury. *Lundy* v. *Second Ave. R. Co.*, 1 *Misc.* 100, 48 *N. Y. S. R.* 676, 20 *N. Y. Supp.* 691.—FOLLOWING Conlin *v.* Rodgers, 39 N. Y. S. R. 51.

477. Running against person standing near track.*— A company is not liable for injuries to one who is struck by the handle on the rear dasher of a car as it rounds a corner where she was standing near the track waiting for the car to pass, plaintiff having seen the car before it reached her, but thought she was far enough from it to be safe, and there being no defect or improper management in the car or in the track. *Widmer* v. *West End St. R. Co.*, 158 *Mass.* 49, 32 *N. E. Rep.* 899.

Plaintiff, a flagman, was temporarily stationed by a steam-railroad company at a point where its gate was broken down, where he was obliged to stand in a narrow space between the steam-railroad track, and defendant's street-car track. While he was engaged in signaling, the driver of a car, who could plainly see him for some distance, approached him from behind, but drove on without checking speed until plaintiff was struck. *Held*, that there was sufficient evidence of negligence to justify a submission to the jury. *D'Oro* v. *Atlantic Ave. R. Co.*, 37 *N. Y. S. R.* 411, 13 *N. Y. Supp.* 789; *affirmed in* 129 *N. Y.* 632, *mem.*, 41 *N. Y. S. R.* 946, *mem.*, 29 *N. E. Rep.* 1030, *mem.*

In such case a request to charge hat if plaintiff stepped back and thus came in collision with the car, which collision would not have occurred had he not stepped back, then plaintiff cannot recover, is too general and a refusal so to charge is proper. *D'Oro* v. *Atlantic Ave. R. Co.*, 37 *N. Y. S. R.* 411, 13 *N. Y. Supp.* 789; *affirmed in* 129 *N. Y.* 632, *mem.*, 41 *N. Y. S. R.* 946, *mem.*, 29 *N. E. Rep.* 1030, *mem.*

478. Injuring persons engaged in excavating under track.*— Plaintiff was engaged in digging a trench in a street by the side of defendant's track. A barrier of planks resting on sections of sewer pipe was erected around the excavation. As one of defendant's cars passed, a piece of pipe fell into the trench, injuring plaintiff. Plaintiff's evidence was to the effect that the car struck the pipe, causing its fall. Another car had just passed without striking it. It appeared that when this car approached the excavation the driver stopped it, the conductor looked along the track and thought there was room to pass, and the foreman of the contractor who was

* Liability of street-railway companies for injury to persons in the street, see note, 51 AM. & ENG. R. CAS. 192.

* Injury to person working on street by being struck by a street-car. When question of contributory negligence for jury, see 43 AM. & ENG. R. CAS. 299, *abstr.*

making the excavation signaled to the driver to come on; he drove along at a walk, passed two of the sections of pipe and struck the third. *Held*, that the evidence failed to establish negligence on defendant's part, and that the submission of the question to the jury was error. *Schmidt* v. *Steinway & H. P. R. Co.*, 132 *N. Y.* 566, *mem.*, 30 *N. E. Rep.* 389, 43 *N. Y. S. R.* 683; *reversing* 57 *Hun* 590, *mem.*, 32 *N. Y. S. R.* 912, 10 *N. Y. Supp.* 672.—REVIEWED IN Lahey *v.* Central Park, N. & E. R. R. Co., 51 N. Y. S. R. 589.

As the driver of a street-car approached an excavation in which a sewer was being constructed, a man who had been present for four days controlling the passage of cars directed the driver to go ahead, but in doing so a pipe was thrown into the excavation and injured one of the workmen. *Held*, that the company should have placed a man there to prevent injuries, if the place was dangerous; and it could not escape liability by showing that the man who directed the car to go forward did not in fact represent the company. *Schmidt* v. *Steinway & H. P. R. Co.*, 55 *Hun* 496, 29 *N. Y. S. R.* 201, 8 *N. Y. Supp.* 664, 9 *N. Y. Supp.* 939, *mem.*

An employé of a city was engaged in laying a water pipe under defendant's track. A ditch had been dug under and at right angles to the track, and plaintiff, in lifting pipe to be placed in the ditch, was compelled to stand over the rail and on the car track, with his back towards approaching cars. The cars were drawn over the ditch by a rope. It was not contradicted that on all other occasions defendant's employés had notified the city's employés that a car was about to be worked over the ditch, but on this occasion no warning was given, and the car ran into plaintiff and injured him. *Held*, that the questions of plaintiff's contributory negligence and of defendant's negligence were both for the jury. *Owens* v. *People's Pass. R. Co.*, 155 *Pa. St.* 334, 26 *Atl. Rep.* 748.

479. Running over drunken man on track.—A company will be liable for the act of a driver in driving upon a man who is lying drunk upon the track, and killing him, where it appears that the driver saw him, but supposing the object to be a bundle of grain made no effort to stop, though he could easily have done so. *Werner* v. *Citizens' R. Co.*, 81 *Mo.* 368; *affirming* 11 *Mo. App.* 601.—FOLLOWING Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475; Harlan *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 26; Zimmerman *v.* Hannibal & St. J. R. Co., 71 Mo. 484; Frick *v.* St. Louis, K. C. & N. R. Co., 75 Mo. 542; Kelley *v.* Hannibal & St. J. R. Co., 75 Mo. 140.—FOLLOWED IN Bergman *v.* St. Louis, I. M. & S. R. Co., 88 Mo. 678. QUOTED IN Donohue *v.* St. Louis, I. M. & S. R. Co., 28 Am. & Eng. R. Cas. 673, 91 Mo. 357.

480. Driving at excessive rate of speed.—If the average rate of speed fixed by the schedule of a company is excessive, in view of the stops necessary to be made in the route, the company will be responsible for an accident occurring from the fact that one of its servants was speeding a car in conformity with the schedule of the company. *Central R. Co.* v. *Allmon*, 147 *Ill.* 471, 35 *N. E. Rep.* 725.

A driver on a street-car is not bound to regulate his speed at such a rate as may be necessary to avoid harm to persons crossing the road in an unreasonable and improper manner. It is as much the duty of persons crossing the street on foot to look out for vehicles as it is the duty of the driver to look out for those who are crossing the street. *Meyer* v. *Lindell R. Co.*, 6 *Mo. App.* 27.

In an action to recover for injuries sustained through being run over by a horse-car, if there is evidence tending to prove that the car driver saw plaintiff on the track in advance of the team, and had an opportunity to observe the danger in which the rapid progress of the horses might place him, and yet made no effort to slacken their movements or deviate their course so as to avoid the collision, but on the contrary, the speed was accelerated as they approached plaintiff, there is sufficient evidence to sustain a finding that the car driver was guilty of negligence. *McClain* v. *Brooklyn City R. Co.*, 40 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 459, 22 *N. E. Rep.* 1062, 27 *N. Y. S. R.* 549; *affirming* 42 *Hun* 657, 6 *N. Y. S. R.* 49.

Plaintiff was injured by a car that was being driven at the rate of five or six miles an hour. Plaintiff swore that he could not see the car until he got to the middle of the track, when he discovered that it was on him; that he jumped before the car struck him. The driver swore that he saw plaintiff standing on the street when he was a block away; that plaintiff stepped nearer the track when the car approached, and that he put

on the brake and succeeded in stopping the car just as plaintiff was struck; that there was nothing between plaintiff and the car. There was nothing to show that the driver attempted to stop the car until he was very close to plaintiff, or that there was anything to prevent him from stopping it before plaintiff was struck. *Held*, that the court was justified in submitting the question of defendant's negligence to the jury. *Brown* v. *Twenty-third St. R. Co.*, 4 *N. Y. Supp.* 192, 21 *N. Y. S. R.* 475, 24 *J. & S.* 356; *affirmed in* 121 *N. Y.* 667, *mem.*, 24 *N. E. Rep.* 1094, *mem.*

481. — at rate prohibited by city ordinance. — In an action to recover for an injury sustained by being run over by a car, plaintiff offered in evidence an ordinance of the city regulating the speed of cars. The evidence was objected to on the ground that no evidence had been offered to show that the car was running at a speed exceeding six miles an hour (the rate allowed by the ordinance) at the time of the accident. One witness had testified that she did not know at what speed the car was running, but that it was running faster than ordinarily, and that a man would have to run very fast to keep up with it. Another testified that she did not see the car coming but heard it, and from the sound of the bells she thought it was coming at full speed. *Held*, that it was competent for the jury to determine whether or not the car was running at a speed exceeding six miles an hour, and that the evidence sufficiently laid the foundation for the introduction of the ordinance. *Baltimore City Pass. R. Co.* v. *McDonnell*, 43 *Md.* 534, 14 *Am. Ry. Rep.* 272.

In such case, defendant was guilty of negligence if the accident could have been avoided had the car not been running at a prohibited rate of speed. *Baltimore City Pass. R. Co.* v. *McDonnell*, 43 *Md.* 534, 14 *Am. Ry. Rep.* 272.

The fact that a car was being driven at a rate of speed prohibited by a city ordinance, at the time plaintiff was injured, is evidence of negligence on the part of the company, but it is not conclusive. *Hanlon* v. *South Boston Horse R. Co.*, 2 *Am. & Eng. R. Cas.* 18, 129 *Mass.* 310. — QUOTED IN Wall *v.* Helena St. R. Co., 12 Mont. 44.

Running a street-car at a rate of speed beyond the limit fixed by a city ordinance tends to show negligence on the part of the company; but whether the car was run in violation of the ordinance is a question of fact for the jury. *Liddy* v. *St. Louis R. Co.*, 40 *Mo.* 506.—REVIEWED IN Scaling *v.* Pullman Palace Car Co., 24 Mo. App. 29.

482. Frightening teams.* — A corporation authorized by statute and the ordinances of a city to operate a dummy on a city street is not liable to a traveler on the street for damage caused by the fright of a horse at the noise made by the escape of steam through the safety valve of the dummy, although the dummy had been standing at one place in the street for half an hour. *Howard* v. *Union Freight R. Co.*, 156 *Mass.* 159, 30 *N. E. Rep.* 479.

Plaintiff's horse, which was standing in a street, suddenly reared up and fell over dead. One of defendant's street-cars had run off the track about twenty or thirty feet from where the horse was standing and was being replaced; but there was no evidence that the horse had been frightened by the occurrence. *Held*, that defendant was not liable. *Hazel* v. *People's Pass. R. Co.*, 43 *Am. & Eng. R. Cas.* 400, 132 *Pa. St.* 96, 18 *Atl. Rep.* 1116.

Although a horse may have taken fright at a street-car which has run off the track and is being restored to it in the usual manner and with the usual noises, the company is not liable for his death in consequence thereof, in the absence of other evidence of negligence. *Hazel* v. *People's Pass. R. Co.*, 43 *Am. & Eng. R. Cas.* 400, 132 *Pa. St.* 96, 18 *Atl. Rep.* 1116.

The conductor of a street-car is guilty of negligence in not stopping or slowing up his car, which was running at a high rate of speed, where, as soon as he came in sight of plaintiff's horses, they began to rear and jump, and the conductor saw, or, in the exercise of ordinary prudence, ought to have seen, the team, and that they were frightened. *Gibbons* v. *Wilkes-Barre & S. St. R. Co.*, 56 *Am. & Eng. R. Cas.* 600, 155 *Pa. St.* 279, 26 *Atl. Rep.* 417.

483. Where company's horses take fright and run away.† —While driving on a street, a span of horses belonging to a street-car company ran away and injured plaintiff. Just previous to their running away they had been attached to a car, and the driver was changing them to the oppo-

* Frightening horses by operation of street railways, see 46 AM. & ENG. R. CAS. 204, *abstr.*

† See also *ante*, **434.**

site end of the car, when either the whippletree fell on their heels, or they became frightened from some other cause, and started on a swift run. *Held*, that the question of the driver's negligence was properly left to the jury. *Lynch* v. *Brooklyn City R. Co.*, 24 *N. Y. S. R.* 447, 52 *Hun* 614, 1 *Silv. Sup. Ct.* 361, 5 *N. Y. Supp.* 311; *affirmed in* 123 *N. Y.* 657, *mem.*, 25 *N. E. Rep.* 955, *mem.*

And a company is not liable to a party injured by being run over in the street by a team of horses belonging to the company, the horses having been frightened by an assault made upon them by third parties, where it appears that the horses were being driven as they had been driven for several years without accident, and in a manner that was deemed safe and discreet. *Weldon* v. *Harlem R. Co.*, 5 *Bosw.* (*N. Y.*) 576.

484. Sufficiency of complaint.— Where the action is for damages based upon defendant's negligence, a general averment of negligence is sufficient to admit proof of special circumstances constituting it. *Oldfield* v. *New York & H. R. R. Co.*, 14 *N. Y.* 310.

In an action for personal injuries, the complaint alleged that while plaintiff was in the act of crossing a certain street on a crosswalk, the driver of a street-car "so negligently and carelessly managed his team that the horses knocked her down and injured her leg." *Held*, that this was a plain and concise statement of the fact constituting a cause of action, as required by N. Y. Code Civ. Pro., § 481, and was sufficient. *Agnew* v. *Brooklyn City R. Co.*, 20 *Abb. N. Cas.* 235, 13 *Civ. Pro.* 25, 9 *N. Y. S. R.* 719.

In such case the company insisted that, under section 546 of the above Code, the court should compel plaintiff to state what act of commission or omission of the driver was negligent. *Held*, that this was not required. To require a more specific statement would be to plead the evidence. *Agnew* v. *Brooklyn City R. Co.*, 20 *Abb. N. Cas.* 235, 13 *Civ. Pro.* 25, 9 *N. Y. S. R.* 719.

485. Conflict of evidence—Question for jury.— It is for the jury to determine whether the driver of a street-car was guilty of negligence in driving forward while a wagon approaching in a block of cars and wagons was advancing at the request of the driver of the car, where the evidence is conflicting as to whether there would have been a collision if the car had remained stationary. *Kerrigan* v. *West End St. R. Co.*, 158 *Mass.* 305, 33 *N. E. Rep.* 523.

Plaintiff was injured by the falling of the horse on which he was riding. He testified that he was riding in the street, on one horse and leading another, and, when in the act of turning off defendant's track, the horse that he was riding was struck on the rump by a passing car, and afterward hit with the whip of the driver, whereby he became unable to manage it and it slipped and fell. The driver of the car admitted that the car touched one of the horses, but denied striking either with the whip, but there was evidence of other witnesses that the driver lashed his whip in the air for the purpose of keeping the horses back. *Held*, that the question growing out of the conflict of evidence must be settled by the jury, and a verdict for plaintiff would not be disturbed. *Berke* v. *Twenty-third St. R. Co.*, 22 *N. Y. S. R.* 492, 52 *Hun* 611, *mem.*, 4 *N. Y. Supp.* 905.

486. Injury caused by wheels slipping.— In an action to recover damages caused by defendant's dray running against a street-car, the fact that the collision would not have occurred except for the slipping of the wheels of the dray on the iron track does not conclusively repel the imputation of negligence. *Seigel* v. *Eisen*, 41 *Cal.* 109.

If there is evidence before the jury tending to show that when the brakes are applied a car wheel will not revolve, but will slide along the ground, the boot worn by plaintiff at the time of the injury is admissible for the purpose of showing by the indentations upon it that the car-wheel ran over plaintiff's foot, and that the brake was not applied. *Hays* v. *Gainesville St. R. Co.*, 34 *Am. & Eng. R. Cas.* 97, 70 *Tex.* 602, 8 *S. W. Rep.* 491.

c. Contributory Negligence of Person in Street.

487. Generally.—Where the evidence shows that plaintiff, who was injured by a collision with a car, contributed by his own fault to bring about the collision, he cannot recover damages from the company on account of the injury, even though the employés of the company were partly in fault. *Schwartz* v. *Crescent City R. Co.*, 30 *La. Ann.* 15.

And where it appears that plaintiff was guilty of negligence directly contributing

to the accident, he must show that the injury could have been avoided if defendant had exercised ordinary care. *Meyer* v. *Lindell R. Co.*, 6 *Mo. App.* 27.

Cases where a nonsuit would be sustained on the ground of contributory negligence are exceptional, and are confined to cases where the undisputed facts show some act which the law adjudges negligent. But if contributory negligence clearly appears from plaintiff's own evidence, and from facts which are undisputed, it is proper to order a nonsuit. *Hernett* v. *Bleecker St. & F. F. R. Co.*, 17 *J. & S.* (*N. Y.*) 185.—APPLYING Stackus *v.* New York C. & H. R. R. Co., 79 N. Y. 464. REVIEWING Barker *v.* Savage, 45 N. Y. 191.

Where a cart and a street-car are both progressing side by side in the same direction, and a collision is caused by plaintiff imprudently turning his horse to one side, a verdict for plaintiff is against the evidence. *Suydam* v. *Grand St. & N. R. Co.*, 17 *Abb. Pr.* (*N. Y.*) 304, 41 *Barb.* 375.

488. Care to be observed in going on track.—It is not negligence *per se* for the driver of a patrol wagon to drive along and upon a street-car track, so long as he uses ordinary care to avoid a collision with the cars on the track, and it is a question for the jury whether he has used such ordinary care. *Swain* v. *Fourteenth St. R. Co.*, 93 *Cal.* 179, 28 *Pac. Rep.* 829.

A pedestrian in crossing the track of a street railroad is only bound to use ordinary care, or that degree of care which people of ordinarily prudent habits could be reasonably expected to exercise under the circumstances. *Driscoll* v. *Market St. Cable R. Co.*, 97 *Cal.* 553, 32 *Pac. Rep.* 591.

To enable a party to recover for an injury by a collision with a street-car, he must show that he exercised a reasonable degree of prudence and caution in endeavoring to avoid the accident. If the evidence shows that, while the car was in motion, he failed to exercise a reasonable degree of prudence, which would have prevented the occurrence of the accident, he cannot recover for injuries either to his person or his property, even though the driver of the car be himself at fault. *Mercier* v. *New Orleans & C. R. Co.*, 23 *La. Ann.* 264.

The rule requiring one exercising his lawful rights, in a place where the exercise of lawful rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed would endanger him. If obstacles temporarily intervene to prevent observation, he should wait until the required observation can be made. *Newark Pass. R. Co.* v. *Block*, 56 *Am. & Eng. R. Cas.* 590, 55 *N. J. L.* 605, 27 *Atl. Rep.* 1067.

489. Care in crossing street-car track distinguished from other railroads.—The cars of a horse railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully traveling upon the highway is not, therefore, bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other. *Lynam* v. *Union R. Co.*, 114 *Mass.* 83.

The rules as to the care one is bound to observe in crossing the track of a steam railroad do not apply with equal strictness to a person about to cross a crowded street, on which is operated a horse railroad. *Brown* v. *Twenty-third St. R. Co.*, 24 *J. & S.* 356, 4 *N. Y. Supp.* 192, 21 *N. Y. S. R.* 475; *affirmed in* 121 *N. Y.* 667, *mem.*, 24 *N. E. Rep.* 1094, *mem.*

It is not necessary to look both up and down before crossing an ordinary street where there is no steam railway. In crossing where there is only a street-car track it is only necessary to look for cars when the situation and surrounding circumstances would require a person of ordinary prudence to do so. *Pyne* v. *Broadway & S. A. R. Co.*, 46 *N. Y. S. R.* 662, 19 *N. Y. Supp.* 217; *affirmed in* 138 *N. Y.* 627, *mem.*, 51 *N. Y. S. R.* 934, *mem.*, 33 *N. E. Rep.* 1083, *mem.*

490. Duty to look and listen before going on track.—The fact that a person passing over a crossing in a city steps on the track of a street railroad, whether the cars accustomed to run thereon are horse-cars or grip-cars, without first stopping to look and see whether a car is ap-

proaching, is not, as matter of law, and without regard to surrounding circumstances, negligence or a want of ordinary care. *Chicago City R. Co.* v. *Robinson*, 36 *Am. & Eng. R. Cas.* 66, 127 *Ill.* 9, 4 *L. R. A.* 126, 18 *N. E. Rep.* 772; *affirming* 27 *Ill. App.* 26.—REVIEWED IN Weber *v.* Kansas City Cable R. Co., 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 7 L. R. A. 819.

It is gross negligence to drive upon a street-railway track in front of an approaching car without looking around until the car runs into one's vehicle; and it is a wrong not only to the company, but to persons riding in or waiting for the car, wilfully to obstruct its progress in this way when there is nothing to hinder one from getting off the track. *Wood* v. *Detroit City St. R. Co.*, 19 *Am. & Eng. R. Cas.* 129, 52 *Mich.* 402, 18 *N. W. Rep.* 124.

It is the duty of a person in crossing a street-car track in a large city like New York to look to ascertain whether there are vehicles coming which may endanger the crossing. It is the duty of every such passenger to make a reasonably vigilant use of his eyes and ears to ascertain whether in crossing a street any danger will be incurred. *Cowan* v. *Third Ave. R. Co.*, 16 *N. Y. S. R.* 916, 1 *N. Y. Supp.* 612, 49 *Hun* 607, *mem.*

Where the injury is caused by a common horse-car, a charge that it was plaintiff's duty to look and listen for an approaching car, and if he did not, in the opinion of the jury, discharge his duty in that respect, he could not recover, is properly refused. *D'Oro* v. *Atlantic Ave. R. Co.*, 37 *N. Y. S. R.* 411, 13 *N. Y. Supp.* 789; *affirmed in* 129 *N. Y.* 632, *mem.*, 41 *N. Y. S. R.* 946, *mem.*

It is the duty of a person about to cross a street-railway track to look, so that he may not walk or drive directly in front of a moving car and be struck by it. *Carson* v. *Federal St. & P. V. Pass. R. Co.*, 50 *Am. & Eng. R. Cas.* 462, 147 *Pa. St.* 219, 23 *Atl. Rep.* 369.

The driver of a wagon who approaches a street-railway crossing, drives upon the track without looking, and immediately comes into collision with a car, is guilty of contributory negligence. *Carson* v. *Federal St. & P. V. Pass. R. Co.*, 50 *Am. & Eng. R. Cas.* 462, 147 *Pa. St.* 219, 23 *Atl. Rep.* 369.

491. —— but not to stop.—It seems that a person is not bound to stop before crossing a street-railway track, but he must look and listen. *Carson* v. *Federal St. & P. V. Pass. R. Co.*, 50 *Am. & Eng. R. Cas.* 462, 147 *Pa. St.* 219, 23 *Atl. Rep.* 369.

492. Failure to notice an approaching car.— It cannot be said as a matter of law that it is contributory negligence in a person about to cross a street to fail to notice that an approaching street-car is being driven at twice its usual rate; and where such person has observed that another person has signaled the car to stop, his failing to observe that the driver did not heed the signal and stop is not contributory negligence. *Lang* v. *Houston, W. S. & P. F. R. Co.*, 75 *Hun* 151, 27 *N. Y. Supp.* 90.

Plaintiff testified that, before entering a cut through a snow-drift along the track of defendant company in which she was run down and injured by a car, she had looked back, but saw no car approaching. *Held*, that as, from the testimony, it was unquestionable that the car which ran her down must have been plainly in sight when she entered the cut, a place for unusual caution and vigilance, so that if she looked at all it must have been heedlessly, she was guilty of contributory negligence, as matter of law. *Warner* v. *People's St. R. Co.*, 141 *Pa. St.* 615, 21 *Atl. Rep.* 737.—FOLLOWING Carroll *v.* Railroad Co., 12 W. N. C. 348.

493. Going on track, with defective hearing and obstructed vision. —A person who is afflicted with deafness and who wears protruding apparel obstructive of the exercise of the sense of sight, and who ventures without looking right or left to cross a street-railway track, acts rashly and is guilty of contributory negligence, and cannot recover damages in case of an injury sustained by a collision with a coming mule and car. *Schulte* v. *New Orleans City & L. R. Co.*, 44 *La. Ann.* 509, 10 *So. Rep.* 811.

In such case the driver has a right to presume that the person is of sound hearing, and that she will exercise her senses so as to avoid an accident by stopping in time to let the mule and car pass freely. *Schulte* v. *New Orleans City & L. R. Co.*, 44 *La. Ann.* 509, 10 *So. Rep.* 811.

494. Not negligence to drive on street where cars run.—In an action to recover for an injury to plaintiff's horses, carriage, and harness, it is not error for the court to refuse to submit interrogatories to the jury based upon the theory that if

plaintiff could have traveled some other street than the one on which the accident occurred, and thus have avoided meeting the cars, it was his duty to do so, and that his failure to do so was such negligence as to preclude a recovery. *Muncie St. R. Co.* v. *Maynard*, 5 *Ind. App.* 372, 32 *N. E. Rep.* 343.

Where the evidence clearly shows that plaintiff made every effort to avoid the collision, but on account of the frightened condition of the horses he could not control them, an instruction requested by defendant to the effect that if plaintiff could have seen the car approaching, and he did not escape, and his property was injured, the law presumes either that he did not look, or if he did look, that he did not heed what he saw, and that such conduct was negligence in itself, is properly refused. *Muncie St. R. Co.* v. *Maynard*, 5 *Ind. App.* 372, 32 *N. E. Rep.* 343.

When the right side of a street is obstructed by cars and trucks, and plaintiff, leading his horse, is ordered by a car driver to get off the track, he is justified in taking the left side, and is not guilty of contributory negligence therefrom where the horse, while there, is run into and injured. *Mooney* v. *Trow Directory P. & B. Co.*, 51 *N. Y. S. R.* 418.

In an action for injury to plaintiff's horses caused by collision with defendant's car—*held*, that plaintiff was not guilty of contributory negligence in selecting the street upon which the injury occurred when he might have gone another route, although the space between the track and a retaining wall was narrow, and an electric railway causing noise calculated to frighten horses was being operated on that track. *Gibbons* v. *Wilkes-Barre & S. St. R. Co.*, 56 *Am. & Eng. R. Cas.* 600, 155 *Pa. St.* 279, 26 *Atl. Rep.* 417.

495. —— nor on track.—Merely being on a street-car track with a vehicle is not in itself negligence; but the party is bound to exercise ordinary care to know when cars are about to pass, and to get off the track. *Bindbeutal* v. *Street R. Co.*, 43 *Mo. App.* 463.

While a person may not recklessly, carelessly, or wilfully obstruct the passage of cars, he is not bound to keep off the tracks; and if he fairly, and in a reasonable manner respecting the paramount right of the company, temporarily obstructs the track, when necessarily engaged in the prosecution of a lawful business, and is, without fault on his part, injured by negligence chargeable to the company, he may maintain an action. *Lahey* v. *Central Park, N. & E. R. R. Co.*, 51 *N. Y. S. R.* 589, 22 *N. Y. Supp.* 380.—REVIEWING Schmidt *v.* Steinway & H. P. R. Co., 132 N. Y. 566, mem., 43 N. Y. S. R. 683.

The court was requested to charge that plaintiff was bound to keep his team, so far as he reasonably could, off the tracks of a street-railroad company, so as to permit the free and unobstructed passage of the cars; but the court refused, and told the jury that plaintiff's horse was standing in the street where it had a perfect right to stand. *Held*, that this was equivalent to saying that plaintiff was not bound to use reasonable care in keeping off the track, and was reversible error. *O'Neill* v. *Third Ave. R. Co.*, 52 *N. Y. S. R.* 486, 3 *Misc.* 521, 23 *N. Y. Supp.* 20.

496. Attempting to drive in front of moving cars.—Plaintiff, while driving in a street on which defendant's track was laid, was called by a friend on the opposite side of the street. He drove across the track and stopped, as he believed, entirely out of the way of the cars, his horse's feet being in the gutter; but the side fender of a car struck and injured his wagon. *Held*, that he was guilty of contributory negligence. *Spaulding* v. *Jarvis*, 32 *Hun* (*N. Y.*) 621.—REVIEWING Stackus *v.* New York C. & H. R. R. Co., 79 N. Y. 469.

A mere error in judgment in one driving on a street, in believing that he can safely cross in front of an approaching car, does not constitute negligence where he could have crossed in safety if the car had been properly managed. *Buhrens* v. *Dry Dock, E. B. & B. R. Co.*, 53 *Hun* 571, 25 *N. Y. S. R.* 191, 6 *N. Y. Supp.* 224; *affirmed in* 125 *N. Y.* 702, *mem.*, 34 *N. Y. S. R.* 1012, *mem.*, 26 *N. E. Rep.* 752.

Plaintiff attempted to cross a street-car track, in a carriage, in front of a rapidly driven car on a down grade, thinking, as she testified, that she had time to cross, but collided with the car. *Held*, that she assumed the risk, and her contributory negligence prevented a recovery. *Thomas* v. *Citizens' Pass. R. Co.*, 46 *Am. & Eng. R. Cas.* 196, 132 *Pa. St.* 504, 19 *Atl. Rep.* 286.

Plaintiff, whose carriage was waiting at the curb, without observing the near approach of a car got into and drove her carriage for a short distance in the same

direction as the car, when she suddenly turned, intending to cross, but in such close proximity to the car that, but for the prompt action of the driver in turning his horse off the track, the horse would have collided with plaintiff's carriage; as it was, notwithstanding the brake was applied to the car, the whiffletree struck the wheel of the carriage, which was upset, and plaintiff was thrown to the ground, and her leg fractured. *Held*, that she could not recover. *Follet* v. *Toronto St. R. Co.*, 15 *Ont. App.* 346. — DISTINGUISHING Radley *v.* London & N. W. R. Co., 1 App. Cas. 754; Allen *v.* North Metropolitan Tramway Co., 4 L. T. 561. QUOTING Wakelin *v.* London & S. W. R. Co., 12 App. Cas. 41; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455.

497. Attempting to drive close behind a car up a ferry-drop. — A street-car was started up a drop from a ferry, but when part way up the horses failed to pull it, and the driver applied the brake and held the car, but failing to get another horse as a helper, as was usual, he released the brake and the car ran back against plaintiff's team, which was following but twenty feet behind. *Held*, that the court could not say that plaintiff did not exercise ordinary prudence under the circumstances. *Cook* v. *Metropolitan R. Co.*, 98 *Mass.* 361.

In such case, plaintiff was not bound to suppose that the horses attached to the car were of insufficient strength, or unwilling, to move the car and keep out of the way of his team, when he kept at a reasonable distance behind. *Cook* v. *Metropolitan R. Co.*, 98 *Mass.* 361.

498. Imputing negligence of driver to owner of a wagon. — The owner of a wagon which is destroyed by collision with a street-car is affected by the contributory negligence of his driver. *Carson* v. *Federal St. & P. V. Pass. R. Co.*, 50 *Am. & Eng. R. Cas.* 462, 147 *Pa. St.* 219, 23 *Atl. Rep.* 369.—QUOTED IN Christensen *v.* Union Trunk Line, 6 Wash. 75.

499. Sitting while driving so as not to see a defect in track.—A person driving along a track is not as matter of law guilty of negligence in sitting in the centre of a low cart, immediately behind his horse, so as to be unable to observe the upturned end of a rail forming part of the track, but if the rail is plainly visible for the distance of 150 feet, and should have been observed by him in the exercise of ordinary care, he is guilty of such negligence as will preclude his recovery. *Bradwell* v. *Pittsburgh & W. E. Pass. R. Co.*, 153 *Pa. St.* 105, 25 *Atl. Rep.* 623.

500. Driving street-car at rapid speed over a railroad crossing. — Where the driver of a street-car has been in the habit of passing over a railroad track some sixty times a day, and could see an approaching train at forty feet from the track, it is imprudent for him to rely upon looking from a greater distance when he did not see any train, and, upon listening, did not hear any, and to drive so that he could not stop his car within the forty feet. *Mantel* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 362, 33 *Minn.* 62, 21 *N. W. Rep.* 853. — APPROVED IN Seefeld *v.* Chicago, M. & St. P. R. Co., 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278. FOLLOWED IN Sweeney *v.* Minneapolis & St. L. R. Co., 22 Am. & Eng. R. Cas. 302, 33 Minn. 153.

501. Releasing hold upon horses standing near track. — It is not contributory negligence *per se* for a driver to leave his horses untied on a narrow street where there is a street-car track while he goes near by to deliver a parcel. *Albert* v. *Bleecker St., etc., R. Co.*, 2 *Daly* (*N. Y.*) 389.

Plaintiff, who kept carriages for hire, had a carriage and horses standing in a city at a public hack stand near defendant's track. A snow-plow passing on the track, as was alleged by plaintiff, threw mud and snow into the carriage and frightened the horses, which ran away, causing the principal injury complained of. Plaintiff's driver in charge did not have hold of the reins, but stood by the open door of the carriage reading a newspaper. Another driver near saw the snow-plow coming and held his horses by their heads. Plaintiff's driver did not observe the approach of the plow and took no precautions, and the horses started before he could get hold of them. The court, on the trial, refused to nonsuit, but, in substance, held that defendant was only liable in case the jury found negligence on its part as to the damage done to the carriage by the mud and snow which went into the open door. The jury rendered a verdict for six cents damages. *Held*, that plaintiff had no reason to complain; that the only error, if any, was in not granting a nonsuit. *Gray* v. *Second Ave. R. Co.*, 65 *N. Y.* 561; *affirming* (*f*) 2 *J. & S.* 519.—DISTINGUISHED IN

Wasmer *v.* Delaware, L. & W. R. Co., 1 Am. & Eng. R. Cas. 122, 80 N. Y. 212, 36 Am. Rep. 608.

502. Crossing track, generally.—Where a crippled person is injured by a street-car while crossing the street, proof that she stopped to look and listen for cars, but saw none, and was struck in one minute thereafter by a car coming around a curve, warrants a finding by the jury that she was not guilty of contributory negligence. *Baltimore Traction Co.* v. *Wallace*, 77 *Md.* 435, 26 *Atl. Rep.* 518.

In such case the proof showed that when plaintiff started to cross the street the car was around the corner and could not be seen. The company asked the court to instruct that plaintiff was guilty of contributory negligence if a reasonably prudent person could have seen the car approaching for a distance of one block from the place where plaintiff left the sidewalk. *Held*, that the instruction was properly refused as irrelevant. *Baltimore Traction Co.* v. *Wallace*, 77 *Md.* 435, 26 *Atl. Rep.* 518.

The fact that a traveler on a highway perceives that an obstacle therein is dangerous to persons attempting to pass it is not conclusive that he does not use due care in making the attempt. *Mahoney* v. *Metropolitan R. Co.*, 104 *Mass.* 73.—QUOTED IN St. Louis, I. M. & S. R. Co. *v.* Box, 52 Ark. 368.

Plaintiff started to cross a street-car track in front of a rapidly approaching car, but was delayed by a child six years of age which was accompanying her catching its foot in the track, and a collision occurred. *Held*, that she was not chargeable with contributory negligence if she would have had ample time to cross had it not been for the delay. *Aaron* v. *Second Ave. R. Co.*, 2 *Daly* (*N. Y.*) 127.

Plaintiff was run over by a street-car while crossing a track. He was somewhat familiar with the situation, and knew that a great many cars passed. He testified that he looked both ways along the track, and saw a car standing at some distance away; that he then started to cross the track and was knocked down. The car which caused the accident came out of a depot switch on a curve and entered the track close to the place where plaintiff was injured. If he had looked back upon the switch track, he could have seen the car coming. Just as the car reached the track the speed of the horses was accelerated, and there was evidence tending to show that but for the increased speed plaintiff would have escaped. *Held*, that it could not be said as matter of law that plaintiff was guilty of contributory negligence, but that the question was one for the jury. *McClain* v. *Brooklyn City R. Co.*, 40 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 459, 22 *N. E. Rep.* 1062, 27 *N. Y. S. R.* 549; *affirming* 42 *Hun* 657, 6 *N. Y. S. R.* 49.

503. Walking on or near the track.—Plaintiff was walking about twilight upon a street-car track, in the outskirts of a city, for no other reason than that it was better walking on the track than on the driveway, and was injured by a car moving at an ordinary rate. *Held*, that his contributory negligence would defeat a recovery, notwithstanding the negligence of the company. *Childs* v. *New Orleans City R. Co.*, 33 *La. Ann.* 154.—DISTINGUISHED IN Ketchum *v.* Texas & P. R. Co., 38 La. Ann. 777.

Plaintiff, a boy twelve and a half years old, was sent to procure ice from a cart, and walked along a street-car track by the side of the cart, which made a good deal of noise, for the purpose of procuring the ice. He was struck by a street-car which approached from behind, and which was five to ten minutes late, and hurrying to make up the time. The driver shouted to the boy, but made no attempt to stop until very near him. Plaintiff knew that no car was due at that time. *Held*, that the question of whether he exercised due care was for the jury. *Howland* v. *Union St. R. Co.*, 150 *Mass.* 86, 22 *N. E. Rep.* 434.

It is not negligence *per se* to travel along a public highway by the side of a street-railway track on which a car is moving in the same direction as the party traveling, unless such party places himself in such position as to be run over or injured by such street-car. *Brooks* v. *Lincoln St. R. Co.*, 37 *Am. & Eng. R. Cas.* 560, 22 *Neb.* 816, 36 *N. W. Rep.* 529.

504. Stopping car on street crossing—Passing over car platform.—Where a street-car is stopped so as to obstruct the passage of a traveler on foot desiring to cross the street, it is not a trespass or wrongful act on his part to step upon and pass over the platform of the car in order to avoid the obstruction; he has the right so to do. *Shea* v. *Sixth Ave. R. Co.*, 62 *N. Y.* 180; *affirming* 5 *Daly* 221, 12 *Am. Ry. Rep.* 154.

505. Standing on walk between tracks. — Plaintiff's cars ran on a curve over a sidewalk for the purpose of entering a depot. Plaintiff stopped on the sidewalk to wait for a car, having a baby in her arms and a little girl by her side. She testified that she saw two cars approaching, and, finding herself in danger, motioned to the driver to stop, which he failed to do, and she was knocked down and injured. The defendant offered evidence tending to show that she attempted to cross the track, and seeing a car approaching ran back and into the other car, which had come to a full stop, and was thereby injured. *Held*, that a verdict for plaintiff would not be disturbed. *O'Toole* v. *Central Park, N. & E. R. R. Co.*, 35 *N. Y. S. R.* 591, 58 *Hun* 609, 12 *N. Y. Supp.* 347; *affirmed in* 128 *N. Y.* 597, *mem.*, 38 *N. Y. S. R.* 1011.

In such case plaintiff had a right to stand on the sidewalk, and she had a right to assume that the company in crossing the sidewalk would show proper respect for the rights of foot passengers. Therefore no claim of contributory negligence could be predicated upon her stopping where she did, though it was in front of the depot. *O'Toole* v. *Central Park, N. & E. R. R. Co.*, 35 *N. Y. S. R.* 591, 58 *Hun* 609, 12 *N. Y. Supp.* 347; *affirmed in* 128 *N. Y.* 597, *mem.*, 38 *N. Y. S. R.* 1011.

506. Falling on track.—Where plaintiff stumbled and fell on a street-car track, it is immaterial that he did not look to see whether a car was approaching before he attempted to cross the track, if there was abundance of time to have crossed had it not been for the fall. The due care that he was required to exercise did not require him to anticipate the probability of the fall. *Ments* v. *Second Ave. R. Co.*, 3 *Abb. App. Dec.* (*N. Y.*) 274; *affirming* 2 *Robt.* 356.

In such case it is not sufficient to relieve the driver of a car, that he exercised ordinary care to avoid the injury. Ordinary care is not sufficient under such circumstances. If the driver of a car sees a person lying upon the track, it is his duty to exercise the very highest care and to make the greatest effort to avoid an injury. *Ments* v. *Second Ave. R. Co.*, 3 *Abb. App. Dec.* (*N. Y.*) 274; *affirming* 2 *Robt.* 356.

Plaintiff, carrying a grocer's basket, started to cross a street on a crosswalk that was covered with ice, when a horse-car was rapidly approaching nearly 200 feet away, but on an up grade; but she slipped and fell, and was run over. *Held*, that it was proper to charge the jury that she was only required to exercise "common, ordinary care and prudence" under the circumstances, and to refuse to charge that she ought not to have attempted to cross if there was danger of slipping or falling. *Baxter* v. *Second Ave. R. Co.*, 3 *Robt.* (*N. Y.*) 510, 30 *How. Pr.* 219.—QUOTING Munger *v.* Tonawanda R. Co., 4 N. Y. 349.

507. When for jury. — Plaintiff belonged to a fire company, and being unable to dress himself fully before starting for a fire, threw his leg between the rounds of a ladder for the purpose of holding on while adjusting his belt, and while so riding the end of the ladder struck a street-car, which injured him. *Held*, that he could not be expected to use the same degree of care as might properly be required of one who had no such duty to perform, and considering his duty and the exigencies of the occasion, the court could not say that he was not in the exercise of due care. *Magee* v. *West End St. R. Co.*, 151 *Mass.* 240, 23 *N. E. Rep.* 1102.

A company allowed snow to be thrown up beside its track and packed down, so as to leave a depression at the track, at a street crossing, of from six to ten inches or more, with a sharp slope downward; and a party in the proper use of the highway sought to cross the track at such crossing, but his cutter was overturned and he was injured. It further appeared that the place was one where an impracticable crossing would have been an unlawful obstruction of a public way, and that it was being crossed habitually. *Held*, that, in the absence of proof that the injured party acted in a careless manner in making the crossing, the question of his contributory negligence was for the jury. *Laughlin* v. *Grand Rapids St. R. Co.*, 26 *Am. & Eng. R. Cas.* 377, 62 *Mich.* 220, 28 *N. W. Rep.* 873.

The question whether, being in a wagon on the track of a street railway, plaintiff and her husband used reasonable diligence and ordinary care to prevent a collision, is for the jury. *Rascher* v. *East Detroit & G. P. R. Co.*, 90 *Mich.* 413, 51 *N. W. Rep.* 463.

Plaintiff, in attempting to cross a track, was struck by the pole of an approaching car, knocked down, and dragged thirty or forty feet. While held between the scraper and the wheel, bystanders raised the end of

the car to remove plaintiff, but were compelled, by a movement of the horses, to drop it before plaintiff was rescued, whereby he sustained dangerous injuries. Plaintiff's view of the track was obstructed by other vehicles. The driver was a boy of fifteen and a half years, lacking strength needful for his employment. The speed of the car was greater than that allowed by ordinance, but a competent driver could have stopped the car within fifteen feet, and within less distance had the speed of the car been within the limit of the city ordinance. *Held*, that the negligence of defendant and contributory negligence of plaintiff were questions for the jury. *Wall* v. *Helena St. R. Co.*, 50 *Am. & Eng. R. Cas.* 474, 12 *Mont.* 44, 29 *Pac. Rep.* 721.—QUOTING Schierhold *v.* North Beach & M. R. Co., 40 Cal. 447; Wright *v.* Malden & M. R. Co. 4 Allen (Mass.) 283; Hanlon *v.* South Boston Horse R. Co., 129 Mass. 310.

Plaintiff was driving, and when within about ten feet of a street-car track he saw a car approaching rapidly on a down grade, but about seventy feet away. He trusted to his judgment in believing he could cross, but collided with the car and was injured. *Held*, that the question of his contributory negligence was for the jury. *Buhrens* v. *Dry Dock, E. B. & B. R. Co.*, 25 *N. Y. S. R.* 191, 6 *N. Y. Supp.* 224, 53 *Hun* 571; *affirmed in* 125 *N. Y.* 702, *mem.*, 26 *N. E. Rep.* 752.

In such case plaintiff had a right to assume that the driver of the car would give him the way to which his position at the crossing already entitled him. *Buhrens* v. *Dry Dock, E. B. & B. R. Co.*, 25 *N. Y. S. R.* 191, 6 *N. Y. Supp.* 224, 53 *Hun* 571; *affirmed in* 125 *N. Y.* 702, *mem.*, 26 *N. E. Rep.* 752.

Plaintiff's intestate, a man sixty-one years old, after looking both ways, tried to cross a street where there were three tracks, and while a car was approaching only fifty feet away, but was struck and killed on the third track. He was in full view of the driver, who did not check his speed and who was driving faster than usual. *Held*, that the question of his contributory negligence was for the jury. *Wells* v. *Brooklyn City R. Co.*, 58 *Hun* 389, 34 *N. Y. S. R.* 636, 12 *N. Y. Supp.* 67.

508. Failure to observe that a car was without bells.—In an action against a company for death at a crossing, it is error to instruct the jury that the deceased had a right to presume that defendant had complied with the law as to providing bells for its team, in the absence of knowledge to the contrary, and that the failure to have bells on the team hauling the car was negligence, and that if the failure to provide the bells was the direct cause of the injury, they must find for plaintiff, where it appeared that the accident happened in the daytime, that the street was clear from obstructions, that the team was moving at a walk, in full view of the deceased, who was well acquainted with the street and in full possession of his senses; because the instruction took from the jury the question whether, if deceased had exercised due care, he might have discovered the absence of the bells, and because the presumption that defendant would obey the laws and attach the bells must cease if actual knowledge to the contrary were shown. *Lynch* v. *Metropolitan St. R. Co.*, 56 *Am. & Eng. R. Cas.* 571, 112 *Mo.* 420, 20 *S. W. Rep.* 642.

In such case defendant has a right to rely upon the exercise of ordinary prudence on the part of plaintiff, as in this case on the part of the deceased, and plaintiff has a right to presume due care on the part of defendant, the obligation being mutual and correlative. *Lynch* v. *Metropolitan St. R. Co.*, 56 *Am. & Eng. R. Cas.* 571, 112 *Mo.* 420, 20 *S. W. Rep.* 642.

509. Duty to get off track in time.—Where plaintiff is driving upon a track when a car is approaching from the opposite direction, at a short distance and in plain sight, it is his duty to turn off the track to avoid a collision, and if he does not do so, through negligence or wilfulness, and a collision ensues, he cannot recover against the company, even if the latter was also in fault, unless the company or its servants wilfully caused the injury, or are guilty of such negligence or reckless conduct that plaintiff's is slight when compared with it. *Chicago W. D. R. Co.* v. *Bert*, 69 *Ill.* 388.—DISTINGUISHED IN Louisville, N. A. & C. R. Co. *v.* Phillips, 31 Am. & Eng. R. Cas. 432, 112 Ind. 59.

It is the duty of a person on foot or on horseback, or having a wheeled carriage under his control, moving on the track of a city railway, to keep a lookout for a car, entitled to move and in the practice of moving in an opposite direction on the same railway; and to begin to turn off the track

soon enough to allow the cars to pass without impediment or hindrance. *Jatho* v. *Green & C. St. Pass. R. Co.*, 4 *Phila.* (*Pa.*) 24.

510. Intoxication. — The fact that a person injured by the negligence of the driver of a horse-car was intoxicated at the time of the accident will not prevent his maintaining an action for damages, unless his intoxication contributed to the injury. *Maguire* v. *Middlesex R. Co.*, 115 *Mass.* 239.

In an action against a street-car company for negligently causing death, the driver of the car that caused the injury testified that the deceased "came staggering over to catch the horses by the heads; he seemed to me to be drunk, but I could not say positively he was." *Held*, that this was sufficient evidence to entitle the company to a specific charge upon the question of intoxication, and a submission to the jury. *Bradley* v. *Second Ave. R. Co.*, 8 *Daly* (*N. Y.*) 289.

511. When not a defense. — Contributory negligence on the part of a person injured by a street-car will not relieve the company from liability, if it appears that the injury might have been avoided, by the use of ordinary care, after those in charge of the car saw the injured person, or if, by the use of such care, the person might have been discovered in time to have avoided the injury. *Baltimore Traction Co.* v. *Wallace*, 77 *Md.* 435, 26 *Atl. Rep.* 518.

If the driver of a vehicle is placed in a state of peril by the negligence of those having charge of a car, the company is responsible for the consequences, since "a defendant cannot impute a want of vigilance to one injured by his act of negligence, if that very want of vigilance was the consequence of an omission of duty on his part." *Gibbons* v. *Wilkes-Barre & S. St. R. Co.*, 56 *Am. & Eng. R. Cas.* 600, 155 *Pa. St.* 279, 26 *Atl. Rep.* 417.

512. Working near track. — Plaintiff was working at the rear end of a coal wagon which stood about eighteen inches from defendant's track, leaving plenty of room for cars to pass. Plaintiff was struck by a passing car and injured. There was no evidence that the driver wantonly ran plaintiff down, or that he intended to injure him, or had any reason to suspect that plaintiff was in the slightest peril or danger. *Held*, that the complaint was properly dismissed. *McKelvey* v. *Twenty-third St. R. Co.*, 5 *Misc.* 424, 26 *N. Y. Supp.* 711.

513. Rule where man is marching in procession.—Plaintiff was marching in a procession in *quasi* military array, when he was injured by a street-car. There was nothing to show that the persons composing the procession had any special right to use the streets, or any other or greater right than belonged to any other citizens, or that they had taken the steps provided by N. Y. Act of 1872, ch. 590, to procure a special license to use the streets. *Held*, that plaintiff and those marching with him were held to the same rule of care as in the case of other travelers on the street. *Brown* v. *Broadway & S. A. R. Co.*, 18 *J. & S.* (*N. Y.*) 106.

Independent of any statutory provision, the company had an equal right with plaintiff to use the street, and no persons using the street, either singly or in a procession, had the right to monopolize it so as unnecessarily to obstruct the passage of cars. *Brown* v. *Broadway & S. A. R. Co.*, 18 *J. & S.* (*N. Y.*) 106.

If a military company occupies the whole of a street, street-cars should stop long enough to give them time to move forward and pass the car on one or both sides of it; but a person riding at the head of such procession is bound to look out at a proper time and see if a car is coming. *Jatho* v. *Green & C. St. Pass. R. Co.*, 4 *Phila.* (*Pa.*) 24.

514. Right to recover for injury received while doing unlawful act.—Mass. Gen. St. ch. 64, § 2, provides that telegraph companies may construct lines of telegraph upon and along the highways and public roads, upon procuring a writing from the mayor and aldermen. Plaintiff was engaged in putting up wires for a company that had procured no such writing, and was climbing a pole, with a wire looped around his body, when the wire was struck by a street-car and he was injured. *Held*, that the jury should have been instructed that plaintiff was doing an illegal act which contributed to the injury, and that he was not entitled to recover, unless the driver of the car recklessly and wantonly drove against the wire. *Banks* v. *Highland St. R. Co.*, 19 *Am. & Eng. R. Cas.* 139, 136 *Mass.* 485.

515. Presumption of negligence. —As a street-car cannot vary from the line of its track, where it appears that a car and a cart are both passing side by side in

* See also *ante*, **375**.

the same direction, with a space of a foot and a half to two feet between them, if a collision occurs, the presumption of negligence is altogether against the driver of the cart, and not against the conductor of the car. *Suydam* v. *Grand St. & N. R. Co.*, 17 *Abb. Pr.* (*N. Y.*) 304, 41 *Barb.* 375.

516. Burden on defendant to prove contributory negligence.* — In an action to recover for injuries by being run over by a street-car, where the plaintiff shows negligence on the part of the driver, if contributory negligence be set up as a defense the defendant must prove it, and it need not be disproved in the first instance by the plaintiff. *Washington & G. R. Co.* v. *Gladmon*, 15 *Wall.* (*U. S.*) 401, 4 *Am. Ry. Rep.* 500.—APPROVED IN Gram *v.* Northern Pac. R. Co., 1 N. Dak. 252. FOLLOWED IN Hopkins *v.* Utah Northern R. Co., 2 Idaho 277; Indianapolis & St. L. R. Co. *v.* Horst, 93 U. S. 291; Higley *v.* Gilmer, 3 Mont. 90. NOT FOLLOWED IN Owens *v.* Richmond & D. R. Co., 88 N. Car. 502. QUOTED IN Sanders *v.* Reister, 1 Dak. 151; Chicago & A. R. Co. *v.* Murray, 71 Ill. 601; Paducah & M. R. Co. *v.* Hoehl, 12 Bush (Ky.) 41. REVIEWED IN Conroy *v.* Oregon Constr. Co., 10 Sawy. (U. S.) 630, 23 Fed. Rep. 71.

5. *Injuries to Employés.*

517. By vicious horses.† — It is the duty of a street-car company which employs a servant to attend to its horses to use a reasonable degree of observation in ascertaining the character of the horses, and to prevent any horse that is dangerous from being kept in its stalls. Knowledge by the superintendent of the stables, or by a head hostler, of the viciousness of a horse is knowledge by the company. *McGarry* v. *New York & H. R. Co.*, 45 *N. Y. S. R.* 564, 18 *N. Y. Supp.* 195; *affirmed in* 137 *N. Y.* 627, *mem.*, 51 *N. Y. S. R.* 931, 33 *N. E. Rep.* 745.

Where an employé sues for an injury caused by a vicious horse, an instruction that if the horse from the time of its purchase had been fed and cared for in the manner in which plaintiff was required to do so, without, to defendant's knowledge, attacking or injuring any person, then defendant was justified in believing that it was safe for plaintiff to feed and take care of him, and that plaintiff could not recover, is properly refused. *McGarry* v. *New York & H. R. Co.*, 45 *N. Y. S. R.* 564, 18 *N. Y. Supp.* 195; *affirmed in* 137 *N. Y.* 627, *mem.*, 51 *N. Y. S. R.* 931, 33 *N. E. Rep.* 745.

In such case, if the employé is ordered to tend a horse that is dangerous and vicious, it is the duty of the company to warn him of the character of the horse, if it is known to the company. *McGarry* v. *New York & H. R. Co.*, 45 *N. Y. S. R.* 564, 18 *N. Y. Supp.* 195; *affirmed in* 137 *N. Y.* 627, *mem.*, 51 *N. Y. S. R.* 931, 33 *N. E. Rep.* 745.

In such case it is not necessary for the employé to prove that the horse had, to the knowledge of the company, previously done similar mischief. It is sufficient if the previous knowledge of the company would lead a reasonable mind to infer that the horse was likely to be vicious. *McGarry* v. *New York & H. R. Co.*, 45 *N. Y. S. R.* 564, 18 *N. Y. Supp.* 195; *affirmed in* 137 *N. Y.* 627, *mem.*, 51 *N. Y. S. R.* 931, 33 *N. E. Rep.* 745.

Plaintiff, who was employed as a hostler by a street-car company, received an injury from the kick of a vicious mare, while grooming her. The fact of the mare's being vicious was known by him, by other employés of the company, and by the officers thereof. Plaintiff had once before been kicked by the same mare, but had not asked to have her taken from his care. At the time of the accident he was not using a strap which he ordinarily used when grooming the mare to prevent her from kicking. *Held*, that he was not entitled to recover. *Green & C. St. Pass. R. Co.* v. *Bresmer*, 4 *Am. & Eng. R. Cas.* 647, 97 *Pa. St.* 103.

In such case evidence is admissible to show that the company knew of the vicious character of the animal, and that the stable boss was possessed of such knowledge, and had had a conversation with the superintendent of the company relative to the sale of the mare. *Green & C. St. Pass. R. Co.* v. *Bresmer*, 4 *Am. & Eng. R. Cas.* 647, 97 *Pa. St.* 103.

518. Driving against railroad flagman.—Plaintiff was stationed as a flagman in a narrow space between an ordinary railroad track and a street-car track, and while standing, in the discharge of his duties, with his back to a street-car, but in plain view of the driver for several hundred feet,

* See also *ante*, 442.

† Liability of horse-car company for injury to driver caused by vicious horse, see 53 AM. & ENG. R. CAS. 209, *abstr.*

was injured. *Held*, that there was sufficient proof to show negligence on the part of the company, and due care on the part of plaintiff. *D'Oro* v. *Atlantic Ave. R. Co.*, 13 *N. Y. Supp.* 789, 37 *N. Y. S. R.* 411; *affirmed in* 129 *N. Y.* 632, *mem.*, 41 *N. Y. S. R.* 946, 29 *N. E. Rep.* 1030.

6. *Expulsion of Passengers.*

519. For non-payment of fare.—A rule of a company requiring passengers to deposit their fare upon entering the car is reasonable, and the refusal of a passenger to comply with the rule after demand warrants the company in evicting him from the car, using no more force than is necessary. *Nye* v. *Marysville & Y. C. St. R. Co.*, 97 *Cal.* 461, 32 *Pac. Rep.* 530.

If a person is a trespasser upon a car, or is unlawfully riding without the payment of fare, and the conductor undertakes to remove him, he must act in a prudent manner, and exercise due care for the safety of such person; and if he fails to do so, and in consequence thereof such person is injured, the company will be liable. *North Chicago City R. Co.* v. *Gastka*, 39 *Am. & Eng. R. Cas.* 377, 128 *Ill.* 613, 21 *N. E. Rep.* 522; *affirming* 27 *Ill. App.* 518.

It is the duty of a passenger to secure evidence of the payment of fare necessary to entitle him to passage on a street-car, under some contract with the company, and the conductor is under no legal obligation to accept the passenger's statement as to that fact. *Mahoney* v. *Detroit St. R. Co.*, 52 *Am. & Eng. R. Cas.* 581, 93 *Mich.* 612, 53 *N. W. Rep.* 793.—DISTINGUISHING Hufford *v.* Grand Rapids & I. R. Co., 64 Mich. 631; Carsten *v.* Northern Pac. R. Co., 44 Minn. 454; Pennsylvania Co. *v.* Bray, 125 Ind. 229; Lake Erie & W. R. Co. *v.* Fix, 88 Ind. 384; Palmer *v.* Charlotte, C. & A. R. Co., 3 So. Car. 580; Burnham *v.* Grand Trunk R. Co., 63 Me. 298; Eddy *v.* Rider, 79 Tex. 57; New York, L. E. & W. R. Co. *v.* Winter, 143 U. S. 60; Toledo, W. & W. R. Co. *v.* McDonough, 53 Ind. 289. REVIEWING Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25.

Where a passenger has a valid contract with a street-car company for passage over its road, but lacks the required evidence of that fact, it is his duty to pay the fare when it is demanded by the conductor, and to seek redress from the company for a violation of the contract. *Mahoney* v. *Detroit St. R. Co.*, 52 *Am. & Eng. R. Cas.* 581, 93 *Mich.* 612, 53 *N. W. Rep.* 793.—QUOTING Frederick *v.* Marquette, H. & O. R. Co., 37 Mich. 346.

A genuine silver coin, worn smooth by use, not appreciably diminished in weight, and distinguishable, is legal tender for car fare; and if ejected for refusal to make other payment, the passenger may have an action for damages. *Jersey City & B. R. Co.* v. *Morgan*, 40 *Am. & Eng. R. Cas.* 675, 52 *N. J. L.* 60, 18 *Atl. Rep.* 904; *affirmed in* 52 *N. J. L.* 558, 21 *Atl. Rep.* 783.

A conductor has a right to expel a person from a car for a refusal to pay fare upon demand; but this is not a right to be exercised in a manner regardless of the circumstances. A person cannot be thrown from a car in rapid motion without the most imminent danger to life; and although he may be liable to expulsion, he may lawfully resist an attempt to expel him in such a case. A refusal to pay fare will not justify any act which puts human life in peril. *Sanford* v. *Eighth Ave. R. Co.*, 23 *N. Y.* 343; *reversing* 7 *Bosw.* 122.

The evidence showed that the conductor of a car, without arresting its motion, seized plaintiff's testate and forcibly ejected him from the front platform. The danger attending such an act was increased by the fact that it was night, and a high bank of snow was thrown on each side of the track, which caused him to roll under the car, where he received fatal injuries. *Held*, that the act of the conductor was unlawful, and not excused by the fact that the testate resisted. He had a right to do so. *Sanford* v. *Eighth Ave. R. Co.*, 23 *N. Y.* 343; *reversing* 7 *Bosw.* 122.

Where defendant justifies plaintiff's expulsion from one of its street-cars by the refusal of plaintiff to pay, pursuant to a rule of defendant, additional fare for each parcel too large to be carried on the lap of the passenger without incommoding others, the question whether two parcels consisting of picture frames twenty by twenty-four inches in size are within the regulation is one of fact to be decided by the jury. *Morris* v. *Atlantic Ave. R. Co.*, 40 *Am. & Eng. R. Cas.* 677, 116 *N. Y.* 552, 22 *N. E. Rep.* 1097, 27 *N. Y. S. R.* 667; *reversing* 5 *N. Y. S. R.* 874.

The question of the negligence of a street-car driver in attempting to remove a passenger from the car, while it is in motion, for non-payment of fare, is for the jury. *Healey* v. *City Pass. R. Co.*, 28 *Ohio St.* 23.

FOLLOWING Murphy *v.* Union R. Co., 118 Mass. 228.

A company is liable in damages for the ejection of a passenger for non-payment of fare where it appears that the passenger had dropped his fare in the box in obedience to a posted rule of the company, and had no knowledge of private directions to the drivers to go through the cars when they were crowded and collect the fares. *Perry* v. *Pittsburgh Union Pass. R. Co.*, 153 *Pa. St.* 236, 25 *Atl. Rep.* 772.

In such a case the passenger is entitled to recover for the injury to his feelings and the humiliation inflicted upon him by the trespass. *Perry* v. *Pittsburgh Union Pass. R. Co.*, 153 *Pa. St.* 236, 25 *Atl. Rep.* 772.

520. For non-conformity to rules.—A company has a right to make and enforce reasonable rules which tend to promote the safety and comfort of its passengers, and if a passenger wantonly refuses to conform to the rules, the conductor or driver may at once expel him, using no more force than is necessary. *Ft. Clark St. R. Co.* v. *Ebaugh*, 49 *Ill. App.* 582.

521. For being intoxicated.—A conductor may eject a person who is intoxicated and has vomited in the car, provided no more force is used than is necessary. *Converse* v. *Washington & G. R. Co.*, 2 *Mac-Arth.* (*D. C.*) 504.

It is the duty of a conductor to remove from a horse-car a person who is intoxicated, if he misbehaves himself, or gives reason to believe that he will misbehave. *Vinton* v. *Middlesex R. Co.*, 11 *Allen* (*Mass.*) 304.

If a passenger is so intoxicated as to be offensive to other passengers, the conductor has a right to remove him; but whether it is negligence to remove him while the car is in motion is a question for the jury. *Murphy* v. *Union R. Co.*, 118 *Mass.* 228, 9 *Am. Ry. Rep.* 282.—APPLYING Vinton *v.* Middlesex R. Co., 11 Allen (Mass.) 304. EXPLAINING Lovett *v.* Salem & S. D. R. Co., 9 Allen 557; Nichols *v.* Middlesex R. Co., 106 Mass. 463.—FOLLOWED IN Healey *v.* City Pass. R. Co., 28 Ohio St. 23.

A rule of a company requiring conductors to remove intoxicated persons from cars is no defense to an action for removing from a car a passenger who was not intoxicated, but who was afflicted by a disease that produced involuntary motions resembling intoxication, and the exclusion of such rule is not error. *Regner* v. *Glens Falls, S. H. & Ft. E. St. R. Co.*, 74 *Hun* 202, 26 *N. Y. Supp.* 625, 56 *N. Y. S. R.* 300.

522. For disorderly conduct.—If the conduct of a passenger is such that his expulsion appears to the conductor to be a just and proper expedient for the purpose of preventing a violation of decency and good order, the conductor will be justified in expelling him, the company being responsible for an abuse of this discretion, or of any oppression in its exercise, and it will be error if the court so instruct the jury as to take away from them the consideration of the question whether the conduct of the passenger furnished a reasonable and probable cause for apprehending a breach of good order. *Lemont* v. *Washington & G. R. Co.*, 1 *Am. & Eng. R. Cas.* 263, 1 *Mackey* (*D. C.*) 180.—DISTINGUISHING Pearson *v.* Duane, 4 Wall. (U. S.) 605. REVIEWING Thurston *v.* Union Pac. R. Co., 4 Dill. (U. S.) 321; Jencks *v.* Coleman, 2 Sumn. (U. S.) 221.

A street-car company has the right to repress and prohibit all disorderly conduct on its cars, and to expel therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable. *Vinton* v. *Middlesex R. Co.*, 11 *Allen* (*Mass.*) 304.—APPLIED IN Murphy *v.* Union R. Co., 118 Mass. 228. APPROVED IN New Orleans, St. L. & C. R. Co. *v.* Burke, 53 Miss. 200.

And the conductor is not bound to wait until some overt act of violence, profaneness, or other misconduct has been committed, to the inconvenience or annoyance of other passengers, before exercising his right to exclude or expel the offender. The power to prevent a disorderly occurrence is quite as essential as the power to stop it after it has been commenced. *Vinton* v. *Middlesex R. Co.*, 11 *Allen* (*Mass.*) 304.

If a passenger is guilty of disorderly conduct without reasonable provocation from the carrier or others, he forfeits his right as a passenger, and the carrier, without using more force than is reasonably necessary, has the right to eject him. *Eads* v. *Metropolitan St. R. Co.*, 43 *Mo. App.* 536.

When the conduct of the passenger is equivocal, so that its character must be determined by the manner, tone, gesture, or intention, then it should be submitted to the jury. But when unequivocally bad, demonstrating itself and striking all respectable and orderly people alike, it should be de-

cleared disorderly by the court, e.g., if a passenger, without reasonable provocation thereto, should wilfully or in anger call the conductor a liar in the presence and hearing of the other passengers. *Eads* v. *Metropolitan St. R. Co.*, 43 *Mo. App.* 536.

Independently of any regulation of his company, the conductor of a street car has a right to put off a passenger, even after his fare is paid, if he becomes disorderly or offensive; and the exercise of the right often becomes a duty owed to other passengers. *Flynn* v. *Central Park, etc., R. Co.*, 17 *J. & S. (N. Y.)* 81.

523. For using vulgar or indecent language.—While a conductor is justified in expelling a passenger for the use of vulgar and indecent language to the annoyance of other passengers, still the law does not justify unreasonable and excessive force, or permit the removal of such passenger from the car at a place or under circumstances dangerous to life or limb. *Chicago City R. Co.* v. *Pelletier*, 134 *Ill.* 120, 24 *N. E. Rep.* 770; *affirming* 33 *Ill. App.* 455.—DISTINGUISHED IN North Chicago St. R. Co. *v.* Olds, 40 Ill. App. 421.

The conductor has no right to put a passenger off for using vulgar and indecent language in a tone loud enough to attract the attention of other passengers, and refusing to desist, unless such language is calculated to annoy and disturb them. *Chicago City R. Co.* v. *Pelletier*, 134 *Ill.* 120, 24 *N. E. Rep.* 770; *affirming* 33 *Ill. App.* 455.

Railway companies are not conservators of the public or private morals, but they may and should adopt and enforce such reasonable rules as will protect their passengers from injury, insult, disturbance, or annoyance. Their duty to prevent the use of offensive language on their cars is for the protection of their passengers, and arises out of their duty to them. *Chicago City R. Co.* v. *Pelletier*, 134 *Ill.* 120, 24 *N. E. Rep.* 770; *affirming* 33 *Ill. App.* 455.

A company attempted to justify an expulsion on two grounds: (1) plaintiff's refusal to pay fare, and (2) his use of language calculated to disturb other passengers. The court instructed that even if plaintiff did not pay his fare, or some one pay it for him, and the conductor did not undertake to remove him in a peaceable manner, using no more force than was necessary, but pushed or threw him off the car while in motion, etc. *Held*, that the instruction could not have been understood as excluding from the jury testimony tending to show misconduct of plaintiff calculated to disturb the other passengers, especially when the jury were told, by other instructions, that the conductor would be justified in putting plaintiff off for using vulgar and indecent language loud enough to disturb other passengers. *Chicago City R. Co.* v. *Pelletier*, 134 *Ill.* 120, 24 *N. E. Rep.* 770; *affirming* 33 *Ill. App.* 455.

524. —— but no excessive force must be used.—In ejecting a passenger the conductor can use no more force than is necessary, and if he does the company will be liable. *Haman* v. *Omaha Horse R. Co.*, 35 *Neb.* 74, 52 *N. W. Rep.* 830. *New York, L. E. & W. R. Co.* v. *Haring*, 21 *Am. & Eng. R. Cas.* 436, 47 *N. J. L.* 137.

A street-car company is liable where a conductor, under a mistake of facts or of judgment, ejects a passenger from a car, when it is not justified by the passenger's misconduct. The company is also liable where there was justifiable cause of the ejection, but excessive force was used, but not wantonly or maliciously. *Higgins* v. *Watervliet T. & R. Co.*, 46 *N. Y.* 23.—DISTINGUISHING Hibbard *v.* New York & E. R. Co., 15 N. Y. 467. QUOTING McManus *v.* Crickett, 1 East 106; Sandford *v.* Eighth Ave. R. Co., 23 N. Y. 343; Seymour *v.* Greenwood, 7 H. & N. 356.—APPLIED IN Corbett *v.* Twenty-third St. R. Co., 42 Hun 587, 4 N. Y. S. R. 535. FOLLOWED IN Jackson *v.* Second Ave. R. Co., 47 N. Y. 274; McCormick *v.* Pennsylvania C. R. Co., 49 N. Y. 303; Rounds *v.* Delaware, L. & W. R. Co., 64 N. Y. 129, 21 Am. Rep. 597. REVIEWED IN Gillett *v.* Missouri Valley R. Co., 55 Mo. 315.

525. Liability of company for act of driver or conductor.—By placing a conductor in his position, the company gives him the implied authority to determine who shall be admitted to and who excluded from the cars; and the company is liable for a wrongful exercise of this authority, and the motive or intention of the conductor will not discharge the company from liability. *Passenger R. Co.* v. *Young*, 21 *Ohio St.* 518.

If a driver of a street-car has authority to collect fare, and to put a person off for nonpayment, the company will be liable, if injury results from excessive force and violence in so doing, or if, as driver, he is

guilty of carelessness or negligence in keeping the car in motion, by reason of which a person is injured. *Healey* v. *City Pass. R. Co.*, 28 *Ohio St.* 23, 14 *Am. Ry. Rep.* 63.—REVIEWING Lovett *v.* Salem & S. D. R. Co., 9 Allen (Mass.) 557; Wilton *v.* Middlesex R. Co., 107 Mass. 108.

Where the injury complained of results from a want of care in a car driver in running the car, and not from the force or violence used in ejecting a person from the car, the company is liable, whether the driver had authority to collect the fare or not. *Healey* v. *City Pass. R. Co.*, 28 *Ohio St.* 23, 14 *Am. Ry. Rep.* 63.

A company is liable for the act of a driver in wrongfully putting a passenger off the platform, even where it is shown that the act is more than negligent, making it forcible, malicious, and wilful, it being within the usual employment of a driver to remove persons from car platforms. *Meyer* v. *Second Ave. R. Co.*, 8 *Bosw.* (*N. Y.*) 305. —FOLLOWING Weed *v.* Panama R. Co., 17 N. Y. 362.

526. Passengers using transfer checks.—A street-car passenger was given a transfer ticket, but was told on the second line that it was intended for a different line, and he was ejected. On the trial of a suit for being put off, there was evidence that plaintiff was well acquainted with the different lines, and evidence tending to show that he did not get off the car he said he did, which was calculated to mislead the agent giving him the ticket. *Held*, that an instruction that if the jury believed plaintiff did not get off the line of cars as related by him, but came from another line, and received the transfer ticket without objection, and undertook to ride on a line that it did not call for, he could not recover, was not erroneous. *Carpenter* v. *Washington & G. R. Co.*, 31 *Am. & Eng. R. Cas.* 120, 121 *U. S.* 474, 7 *Sup. Ct. Rep.* 1002.

A company that operated several lines was in the habit of transferring passengers from one to the other, giving colored checks for the purpose, each designating the line on which it was to be used, and not good on any other line. Plaintiff, who was familiar with this practice, by a mistake received a wrong check from a conductor, without reading it. *Held*, that he must pay his fare on the second line or be expelled. *Bradshaw* v. *South Boston R. Co.*, 16 *Am. & Eng. R. Cas.* 386, 135 *Mass.* 407, 46 *Am. Rep.* 481.—DISTINGUISHED IN Poulin *v.* Canadian Pac. R. Co., 47 Fed. Rep. 858; Philadelphia, W. & B. R. Co. *v.* Rice, 26 Am. & Eng. R. Cas. 264, 64 Md. 63. QUOTED IN Atchison, T. & S. F. R. Co. *v.* Gants, 34 Am. & Eng. R. Cas. 290, 38 Kan. 608.

By a city ordinance granting certain franchises to defendant, a passenger who has paid one fare on any line operated by the company is entitled to a transfer check or ticket entitling him to a continuous passage over any connecting or crossing line. Where such passenger applies for and accepts a transfer ticket for one of several continuous or crossing lines, plainly marked and designated, he will be limited to the line so selected, but where the route designated is not so limited, but is equally applicable to several lines, he will be entitled to be transported over either. *Pine* v. *St. Paul City R. Co.*, 52 *Am. & Eng. R. Cas.* 584, 50 *Minn.* 144, 52 *N. W. Rep.* 392, 16 *L. R. A.* 347.

Plaintiff paid his fare and received a transfer check which entitled him to continue his journey on the "next" connecting car on another line of the same company. He took the next car on the connecting line, and the conductor took up his transfer check. Without notice to plaintiff, this car was taken off after going a short distance. The conductor having disappeared, plaintiff was informed by the driver of the car that he should take the next passing car. He did so, but was put off by the conductor because he had no transfer check, and refused to pay fare again. *Held*, that plaintiff showed, *prima facie*, a right to recover for the conduct of defendant's agents leading to and including the expulsion. *Appleby* v. *St. Paul City R. Co.*, 54 *Minn.* 169, 55 *N. W. Rep.* 1117.

The defense for ejecting a passenger was that he presented to the conductor a transfer check which was insufficient, since it was torn in two, and offered to prove a rule of the company requiring the conductor to collect fares in money or by proper ticket or transfer check, and also to prove the custom of passengers, on receiving their checks at the place of transfer and finding that they did not want them, to tear them in two and throw them down. *Held*, competent evidence, and its rejection error. *Woods* v. *Metropolitan St. R. Co.*, 48 *Mo. App.* 125.

The conductor must have proper evidence of the right of the passenger to carriage,

and this right will avail the passenger nothing unless he produce this evidence. *Woods* v. *Metropolitan St. R. Co.*, 48 *Mo. App.* 125.

A conductor cannot stop to investigate the right which a passenger might have aside from the evidence of such right presented to him, and his duty, when a passenger is without the evidence of having paid his fare, is plain and imperative—to collect the same, or on refusal to pay to put the passenger off, using no more force than is necessary. *Woods* v. *Metropolitan St. R. Co.*, 48 *Mo. App.* 125.

On leaving a car plaintiff received a check which stated that it was good "for a continuous ride" from the street where it was issued to the end of the company's line. Plaintiff did not take another car at that place; but during the afternoon of the same day got on a car below where the check had been issued, paid his fare, and after passing the place where the check had been issued tendered it for further fare, but it was rejected. *Held*, that the company was liable. Plaintiff had a right to ride on any car, and the word "continuous" did not apply to the portion of the route traveled before the check was issued. *McMahon* v. *Third Ave. R. Co.*, 15 *J. & S.* (*N. Y.*) 282

527. —— coupon tickets.—A rule of a company, under a contract with the city requiring it to carry passengers over two sections of its line for one fare, and the passenger to show an undetached coupon ticket as a voucher of his right to continue beyond a given point, is reasonable in law, and the company is entitled to eject one refusing to comply. *De Lucas* v. *New Orleans & C. R. Co.*, 38 *La. Ann.* 930.

A passenger, on paying the fare, was entitled to transportation over the lines of two street railways, for which a ticket of a peculiar color and print was used, consisting of two parts, separated by a perforated line. The lower part contained the evidence of the passenger's right to ride over the road of the company to which the fare was paid, and it was the duty of its conductor to deliver to him the upper part, which contained the evidence of his right to ride over the other road. By mistake, the conductor so separated the parts as to leave a portion of the upper part upon the lower part of the ticket, and delivered the remainder of the upper part to the passenger. The conductor on the other road refused to accept this fragment, and, on refusal of the passenger to pay fare, ejected him. *Held*, as a matter of law, that the conductor was bound to know that the fragment was a portion of a genuine ticket used upon his line, which, if whole, would have entitled the passenger to a ride over the line. *Rouser* v. *North Park St. R. Co.*, 97 *Mich.* 565, 56 *N. W. Rep.* 937.

Where a company issues a ticket with coupons attached for different rides, a condition that the coupons will not be good if detached is reasonable, and a coupon detached by the passenger not in the presence of the conductor is not good for a passage. *Walker* v. *Dry Dock, E. B. & B. R. Co.*, 33 *How. Pr.* (*N. Y.*) 327.

528. —— commutation checks.—Mass. Act of 1871, ch. 381, § 36, provides for commutation checks for passengers on street-cars in the city of Boston which shall entitle them "to a passage on the same day only in any car run in the city between any two points therein," without paying more than a sum named "for both of the passages aforesaid." *Held*, that this does not entitle a passenger who has changed cars and surrendered the check in the second car to a passage on a third car going further on the same line, though he was told by the conductor that he might ride on the third car without payment of additional fare. *Wakefield* v. *South Boston R. Co.*, 117 *Mass.* 544, 6 *Am. Ry. Rep.* 238.

Mass. Pub. St. ch. 113, § 47, relating to commutation checks on street railways, provides that such checks shall not entitle the holder "to a passage over the same route on which the check was issued, or a route parallel thereto, and between and including two common points." *Held*, that it is not necessary that two street-car routes should be parallel for the whole length of each, or of either, in order to fall within the meaning of the statute. If the route on which the passenger proposes to travel is substantially parallel to that on which he receives his check, and if it is between and includes two common points, it is enough, and his trip back in the direction from which he came is, substantially, a return trip. *Cronin* v. *Highland St. R. Co.*, 28 *Am. & Eng. R. Cas.* 122, 144 *Mass.* 249, 10 *N. E. Rep.* 833.

529. Limiting check to fifteen minutes after delivery.—There is nothing unreasonable in a requirement that a transfer ticket from one route of a street railway to another shall not be honored un-

less used within fifteen minutes after its delivery to the passenger, in the absence of any obligation on the part of the company, by charter, ordinance, or contract, to make such transfer and carry the passenger over both routes for a single fare. *Heffron* v. *Detroit City R. Co.*, 52 *Am. & Eng. R. Cas.* 588, 92 *Mich.* 406, 16 *L. R. A.* 345, 52 *N. W. Rep.* 802.

It is the duty of a passenger receiving such a transfer ticket to read it, and his failure to do so cannot give him any rights against the company which he would not have had after reading it and thus being advised by the limitation as to the time within which it could be used. *Heffron* v. *Detroit City R. Co.*, 52 *Am. & Eng. R. Cas.* 588, 92 *Mich.* 406, 16 *L. R. A.* 345, 52 *N. W. Rep.* 802.

If the passenger takes the first car which passes the point of transfer after alighting from the one on which he originally took passage, even though the time within which the ticket is receivable by the conductor by the limitation on its face has expired, the passenger may have an action against the company for being ejected from the latter car on refusing to pay a second fare; but no such state of facts is averred in the declaration in this case. *Heffron* v. *Detroit City R. Co.*, 52 *Am. & Eng. R. Cas.* 588, 92 *Mich.* 406, 16 *L. R. A.* 345, 52 *N. W. Rep.* 802.—DISTINGUISHING Hufford *v.* Grand Rapids & I. R. Co., 64 Mich. 631. FOLLOWING Frederick *v.* Marquette, H. & O. R. Co., 37 Mich. 342.

530. Sick passengers. — A sick passenger must conform to the reasonable regulations of the company. He has no prerogative to misbehave, and to subject other passengers to annoyance by his offensive conduct, and it will be no protection against his expulsion that his misconduct is not wilful or voluntary. The absence of an evil intention is a good defense to an indictment, but it cannot exonerate a person who is honestly supposed to be drunk, and who repeatedly disobeys the request of the conductor to behave himself. *Lemont* v. *Washington & G. R. Co.*, 1 *Am. & Eng. R. Cas.* 263, 1 *Mackey* (*D. C.*) 180.

An instruction which implies that vomiting from intoxication in a street-car is the only form of that evil which will authorize the conductor to expel the offending passenger is erroneous, as it takes from the minds of the jury all other forms of the evil which, in the proper management of the car, might justify the conductor in ejecting the passenger. *Lemont* v. *Washington & G. R. Co.*, 1 *Am. & Eng. R. Cas.* 263, 1 *Mackey* (*D. C.*) 180.

The rule to be applied to steam-cars in regard to accommodations to sick or decrepit persons is not a proper rule to be applied to horse railways. What might be permitted on the former, where the journeys are long and continuous, could not be practised on the latter without great inconvenience to the company and the passengers. If the passenger is known by the conductor to be sick (and good faith requires that he be informed by the passenger of that fact, in order that proper and reasonable allowance may be made for what may seem unusual or obnoxious in his conduct), and he is shown good treatment, the company will not be required to provide, without a special contract, any extra means for his accommodation. *Lemont* v. *Washington & G. R. Co.*, 1 *Am. & Eng. R. Cas.* 263, 1 *Mackey* (*D. C.*) 180.

Although a common carrier of passengers owes obligations to its well passengers as well as to those who are sick, and is bound to protect the rights of both, and although when the condition of one passenger, from sickness or otherwise, is such as to be inconsistent with the safety, health, or even reasonable comfort of his fellow-passengers, regard for the rights of the latter will authorize the carrier to terminate the carriage by excluding him, yet this right cannot be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well-being of the ejected passenger. *Conolly* v. *Crescent City R. Co.*, 41 *La. Ann.* 57, 3 *L. R. A.* 133, 5 *So. Rep.* 259, 6 *So. Rep.* 526.—QUOTED IN Weightman *v.* Louisville, N. O. & T. R. Co., 70 Miss. 563.

A passenger stricken with apoplexy while riding on a street-car, although attended with severe vomiting, to the inconvenience and great discomfort of other passengers, cannot be removed, while in a speechless and helpless condition, and laid in the open street on a bleak, drizzling December day, and there abandoned with no effort to procure him attention, without a gross violation by the carrier of its duty as such, and liability for resulting damage. *Conolly* v. *Crescent City R. Co.*, 41 *La. Ann.* 57, 3 *L. R. A.* 133, 5 *So. Rep.* 259, 6 *So. Rep.* 526.

The mistake of the driver in supposing that a passenger was drunk, when the latter

had ridden a considerable distance without misbehavior, and had been guilty of none except vomiting occasioned by illness, cannot excuse the company for ejecting him and leaving him uncared for on the street in inclement weather. *Conolly* v. *Crescent City R. Co.* 41 *La. Ann.* 57, 3 *L. R. A.* 133, 5 *So. Rep.* 259, 6 *So. Rep.* 526.

531. Allowance of exemplary damages.—Plaintiff and his wife entered a street-car and presented to the conductor tickets entitling them to ride to their destination, informing the conductor where they wished to go. Between the beginning and end of the journey it was necessary to be transferred to another car, and they were transferred personally by the conductor of the first car, but were given no transfer tickets, nor did plaintiff know that they were necessary. The conductor of the second car called for a transfer ticket or payment of fare, and in default thereof ejected plaintiff and his wife, requiring them to get off in the mud a short distance from the street crossing, and in the presence of a number of people. *Held*, that the case was one authorizing exemplary damages. *City & S. R. Co.* v. *Brauss*, 18 *Am. & Eng. R. Cas.* 324, 70 *Ga.* 368.

If the company's servant, in expelling plaintiff, inflicted injuries in a spirit of oppressive malice, or acted in such a manner as to indicate a heedless disregard of consequences, plaintiff may recover exemplary damages. *Citizens' St. R. Co.* v. *Willoeby*, 58 *Am. & Eng. R. Cas.* 485, 134 *Ind.* 563, 33 *N. E. Rep.* 627

If a passenger is forcibly ejected from a car for non-payment of fare illegally demanded, the rule or measure of damages is a question of law; and if the expulsion was deliberate and forcible, the jury may give such exemplary damages as they may consider proper punishment for the conduct of the company's agent. *Baltimore & Y. Turnpike Road* v. *Boone*, 45 *Md.* 344.—FOLLOWED IN Philadelphia, W. & B. R. Co. *v.* Larkin, 47 Md. 155.

A carrier of passengers using due care in selecting its servants is liable for compensatory damages only, and not for exemplary damages, where its conductor wrongfully ejects a passenger from its cars, unless such wrongful act is authorized or ratified by the carrier. *Rouse* v. *Metropolitan St. R. Co.*, 41 *Mo. App.* 298.—REVIEWING Goddard *v.* Grand Trunk R. Co., 57 Me. 202.

A street-car passenger cannot recover exemplary damages for being unlawfully ejected from a car, where no intentional offense was committed, as where a passenger is transferred from one car to another, and is ejected by the conductor, who mistakenly but honestly supposes that no fare has been paid. *Hamilton* v. *Third Ave. R. Co.*, 53 *N. Y.* 25, 5 *Am. Ry. Rep.* 362; *reversing* 3 *J. & S.* 118, 44 *How. Pr.* 294, 13 *Abb. Pr. N. S.* 318.—APPLIED IN Homiston *v.* Long Island R. Co., 52 N. Y. S. R. 1. DISTINGUISHED IN Yorton *v.* Milwaukee, L. S. & W. R. Co., 6 Am. & Eng. R. Cas. 322, 54 Wis. 234, 41 Am. Rep. 23. FOLLOWED IN Townsend *v.* New York C. & H. R. R. Co., 56 N. Y. 295. QUOTED IN Quigley *v.* Central Pac. R. Co., 11 Nev. 350; Townsend *v.* New York C. & H. R. R. Co., 4 Hun (N. Y.) 217. REVIEWED IN Lake Erie & W. R. Co. *v.* Fix, 11 Am. & Eng. R. Cas. 109, 88 Ind. 381, 45 Am. Rep. 464; Paine *v.* Chicago, R. I. & P. R. Co., 45 Iowa 569; Mahoney *v.* Detroit St. R. Co., 93 Mich. 612; Parker *v.* Erie R. Co., 5 Hun 57; Parker *v.* Long Island R. Co., 13 Hun 319; Harding *v.* New York, L. E. & W. R. Co., 36 Hun 72; Jerome *v.* Smith, 48 Vt. 230.

532. —— of punitive damages.—To render a railroad liable for punitive damages for the wrongful ejectment of a passenger by the conductor of a street-car, it is incumbent upon the plaintiff to show that the act complained of was done with the authority, either express or implied, of defendant, or was subsequently adopted by the company. *Turner* v. *North Beach & M. R. Co.*, 34 *Cal.* 594.—REVIEWED IN Palmer *v.* Charlotte, C. & A. R. Co., 3 So. Car. 580.

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I. ESTABLISHMENT OF STREETS AND HIGHWAYS.

1. *Dedication.**

1. The power to dedicate.—A company which has received a land grant from the general government has the power to lay off and dedicate streets intersecting its right of way. Crossings may be made without crippling the railroad or impairing its usefulness. *Northern Pac. R. Co.* v. *Spokane*, 56 *Fed. Rep.* 915.

A railroad corporation may dedicate to public use a highway across lands owned by it and used for its railroad tracks. *State* (*Central R. Co., Pros.*) v. *Bayonne*, 43 *Am. & Eng. R. Cas.* 176, 52 *N. J. L.* 503, 20 *Atl. Rep.* 69.

Conveyances by a railroad corporation of lands bounding on a street laid out across its track will effect a dedication of the street to public use, and the fact that such conveyances were made while the railroad was in the hands of a receiver, the corporation joining in the grant under a relaxation of the injunction in the receivership proceedings, will not prevent a dedication being inferred. *State* (*Central R. Co., Pros.*) v. *Bayonne*, 43 *Am. & Eng. R. Cas.* 176, 52 *N. J. L.* 503, 20 *Atl. Rep.* 69.—REVIEWING State (New York & L. B. R. Co., Pros.) *v.* Drummond, 45 N. J. L. 511. Meredith *v.* Sayre, 32 N. J. Eq. 557.

Under N. J. laws relating to Jersey City, the board of street and water commissioners has power to dedicate, by resolution, lands belonging to the city to street purposes, but such board has no power to order the removal of railroad abutments which may be in the line of said street. *State* (*Mayor, etc., of Jersey City, Pros.*) v. *National Docks R. Co.*, (*N. J.*) 26 *Atl. Rep.* 145.

2. Validity—Common-law dedication.—The use of a street for a railroad is a public use, and is not necessarily destructive of the character of the public way; and

* Dedication of land for highway, see note, 36 AM. & ENG. R. CAS. 5.

Railroad dedicating street across its right of way. Power to dedicate, see 56 AM. & ENG. R. CAS. 617, *abstr.*

a condition annexed to a dedication that a railroad company should have the right to lay a track or tracks in the street dedicated is not void. *Noblesville* v. *Lake Erie & W. R. Co.*, 130 *Ind.* 1, 29 *N. E. Rep.* 484.

A common-law dedication of land cannot be made to a railroad company for public use for railroad purposes. *Watson* v. *Chicago, M. & St. P. R. Co.*, 46 *Am. & Eng. R. Cas.* 543, 46 *Minn.* 321, 48 *N. W. Rep.* 1129. — FOLLOWED IN Minneapolis Mill Co. *v.* Minneapolis & St. L. R. Co., 46 Minn. 330.— *Minneapolis Mill Co.* v. *Minneapolis & St. L. R. Co.*, 46 *Minn.* 330, 48 *N. W. Rep.* 1132.

A dedication of land for public use as a highway may be made subject to a right to devote a part thereof to use for railroad purposes, and when such portion has been thus devoted, the use as a way will be suspended, and remain suspended so long as that part is used for railroad purposes. *Ayers* v. *Pennsylvania R. Co.*, 46 *Am. & Eng. R. Cas.* 549, 52 *N. J. L.* 405, 20 *Atl. Rep.* 54.

Conveyance of land abutting on a highway dedicated to the public use subject to a right to devote a part thereof to use for railroad purposes, prior to the designation of a part for railroad purposes, will pass the grantor's title to the centre of the street subject to the public easement and the reserved right to devote to use for railroad purposes. *Ayers* v. *Pennsylvania R. Co.*, 46 *Am. & Eng. R. Cas.* 549, 52 *N. J. L.* 405, 20 *Atl. Rep.* 54.

The fact that the company, which accepted from the owner a grant of a part of such land and devoted it to railroad use, after acts from which such a dedication of the whole would be inferred, had filed a survey of its route over the same land prior to the dedication, and that its charter prescribed that it should become seized in fee of lands taken by condemnation, did not deprive the owner of the power, or indicate his intent not to dedicate thus, for the company could take less than a fee by purchase, and the perpetual and paramount right to use for railroad purposes thus acquired is not inconsistent with such dedication. *Ayers* v. *Pennsylvania R. Co.*, 46 *Am. & Eng. R. Cas.* 549, 52 *N. J. L.* 405, 20 *Atl. Rep.* 54.

3. What does not amount to a dedication. — It is well settled that a railroad company may dedicate streets which it owns in fee, or over which it owns a right of way, in conjunction with the owner of the fee, to the public as a highway; but the intention to do so should be manifest. *Williams* v. *New York & N. H. R. Co.*, 39 *Conn.* 509, 4 *Am. Ry. Rep.* 264.

To constitute a dedication of land for a public highway there must be an intent to dedicate and an acceptance by the public. A company purchased a strip of land adjoining its station, connected at either end with a public street, and which was used by the public in passing from one street to the other, or in passing to and from the station. Complainant purchased land adjoining the strip, which he improved for business purposes, and in conjunction with the company laid a sidewalk in front. After several years the company undertook to remove the sidewalk to make more room for its station, when complainant applied for an injunction. *Held:* (1) that the company was not estopped from denying that the land was dedicated for a highway; (2) that if it had actually become a highway by dedication, the petitioner would have an adequate remedy at law; (3) that there was not sufficient evidence of dedication nor of acceptance. *Williams* v. *New York & N. H. R. Co.*, 39 *Conn.* 509, 4 *Am. Ry. Rep.* 264.

Where a company owns a right of way along the border of a farm, the owners of the farm cannot dedicate the strip used for a right of way for highway purposes, so as to affect the rights of the company. *Detroit* v. *Detroit & M. R. Co.*, 23 *Mich.* 173.

On a town plat was left, undivided into lots, a strip of land, on which were the words: "Reserved for right of way, Line of S. M. R. R." *Held*, that this was not, under Minn. Gen. St. 1878, ch. 29, § 5, a donation of the land to the company. *Watson* v. *Chicago, M. & St. P. R. Co.*, 46 *Am. & Eng. R. Cas.* 543, 46 *Minn.* 321, 48 *N. W. Rep.* 1129. — FOLLOWING Hennepin County Com'rs *v.* Dayton, 17 Minn. 237.

A company that enters into an agreement with the owner of lands adjoining a street, and, in that agreement, merely refers to such street as a landmark, does not thereby dedicate such street to the public; nor is the fact that such street is designated as an existing highway on a map of lands condemned by the company any evidence of dedication. *Meredith* v. *Sayre*, 32 *N. J. Eq.* 557.—REVIEWED IN State (Central R. Co., Pros.) *v.* Bayonne, 43 Am. & Eng. R. Cas. 176, 52 N. J. L. 503.

An exchange between an owner and such corporation, and their deeds, conveyed land on such street. *Held*, that, while such recog-

nition of the street was tantamount to a dedication, it would not prevent either of them from seeking to vacate it by lawful means. *Meredith* v. *Sayre*, 32 *N. J. Eq.* 557.

Adjoining landowners covenanted that they would leave a street between their lands thirty feet wide, which should be "forever kept open as a highway in common for the use of the persons who may be the owners of the lots or land bounded on either side." This new street did not terminate at any street or alley. *Held*, that this was not a dedication to the public, so as to give the municipal authorities the right to control it, or to authorize the laying of a railroad track thereon. *Talbott* v. *Richmond & D. R. Co.*, 31 *Gratt.* (*Va.*) 685.

4. Necessity of acceptance.—An intention by the landowner to dedicate land for a public highway is not sufficient. There must be an acceptance by the public; and the acceptance of a deed from one who holds the land in trust is not a sufficient acceptance by the public. *New York, N. H. & H. R. Co.* v. *New Haven*, 46 *Conn.* 257.

An acceptance by the public will not be presumed where it does not appear that the way is one of common convenience and necessity, and therefore beneficial to the public. *New York, N. H. & H. R. Co.* v. *New Haven*, 46 *Conn.* 257.

Where a railroad company obtains title in fee to certain land, and the city, which claims that the land had previously been dedicated for a street, acquiesces in the claim of the company for nearly forty years, if the land ever was dedicated it will be deemed abandoned, and the city can only take it for a highway by condemning it, as in any other case. *New York, N. H. & H. R. Co.* v. *New Haven*, 46 *Conn.* 257.

5. Sufficiency of acceptance.—To show the establishment of a public street or highway through a common-law dedication, it is not necessary that any formal act of acceptance by the public authorities be shown. Acceptance may be shown by user by the public, and by an actual assumption of care and control over the street by the public authorities, as by working upon or grading it. *Brakken* v. *Minneapolis & St. L. R. Co.*, 7 *Am. & Eng. R. Cas.* 593, 29 *Minn.* 41, 11 *N. W. Rep.* 124. *Albert* v. *Gulf, C. & S. F. R. Co.*, 2 *Tex. Civ. App.* 664, 21 *S. W. Rep.* 779.

Where a dedicated street is opened obliquely over a railroad, the court will not interfere with the discretion of the common council in accepting the same and ordering work to be done thereon, where it is acting within its charter, and it does not appear that the crossing is unnecessary, or a dangerous obstruction to the company's right of travel. *State* (*Central R. Co., Pros.*) v. *Elizabeth*, 35 *N. J. L.* 359; *affirmed in* 37 *N. J. L.* 432.

When an ordinance is passed to open a street which has been laid out and marked on the map and grade of the commissioners of Bayonne across prosecutor's track, and the commissioners appointed to assess the value of the land taken and damages make no award to the railroad corporation, and indicate that no award is made because of a dedication of the lands to public use, and the report is confirmed, the whole proceeding amounts to an acceptance by the municipal corporation of the dedication, if any has been made. *State* (*Central R. Co., Pros.*) v. *Bayonne*, 43 *Am. & Eng. R. Cas.* 176, 52 *N. J. L.* 503, 20 *Atl. Rep.* 69.

6. Proof of dedication, generally.—Testimony by the directors of a railroad corporation which had constructed a road upon its land that it was the intention of the corporation, at the time of its construction, to make it a public road, and that the land was purchased for that purpose, is admissible in an action to have it declared a public highway. It is not necessary that a formal resolution of the intention of the corporation should have been entered upon its minutes. *People* v. *Eel River & E. R. Co.*, 98 *Cal.* 665, 33 *Pac. Rep.* 728.

In an action against a township trustee, for trespass in entering plaintiff's close and cutting down fence posts thereon, a dedication of the *locus in quo* to public use was proved by evidence showing that a railroad company, to secure a lower grade for its road across a street forming the northern boundary of a city, was to furnish a strip of plaintiff's ground for a street crossing further north, at surface grade, and entered into negotiations with plaintiff, and agreed, not in writing, upon a price; that the company took possession of the old street crossing, and its engineer, assisted by plaintiff, surveyed the line of the new road; that a new bridge was necessitated by the change of highway, and was constructed; and that plaintiff resided in immediate proximity to the premises occupied, and had knowledge of the use of his land for the highway as

changed from the time it commenced, although plaintiff never received payment for his land from the company or the county. *Campbell* v. *O'Brien*, 10 *Am. & Eng. R. Cas.* 266, 75 *Ind.* 222.

No particular form or ceremony is necessary in the dedication of land to public use; all that is required is the assent of the owner and the fact of its being used for public purposes as intended by the appropriation. But when the dedication is not expressed, and is to be inferred from the acts and conduct of the owner, and the use by the public, these ought to be such as to exclude any other hypothesis but that of dedication. In all such cases the consent of the owner must clearly appear. *New Orleans & C. R. Co.* v. *Carrollton*, 3 *La. Ann.* 282.

Where the dedication of a street is sought to be established either by the recording of a plan, or by the actual use of the street by the public, or by such an acceptance by the public as would be binding upon the owner by estoppel, the evidence must be clear. *Verona* v. *Allegheny Valley R. Co.*, 152 *Pa. St.* 368, 25 *Atl. Rep.* 518.

7. —— by maps and plans.—A land-grant railroad platted certain of its land with regularly laid out streets, which were declared to be dedicated to the public, reserving a strip running through the land for the tracks of the railroad. *Held*, that this reservation did not extend to the points where streets intersected and crossed it, so as to allow the company to erect a depot on such crossing, and thereby close the crossing. *Northern Pac. R. Co.* v. *Spokane*, 56 *Fed. Rep.* 915.

And so long as the company had other facilities for conveniently handling its business, it would not be allowed to maintain a depot on such crossing merely because the location would give it some advantages over other competing roads. *Northern Pac. R. Co.* v. *Spokane*, 56 *Fed. Rep.* 915.

Where a defective town plat is given in evidence to show a common-law dedication of a street, oral declarations of the parties who signed it as to what they intended to offer by it to the public are inadmissible. What was intended by it must be determined from the plat alone. *Waysata* v. *Great Northern R. Co.*, 46 *Minn.* 505, 49 *N. W. Rep.* 205.

Platting a narrow undivided strip on the water side of a street laid out upon lands under water, with other streets running to it on the land side, but not across it, excludes any inference of intention to dedicate lands outside of such street, and effectually limits the public easement. *Duluth* v. *St. Paul & D. R. Co.*, 49 *Minn.* 201, 51 *N. W. Rep.* 1163. —FOLLOWING Gilbert *v.* Eldridge, 47 Minn. 210; Hanford *v.* St. Paul & D. R. Co., 43 Minn. 104.

Where an inspection of a plat shows the whole of a triangular space to have been dedicated to the public as a highway, the original owner cannot maintain an action of trespass against a railroad company for constructing a railroad thereon, on the alleged ground that he is still the owner. *Sanborn* v. *Chicago & N. W. R. Co.*, 16 *Wis.* 19.

Where landowners by their plat reserve certain lands to themselves, they may, by a subsequent and independent act *in pais*, dedicate the reserved lands to the public; but a recorded plat cannot be enlarged by a subsequent parol construction, either by the landowners or the public, so as to include the reserved lands. *Diedrich* v. *Northwestern Union R. Co.*, 42 *Wis.* 248, 15 *Am. Ry. Rep.* 9.

In 1871 the owner of land had a plan made and registered, laying out the land into lots and streets. Most of the land, including that part marked as O. street, was fenced in and used for pasturage, and so continued until 1881, when a portion thereof including O. street, no lots fronting thereon having been disposed of, was sold to defendant company, which treated the land as private property, using it as a shunting yard. *Held*, that O. street was not a highway within the meaning of the railway act. *Shoebrink* v. *Canada Atl. R. Co.*, 37 *Am. & Eng. R. Cas.* 462, 16 *Ont.* 515.—DISTINGUISHING Williams *v.* Great Western R. Co., L. R. 9 Ex. 157. QUOTING Daniel *v.* Metropolitan R. Co., L. R. 3 C. P. 216.

8. —— by acts in pais.—Evidence that for thirty years the public used a crossing, and that up to a short time before the commencement of a suit the railway company had recognized their right to do so, and in the construction of buildings on its right of way had left an opening the width of the street; had constructed approaches from both sides; had constructed and maintained a plank crossing for the convenience of the public; had erected and maintained at the place a sign reading "Railroad crossing,

look out for the cars," and for a portion of the time had kept a flagman's station there, is sufficient to show a parol dedication of the highway to the public. *Illinois C. R. Co.* v. *People*, 49 *Ill. App.* 538.

A company laid its track over a traveled street or road which had not theretofore been legally laid out as such, and the public thereafter continued to use the crossing as a highway for many years, without interference by the company, which, on the contrary, kept the same in proper repair for public use, and planked the same, and built cattle-guards on each side thereof. *Held*, sufficient evidence of a dedication thereof for public use as a highway. *St. Paul, M. & M. R. Co.* v. *Minneapolis*, 44 *Minn.* 149, 46 *N. W. Rep.* 324.

9. —— when a question for the jury. — The question whether a company has dedicated a highway for public use across its railroad is one of fact for the jury. *Skjeggerud* v. *Minneapolis & St. L. R. Co.*, 38 *Minn.* 56, 35 *N. W. Rep.* 572.

10. Proof of acceptance.—The mere laying out of lots, and making a map showing streets, do not, of themselves, deprive the owner of the right to use the property as his own. There must be an acceptance of the dedication, of which the sale and purchase of lots are sufficient proof. In determining the respective rights of a city and those of a railroad to which a right of way was granted after the filing of a map and its acknowledgment, as provided in Ala. Act of Feb. 28, 1887, the court holds that the interest which passed by virtue of the statute is superior to any that could subsequently be conveyed, without regard to the terms and covenants of any such subsequent grant and conveyance. *Birmingham Mineral R. Co.* v. *Bessemer*, 98 *Ala.* 274, 13 *So. Rep.* 487.

Persons holding title to lands through which a railroad company had acquired a right of way laid off the same into town lots by a plat which was recorded, leaving strips on each side of the right of way. There was an acquiescence in this plat for ten years, during which the original proprietor paid no taxes on such vacant grounds. *Held*, notwithstanding defects in the plat, that the long acquiescence clearly indicated an intention to adopt the plat and to make the dedication of the vacant strip to the use of the public; and where the railroad used the ground for sixteen years, and the public also enjoyed its use for wood, lumber, pens for grain, and as a pass-way, these facts abundantly proved the acceptance of the dedication. *Smith* v. *Flora*, 64 *Ill.* 93.

11. Presumption of dedication from public user, acquiescence, etc. —A railroad purchased a strip of land extending from its station to the county road, over which it constructed a road which was used by the public as a highway without interruption for four years, when the company erected a gate near one end of it to prevent driving on its wharf at night. The gate was left open during the day but closed at night. Three years later the company built a warehouse directly across the road near its station, and placed a permanent gate at the extremity near the county road, which it kept securely locked. In an action to have the obstructions removed and the road declared a public highway—*held*, that the company had dedicated the strip to public use at the time the road was opened, and that the public had accepted the dedication by user, and had used the highway continuously from the time it was opened until the final obstructions were erected. *People* v. *Eel River & E. R. Co.*, 98 *Cal.* 665, 33 *Pac. Rep.* 728.

The use of a road as a highway by the public for more than ten years, with the knowledge, consent, and permission of the owner, amounts to a dedication of it to that use, and a railroad company may lay its track over and along such highway. *Gear* v. *Chicago, C. & D. R. Co.*, 39 *Iowa* 23.—FOLLOWING Milburn *v.* Cedar Rapids, 12 Iowa 246.

A highway which is opened and used with the assent or acquiescence of the owner will be presumed to have been intentionally dedicated by him to the use of the public. The facts will justify the presumption that he is aware of its use. But the user of wild and uninclosed timber or prairie land as a highway will not raise such a presumption. *So held*, in an action against a railway for obstructing a highway. *State* v. *Kansas City, St. J. & C. B. R. Co.*, 45 *Iowa* 139.

A road within the meaning of Tex. Rev. St., art. 4232, is one dedicated to the public use, or commonly used and traveled on by the public, and the character of the road may be established as public by evidence of long-continued use as such. *Markham*

v. *Houston & T. C. R. Co.*, 1 *Tex. App. (Civ. Cas.)* 35.

12. Effect of dedication on rights of donor.—Dedication of land for streets works an estoppel *in pais*, and precludes the original owner from revoking it. *Cincinnati* v. *White*, 6 *Pet. (U. S.)* 431.—DISTINGUISHED IN Green *v.* Tacoma, 51 Fed. Rep. 622; Terre Haute & S. R. Co. *v.* Rodel, 10 Am. & Eng. R. Cas. 284, 89 Ind. 128, 46 Am. Rep. 164.

When the owner of land lays it off into lots or blocks, setting apart certain portions as streets, with a view of establishing a town, a subsequent sale and conveyance of lots abutting on the street, as shown by a map which is referred to, is a complete and irrevocable dedication of it to the use of the purchasers and the public, and the grantor cannot afterwards impose on the land an additional, inconsistent servitude; but if lots are sold with reference to a map on which are marked lines showing a reservation of a part of the street for railroad purposes, the purchaser buys subject to this reservation, and his title as owner of the ultimate fee to the centre of the street is subordinate to the reserved right. *Evans* v. *Savannah & W. R. Co.*, 90 *Ala.* 54, 7 *So. Rep.* 758.

By the making and recording of a town plat, under the statutes of Indiana, the designation of streets, lanes, and alleys on the plat gives to the public only an easement therein for such use as the public have a right to make of them; but the fee simple remains in the proprietor. *Cox* v. *Louisville, N. A & C. R. Co.*, 48 *Ind.* 178.—CRITICISING Perley *v.* Chandler, 6 Mass. 454; New Albany & S. R. Co. *v.* O'Daily, 13 Ind. 353. QUOTING Protzman *v.* Indianapolis & C. R. Co., 9 Ind. 467; Haynes *v.* Thomas, 7 Ind. 38. REVIEWING Tate *v.* Ohio & M. R. Co., 7 Ind. 479.

Where a corporation owning land adjoining a city lays out and plats its land as an addition to the city, and dedicates the streets for public use, with the condition that it reserves to itself, its successors, or assigns, the right to use and occupy the streets for the purpose of operating a railroad, such reservation does not relieve the corporation from constructing, operating, and maintaining its line of railroad in a legal and proper manner. *Ottawa, O. C. & C. G. R. Co.* v. *Larson*, 36 *Am. & Eng. R. Cas.* 163, 40 *Kan.* 301, 2 *L. R. A.* 59, 19 *Pac. Rep.* 661.—FOLLOWED IN Ottawa, O. C. & C. G. R. Co. *v.* Peterson, 40 Kan. 310.

Where a proprietor of lands dedicates to public use two streets, reserving a strip of land between them, the use made by him of the land so reserved at the time of the dedication will not deprive him or his assigns of the right of applying it afterwards to other uses. *French* v. *New Orleans & C. R. Co.*, 2 *La. Ann.* 80.—QUOTED IN Tilton *v.* New Orleans City R. Co., 35 La. Ann. 1062.

Where the language of a deed is sufficient to create an easement of a right of way over the premises conveyed as an appurtenant to the grantor's premises lying adjacent thereto, and words are added indicating a purpose to dedicate the way as a public street—*held*, that the creation of a public right to be enjoyed *in futuro* whenever the public authorities might see fit to accept the dedication was not inconsistent with the private easement which enured to the grantor immediately from the grant, and that the latter was entitled to the use of the way although the public had not accepted the dedication. *Booraem* v. *North Hudson County R. Co.*, 40 *N. J. Eq.* 557, 5 *Atl. Rep.* 106; *affirming* 39 *N. J. Eq.* 465.—FOLLOWED IN Dodge *v.* Pennsylvania R. Co., 43 N. J. Eq. 351.

13. —— or those claiming under him.—Where a proprietor of unimproved land, within the limits of an incorporated city, lays out and dedicates a portion of it as a street, then lays off lots on such street, and, with a view of enhancing their value, sells them with the express stipulation that the street on which they so abut "shall be kept open to its full dimensions for all time," if the city government accepts the street, it takes it encumbered with a trust in favor of the purchasers of said lots and their successors in title; and equity will enforce that trust. *Savannah, A. & G. R. Co.* v. *Shiels*, 33 *Ga.* 601.

When one who has made a dedication of land for a street subject to a right to designate a portion thereof for railroad purposes has conveyed a central strip of thirty-three feet to a company for railroad purposes, a conveyance afterwards made of land along such a highway will pass all the title the grantor has under the street to its centre; the circumstance that the grantor does not own all the land to the centre will not restrict the conveyance to the line of the

street. *Ayres* v. *Pennsylvania R. Co.*, 48 *N. J. L.* 44, 3 *Atl. Rep.* 885, 57 *Am. Rep.* 538.

14. Effect on rights of third persons or the public. — The dedication of a street to the public does not authorize it to be used for an ordinary railroad track; and the municipal representatives cannot authorize it to be so used without compensation to adjacent owners. *Grand Rapids & I. R. Co.* v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich* 393, 11 *N. W. Rep.* 212; *former appeal in* 38 *Mich.* 62.

Where, upon a town plat, a street is laid down and the only boundary for part of the street on one side is a navigable lake or river, the street extends to low-water mark, and the dedication will be held to have been intended to enable the public to get to the water for the better enjoyment of the public right of navigation. *Waysata* v. *Great Northern R. Co.*, 50 *Minn.* 438, 52 *N. W. Rep.* 913.

A dedication of land for public use as a highway may be made subject to a right to designate a portion thereof for use for railroad purposes; and when such portion has been designated and devoted to railroad purposes, the public use will be suspended and remain suspended so long as that portion is devoted to such purposes. *Ayres* v. *Pennsylvania R. Co.*, 48 *N. J. L.* 44, 3 *Atl. Rep.* 885, 57 *Am. Rep.* 538.

The fact that a statute authorizes the county authorities "to lay out and establish, change, and discontinue public roads and highways" does not negative the existence of public roads otherwise established, and relieve the railroad from the duty of running its trains across a public road by dedication, so as to avoid injury to the public. *Missouri Pac. R. Co.* v. *Lee*, 35 *Am. & Eng. R. Cas.* 364, 70 *Tex.* 496, 7 *S. W. Rep.* 857.

2. *Taking Land for Streets and Laying Out Roads.*

15. California. — An answer in proceedings by a city to condemn a right of way for the opening of a street, setting forth that the action is instituted upon the motion and at the request and for the benefit of a railroad company, goes to the public character of the use and the necessity for its establishment, and may properly be stricken out as insufficient. *Santa Ana* v. *Harlin*, 99 *Cal.* 538, 34 *Pac. Rep.* 224.

The action of a city council in ordering the opening of a street, after the steps provided by statute have been taken, and the resolution and ordinance ordering the work have been regularly adopted, is final and conclusive of the necessity of the improvement, and the courts may not adjudicate the question of such necessity in an action or proceeding for condemnation of lands necessary to the improvement. *Santa Ana* v. *Harlin*, 99 *Cal.* 538, 34 *Pac. Rep.* 224.

16. Connecticut.—The selectmen of a town laid out a highway nearly parallel with a railroad track, leaving between the highway and the track, through the entire length of the former, a narrow strip which for more than twenty years had been used as a highway, but which was then on the company's right of way, and in part owned by it in fee simple, and on which stood the company's depot, but which was too narrow to meet the demands of public travel. Petitioner sought to have the proceedings set aside on the ground that the open space had been used so long as to make it a public highway, and that the selectmen had no authority to make a mere enlargement thereof. *Held*, that the power given to the selectmen to lay out such highways "as they shall judge necessary" gave them power to locate the road in question, and the report of the selectmen should not be set aside. *Sackett* v. *Greenwich*, 38 *Conn.* 525.

A town has authority, under Conn. Gen. St. § 3490, and also under the general statutes relating to highways, to take land for an alteration of a highway required by the railroad commissioners under section 3489. *Westbrook's Appeal*, 37 *Am. & Eng. R. Cas.* 446, 57 *Conn.* 95, 16 *Atl. Rep.* 724.

17. Georgia.—A municipal corporation cannot appropriate, for the opening of a street, land which has been purchased by the state for the erection of car shops and other buildings appertaining to a railroad owned by it. *Mayor, etc., of Atlanta* v. *Central R. & B. Co.*, 53 *Ga.* 120.

18. Illinois.—(1) *In general.*—The fact that property sought to be taken for a public street, by a town authorized to do so, belongs to a corporation, which acquired its title by the exercise of the right of eminent domain, does not affect the right to take it. There can be no distinction in the exercise of this right between the property of individuals and of chartered corporations, nor between the rights to land acquired by a

corporation and title held by the citizen under letters patent from the government. *Chicago, R. I. & P. R. Co.* v. *Lake*, 71 *Ill.* 333.—QUOTING Richmond, F. & P. R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71; West River Bridge Co. *v.* Dix, 6 How. 529.—QUOTED AND FOLLOWED IN Illinois C. R. Co. *v.* Chicago, 141 Ill. 586.

A city, by the condemnation of a railroad right of way for a street, acquires only an easement. By clause 89 of section 1, art. 9, of the statute relating to cities and villages, no power is granted to the city to acquire the exclusive control or the exclusive right of occupancy of that part of the company's tracks and right of way across the street which is sought to be opened or extended. In such case, neither will have the right of occupancy to the exclusion of the other, but each subordinate to the right of the other for the separate use contemplated. *Illinois C. R. Co.* v. *Chicago*, 138 *Ill.* 453, 28 *N. E. Rep.* 740.

The taking and appropriating of property for a public street by a city or village is in its nature for a public use, and cannot be questioned or denied unless the power or discretion is manifestly abused to the oppression of the citizen; and when the use is public the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain. That right is political in its nature, not judicial. *Illinois C. R. Co.* v. *Chicago*, 51 *Am. & Eng. R. Cas.* 528, 141 *Ill.* 586, 30 *N. E. Rep.* 1044.—QUOTING Curry *v.* Mt. Sterling, 15 Ill. 320; Brush *v.* Carbondale, 78 Ill. 371; Sheridan *v.* Colvin, 78 Ill. 237. QUOTING AND FOLLOWING Chicago, R. I. & P. R. Co. *v.* Lake, 71 Ill. 333.

Where a railroad company has acquired a perpetual easement in a street where its track is laid, this is property, and cannot be taken or damaged for public use without compensation. *Chicago & N. W. R. Co.* v. *Jefferson*, 14 *Ill. App.* 615.

(2) *Condemnation — Election of remedies.* —The condemnation, for a public street, of land which is held by a company as a right of way, should be subject to its joint use by the railroad in the exercise of its franchise and by the public as a street. These rights to its use and occupancy coexist in the city condemning and the railway company. *Illinois C. R. Co.* v. *Chicago*, 138 *Ill.* 453, 28 *N. E. Rep.* 740.—FOLLOWED IN Chicago & N. W. R. Co. *v.* Chicago, 140 Ill. 309. QUOTED IN Illinois C. R. Co. *v.* Chicago, 141 Ill. 586.

The court in which a condemnation proceeding is brought by a village or city, for the purpose of extending a street, has ample power and authority to determine the sufficiency of the ordinance and the petition to authorize the condemnation. If the city or village is exceeding its powers by attempting to appropriate railroad property to its exclusive use, the court, upon motion, may dismiss the petition. *Illinois C. R. Co.* v. *Chicago*, 138 *Ill.* 453, 28 *N. E. Rep.* 740.

A bill in chancery by a railway company to restrain a village or city from proceeding to condemn the right of way of the former for a public street, which fails to show that the city is seeking to take possession of the land sought for the street, and does not seek to enjoin the city from any act or acts having for their object the taking of possession of the right of way without making compensation, or of interfering with the company in its enjoyment prior to the ascertainment and payment thereof, is bad on demurrer. So where all the matters complained of, if available at all, are of such a character as may be interposed in the condemnation proceeding, the bill may be properly dismissed for want of jurisdiction. *Illinois C. R. Co.* v. *Chicago*, 138 *Ill.* 453, 28 *N. E. Rep.* 740.

If cities and villages may elect between the condemnation proceedings prescribed by the act relating to eminent domain and the act relating to cities and villages, their election of one excludes all the provisions of the other, and they will not be obliged to proceed partly under both. *Chicago & N. W. R. Co.* v. *Chicago*, 148 *Ill.* 141, 35 *N. E. Rep.* 881.

Where a city council has passed an ordinance providing for an improvement, and it appears that private property must be taken or damaged in order to make the improvement, the right to file a petition for condemnation arises without the performance of any other conditions. *Chicago & N. W. R. Co.* v. *Chicago*, 148 *Ill.* 141, 35 *N. E. Rep.* 881.

Ill. Eminent Domain Act, § 2, which requires a petition to condemn to state that the compensation for the land taken or damaged cannot be agreed upon by the parties interested, does not apply to a case where a city files its petition to condemn under the Cities and Villages Act, art. 9. That article and section 2 of the former act are not to be construed as *in pari materia*.

Chicago & N. W. R. Co. v. *Chicago*, 148 *Ill.* 141, 35 *N. E. Rep.* 881.

Where two judgments are entered against a railway company in condemnation proceedings by a city, and an appeal is taken in one case, and a stipulation is filed that the other judgment shall be affirmed or set aside accordingly as the former case may be decided, if the judgment is affirmed in the case appealed, the judgment in the other case will be treated as affirmed, and an appeal therein will involve only the proceedings subsequent to the entry of the original judgment. *Chicago & N. W. R. Co.* v. *Chicago*, 148 *Ill.* 141, 35 *N. E. Rep.* 881.

Where a city, after judgment of condemnation of land of a railroad for a street, dismisses the petition, and seeks by a new proceeding to condemn the very same land, so as to avoid payment of the sum awarded, the remedy of the company is not by a bill in equity to enjoin the second proceeding, as the law furnishes a complete and adequate remedy by motion to dismiss the same. *Chicago, R. I. & P. R. Co.* v. *Chicago*, 148 *Ill.* 479, 36 *N. E. Rep.* 72.—REFERRING TO Chicago, R. I. & P. R. Co. *v.* Chicago, 143 Ill. 641.

In such case, the city may have the order of dismissal set aside, pay the compensation awarded in the former proceeding, take possession of the land condemned, and open the street over the same. The company, by having the second proceeding dismissed, will be estopped from objecting to the setting aside of the order dismissing the first proceeding. *Chicago, R. I. & P. R. Co.* v. *Chicago*, 148 *Ill.* 479, 36 *N. E. Rep.* 72.

An allegation of inability to agree upon the compensation, or that the owner of the property sought to be taken is incapable of consenting, or that his name or residence is unknown, or that he is a non-resident, is necessary, or even jurisdictional, in case of petition filed under the provisions of the Eminent Domain Law. But where the petition is filed under article 9 of the City and Village Act, to condemn land for a street, no such allegation is required. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88.—FOLLOWING Reed *v.* Ohio & M. R. Co., 126 Ill. 48; Lieberman *v.* Chicago & S. S. R. T. R. Co., 141 Ill. 140; Chicago, B. & Q. R. Co. *v.* Chamberlain, 84 Ill. 333; Bowman *v.* Venice & C. R. Co., 102 Ill. 459.

The statute in relation to eminent domain provides a general mode of condemnation, applicable to all cases for the exercise of the right to take or damage private property for public uses by any corporate or municipal authority, public body, officer, agent, person, commission, or corporation. In all condemnation proceedings instituted under that statute its provisions must be held to apply. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88.

But the legislature, in the exercise of its undoubted power, has seen fit, by article 9 of the City and Village Act, to provide for an independent and somewhat different mode of proceeding in cases of the taking or damaging of private property by cities and villages for local improvements. And the intention to provide such different mode of procedure by cities and villages would be defeated, if, by construction, the two statutes should be practically amalgamated, so as to make all the provisions of the one apply to and become a part of the other. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88.

Unquestionably many of the rules prescribed in the Eminent Domain Act apply to condemnation under article 9 of the City and Village Act. But the provisions of section 2 of the former act have no application to a proceeding under the latter act. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88.

In a proceeding by a city to condemn the right of way of a railway company for the extension of a street intersecting another street in which the company has its right of way, evidence of the expense the company will be put to in the construction of the crossing and its approaches, and of the cost of erecting gates, and the house and machinery for operating them, and also the expense of a gate-keeper, and of keeping gates, machinery, and crossing in repair, is properly excluded. All such expenditures are matters for which the company is not entitled to any compensation. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88.

(3) *Compensation.*—So far as the taking of a strip for street purposes is concerned, the measure of compensation will be the amount of decrease in value of the use for railroad purposes which will be caused by the use for the purposes of a

street, such use for the purposes of a street being subject to the use of the company for railroad purposes. *Chicago & N. W. R. Co.* v. *Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.

Where a judgment fixing the compensation, in a proceeding by a city under article 9 of the act relating to cities and villages, has been rendered without appeal, or has been affirmed on appeal, it cannot be said that the trial court has nothing to do but to execute such judgment. The judgment being conditional, the trial court can do nothing until the condition is performed, which is the payment of the compensation or damages awarded. On payment, the judgment will ripen into a legal condemnation. A reasonable time will be allowed for the performance of the condition. *Chicago & N. W. R. Co.* v. *Chicago*, 148 *Ill.* 141, 35 *N. E. Rep.* 881.

The judgment of condemnation of land for the extension of a street, after being affirmed on appeal or writ of error, cannot be opened for the purpose of showing that a greater compensation should have been allowed than that which was adjudged to be just and sufficient. *Chicago & N. W. R. Co.* v. *Chicago*, 148 *Ill.* 141, 35 *N. E. Rep.* 881.

Where a street is extended across a railway track or right of way, the company is required to make suitable crossings and approaches, as a matter of police regulation, at its own expense; and the cost and expense of making safeguards against accidents and injury to persons passing over street crossings are not elements of damage or compensation. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88. —APPROVING Chicago & N. W. R. Co. *v.* Chicago, 140 Ill. 309.

Burdens imposed upon a railway company by the extension of a street across its right of way, which the law imposes upon it as a proper police regulation, do not constitute elements of damages in a proceeding to condemn a crossing. By such extension of a street across the right of way the railway company assumes new relations to the public, and becomes obligated to adopt and observe new measures for preserving the public safety. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88.

It is doubtful whether a municipal corporation has the power, by private agreement with a property owner, to fix the amount of compensation to be paid, especially when the compensation thus ascertained is to be raised by special assessments upon contiguous property, or the property deemed to be benefited. *Lake Shore & M. S. R. Co.* v. *Chicago*, 148 *Ill.* 509, 37 *N. E. Rep.* 88.

19. Indiana. — The line of an established railroad may be referred to as a monument in the description of the course of a proposed highway. *McDonald* v. *Payne*, 114 *Ind.* 359, 16 *N. E. Rep.* 795.

The presumption that the line mentioned in giving the course of a proposed highway is to be the centre thereof is overthrown if the description itself shows a contrary intent. So, if the line is described as running along the north line of a railroad, it will be assumed that the intention is that the whole width of the highway shall lie north of and adjoining the right of way, as the right of way of a railroad company cannot be appropriated for highway purposes without its consent. *McDonald* v. *Payne*, 114 *Ind.* 359, 16 *N. E. Rep.* 795.

A city has no power to condemn real estate belonging to a railroad company, in actual use for right of way and for depot purposes, and to appropriate the same to the use of the public as a street, as the statute authorizing cities to condemn and take lands for public use as a street neither in terms, nor by necessary implication, authorizes the taking of property already dedicated to the public use. *Valparaiso* v. *Chicago & G. T. R. Co.*, 42 *Am. & Eng. R. Cas.* 685, 123 *Ind.* 467, 24 *N. E. Rep.* 249.—APPROVED IN Seymour *v.* Jeffersonville, M. & I. R. Co., 126 Ind. 466.—*Seymour* v. *Jeffersonville, M. & I. R. Co.*, 47 *Am. & Eng. R. Cas.* 38, 126 *Ind.* 466, 26 *N. E. Rep.* 188. —APPROVING Valparaiso *v.* Chicago & G. T. R. Co., 123 Ind. 476.

Where the municipal authorities have instituted proceedings to appropriate a strip of ground occupied by a railroad track, which strip is part of a continuous railroad, an injunction proceeding will lie to prevent the appropriation. *Seymour* v. *Jeffersonville, M. & I. R. Co.*, 47 *Am. & Eng. R. Cas.* 38, 126 *Ind.* 466, 26 *N. E. Rep.* 188.

20. Iowa. — A corporation holding a lease, perpetual at its option, has a right to be heard in proceedings to establish a city street over the property. *Storm Lake* v. *Iowa Falls & S. C. R. Co.*, 20 *Am. & Eng. R. Cas.* 420, 62 *Iowa* 218, 17 *N. W. Rep.* 489.

A railroad company existing under the laws of Iowa is deemed a resident of every

county through which it operates its road, and is entitled to notice of the establishment of a highway across its right of way, under Iowa Code, § 936, providing that notice shall be served on each owner or occupier of land lying in a proposed highway, or abutting thereon, "who resides in the county." *Chicago, R. I. & P. R. Co.* v. *Ellithorpe*, 78 *Iowa* 415, 43 *N. W. Rep.* 277. —DISTINGUISHING State ex rel. *v.* Chicago, B. & Q. R. Co., 68 Iowa 135.

A failure to give notice of the establishment of a highway, as required by Iowa Code, § 936, renders the action in establishing the road void, as notice will not be presumed from the mere fact of establishing the highway. *So held*, where a company enjoined the construction across its track of a highway which had been located without notice to the company. *Chicago, R. I. & P. R. Co.* v. *Ellithorpe*, 78 *Iowa* 415, 43 *N. W. Rep.* 277.

Failure to give the notice, as required by the above statute, will render the proceedings void as against a railroad company upon whom notice should have been served. *Chicago, R. I. & P. R. Co.* v. *Ellithorpe*, 78 *Iowa* 415, 43 *N. W. Rep.* 277.

The statute authorizing the establishment of a highway upon notice by publication is not in conflict with the Constitution. *State* v. *Chicago, M. & St. P. R. Co.*, 80 *Iowa* 586, 46 *N. W. Rep.* 741.

A notice of the establishment of a highway which complies with the Code, § 936, is sufficient, when authenticated by the signature of the county auditor, without the affixing of his seal. *State* v. *Chicago, M. & St. P. R. Co.*, 80 *Iowa* 586, 46 *N. W. Rep.* 741.

21. Massachusetts. — Under Mass. Gen. St. ch. 63, § 59, the mayor and aldermen of cities or selectmen of towns have no authority to lay out a way across any portion of the land, not exceeding five rods in width, which has been taken by a railroad corporation for its railroad, unless permission has been granted by the county commissioners. *Com.* v. *Haverhill*, 7 *Allen* (*Mass.*) 523.

The South Cove corporation, incorporated by Mass. Act of 1833, ch. 17, was not authorized by its charter to establish public highways across its land, without the assent of the municipal authorities, by laying out streets not required for convenient access to the existing streets from the railroad stations authorized by that statute to be placed upon its land; and did not create a public street by merely marking it on a plan, and covenanting with owners of adjacent land to lay it out, over a place which was covered with tidewater until 1850. *Attorney-General* v. *Old Colony & N. R. Co.*, 12 *Allen* (*Mass.*) 404.

In 1850 a company was authorized to construct its road over certain flat lands in South Boston, which were then covered by water. Subsequently the city was authorized to lay out streets over the lands within a certain time, but some question was raised as to the validity of the laying out of a certain street; but in 1873 the company accepted a statute authorizing it to take a parcel of the flats for extending its terminal facilities. *Held*, that whether the street as originally laid out was valid or not, it was made so by the statute of 1873, and the company was not entitled to an injunction to restrain the city from constructing a street across its track. *New York & N. E. R. Co.* v. *Boston*, 127 *Mass.* 229.

22. Minnesota. — Under a general power to lay out and open streets in a city, the city council has no authority to lay out and open a street through depot grounds in such a manner as to destroy, or essentially impair, the value of the company's easement therein, theretofore acquired under and in pursuance of an express legislative grant for that purpose. *Milwaukee & St. P. R. Co.* v. *Faribault*, 23 *Minn.* 167, 17 *Am. Ry. Rep.* 40.—DISTINGUISHED IN St. Paul, M. & M. R. Co. *v.* Minneapolis, 24 Am. & Eng. R. Cas. 309, 35 Minn. 141. FOLLOWED IN St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359. QUOTED IN Baltimore & O. R. Co. *v.* Pittsburg, W. & K. R. Co., 10 Am. & Eng. R. Cas. 444, 17 W. Va. 812.

22a. Nebraska. — It is the true sense and meaning of the proviso to Neb. Comp. St. ch. 14, § 69, subd. 28, providing for five householders to assess the damages for land taken for extension of a street, that before the election of the five disinterested householders therein provided for, an ordinance should be passed, approved, and published, according to law, prescribing the manner of such election and the compensation of such householders as assessors; and it is not sufficient that such householders be appointed in gross by ordinance, without such method being prescribed. *Union Pac.*

R. Co. v. *Burlington & M. R. R. Co.*, 19 *Neb.* 386, 27 *N. W. Rep.* 238.—DISTINGUISHED IN State ex rel. *v.* Grand Island & W. C. R. Co., 31 Neb. 209.

23. New Hampshire. — A contract binding a corporation having a railroad in operation to construct a side track at a point on its railroad near the terminus of a proposed highway, within a reasonable time after the highway shall be constructed, is competent to be received and considered by the commissioners, in a hearing upon the laying out of the proposed highway, as evidence tending to show the probability that, if the proposed road be laid and built, persons drawing lumber over it will be furnished with railroad facilities at that point. *Hayward* v. *Bath*, 40 *N. H.* 100.

24. New Jersey.—A municipal corporation, under an authority to condemn lands for public streets, has no power to lay a street longitudinally over grounds acquired by a railroad company, under its charter, on which is laid a track in use for the deposit and unloading of freight cars. *New Jersey Southern R. Co.* v. *Long Branch Com'rs*, 39 *N. J. L.* 28, 14 *Am. Ry. Rep.* 211.

Platforms laid by a railroad company along its track, for freight or passengers, are not of such character, nor ordinarily so essential to the enjoyment of the franchise of the company, that they may not, in subservience to the public necessity, be removed in laying a public road. *State* (*New York & L. B. R. Co., Pros.*) v. *Drummond*, 20 *Am. & Eng. R. Cas.* 13, 46 *N. J. L.* 644; *affirming* 45 *N. J. L.* 511.

25. New York.—(1) *In general.*—An injunction will lie to restrain highway commissioners from taking possession of grounds necessary for use as a railroad station, and acquired by the company for that purpose; but where the commissioners have a right to lay out a highway, but have failed to acquire jurisdiction through irregularities in the proceedings, an injunction will not lie. *Albany Northern R. Co.* v. *Brownell*, 24 *N. Y.* 345.

Under the power given by the charter of Buffalo (Laws 1870, ch. 519) to take lands for "canals, basins, slips," and other corporate purposes, the common council instituted proceedings for the purpose of acquiring a strip of land sixty feet wide and about two miles long, through which to extend the M and H Street Canal. Portions of the lands sought to be taken for that purpose had already been acquired by various railroad corporations for the purposes of their roads. The line of the extension passed entirely through the yards of one of the corporations at a point where there were numerous tracks with switches and turnouts. It intersected other tracks—some of them the main tracks, others leading to yards, freight depots, etc.—all in constant use and indispensably necessary for the business of the corporations. By the charter, the city acquires a fee to lands taken under its provisions. No provision was made in the proceedings reserving the right to the railroad corporations to bridge the canal, or in any way to use the lands after the city had acquired title. *Held*, that no power to take such lands was given to the city by its charter, either expressly or by necessary implication. *In re Buffalo*, 68 *N. Y.* 167.—APPLIED IN Suburban Rapid Transit Co. *v.* Mayor, etc., of N. Y., 128 N. Y. 510. DISTINGUISHED IN Stranahan *v.* Sea View R. Co., 84 N. Y. 308.

(2) *In New York city.* — The legislature has the power to authorize a company to occupy an avenue with its tracks, and to prescribe the mode of occupation, and also to judge of the relative profits resulting to the city and the company from changing the avenue; and its judgment is not subject to review by the courts. *People ex rel.* v. *Havemeyer*, 3 *Hun* (*N. Y.*) 97, 16 *Abb. Pr.* 219, 4 *T. & C.* 365, 47 *How. Pr.* 494.

Where a company purchases land within the city, and holds the fee-simple title, it may devote it to any purpose to which it sees fit, the same as a private individual would use his land; and therefore it may be taken by the city for street purposes, without special legislative authority. *In re Alexander Ave.*, 17 *N. Y. Supp.* 933, 63 *Hun* 630, *mem.*, 44 *N. Y. S. R.* 546.

In such case, besides the above general authority, N. Y. Act of 1882, ch. 410, known as the Consolidation Act, § 957, provides that no street in New York not laid out before May 23, 1873, shall be constructed through or upon the depot or station grounds of any railroad or branch of the same, then operated by steam power within certain wards, unless with the consent of the company. *Held*, that this was a clear recognition of the right of the city to open streets through depot or station grounds prior to the date fixed. *In re Alexander Ave.*, 17 *N. Y. Supp.* 933, 63 *Hun* 630, *mem.*, 44 *N. Y. S. R.* 546.

By N. Y. Act of 1874, ch. 604, § 1, the park commissioners of the city have the exclusive power to lay out, survey, and monument streets, roads, avenues, public squares, and lands belonging to the state. *Held*, that such commissioners had a right to condemn land under water along the Harlem river, belonging to the state, for street purposes. *In re Alexander Ave.*, 17 *N. Y. Supp.* 933, 63 *Hun* 630, *mem.*, 44 *N. Y. S. R.* 546.

In such case a railroad company urged that the commissioners had awarded nothing for certain bulkheads which it had erected along the river; but it appeared that an award was made for all the land which was taken. *Held*, that, as the bulkheads were mere appurtenances to the land, and, as such, gave value to it, allowing damages for taking the land would be deemed as including the bulkheads. *In re Alexander Ave.*, 17 *N. Y. Supp.* 933, 63 *Hun* 630, *mem.*, 44 *N. Y. S. R.* 546.

By the Consolidation Act streets are divided into three classes, the first including those for the convenience of the general public, either as a route of travel or for drainage. *Held*, that streets of this class may be opened whenever the interests of the public may demand it; and it is only the second and third classes which, under section 990, can only be opened by the approval of a majority of the persons interested. *In re Alexander Ave.*, 17 *N. Y. Supp.* 933, 63 *Hun* 630, *mem.*, 44 *N. Y S. R.* 546.

26. Ohio.—Cities and incorporated villages, in the exercise of the power to lay off and establish streets, and to enter upon and take land for that purpose, conferred by the general act of May 3, 1852 (50 Ohio L. 223), are authorized to lay streets across land which is the subject of the franchise of a railroad corporation, provided the second use for which the land is so taken is, in the circumstances of the particular case, reasonably consistent with the former use. The land may, in such case, be subjected to the additional use, but the former use may not thereby be defeated. *Little Miami & C. & X. R. Co.* v. *Dayton*, 23 *Ohio St.* 510.—DISTINGUISHED IN Western Union Tel. Co. *v.* Rich, 19 Kan. 517.

27. Oregon.—The common council of the city of Portland, in appropriating property for the purpose of laying out and establishing streets and alleys, is an inferior tribunal, and must comply strictly with every prerequisite of the statutes; and unless it does so, its acts are void. *Northern Pac. Terminal Co.* v. *Portland*, 14 *Oreg.* 24, 13 *Pac. Rep.* 705.

Under a statute providing that in such case "the council shall appoint three disinterested freeholders of the city, no kin to any owner or person interested in any property to be appropriated, possessing the qualifications of jurors of the circuit court of the county of Multnomah, to view such proposed streets," a finding by the council that the viewers "are freeholders within the state of Oregon," and "disinterested in the property proposed to be appropriated," is insufficient. *Northern Pac. Terminal Co.* v. *Portland*, 14 *Oreg.* 24, 13 *Pac. Rep.* 705.

28. Pennsylvania. — It is essentially requisite to the validity of proceedings had in the quarter sessions for the laying out of a road that the record should show that notice was duly served on the owners through whose land the road is laid out, and that either releases had been obtained from them or the damages sustained, if any, ascertained. And, if a landowner in such case be a corporation, it must appear of record that notice was served in the mode provided by statute. *Appeal of Central R. Co.*, 102 *Pa. St.* 38.

In laying out a public road across a railroad, at grade, it is not necessary that either the petition or the report of viewers should state or show the necessity of such crossing. *In re Road in Sterrett Tp.*, 114 *Pa. St.* 627, 7 *Atl. Rep.* 765.

The laying out of a public road across a railroad at grade of the tracks is not illegal *per se*. The subject of grade crossing is one that appeals strongly to the sound discretion of the court of quarter sessions. *In re Road in Sterrett Tp.*, 114 *Pa. St.* 627, 7 *Atl. Rep.* 765.

Where both viewers and reviewers have found a proposed road to be practicable and necessary for the public convenience, an exception that they have not passed upon a contingent liability to a company, arising out of the cost of substituting a culvert through an embankment instead of a trestle, will not be sustained. *Kingston Tp. Road*, 134 *Pa. St.* 409, 19 *Atl. Rep.* 750.

Where an act relating to the location and opening of streets provides that damages are to be assessed only upon the application of the owner, and he is liable to be barred

if he does not apply, the owner is entitled to the notice provided by the act, with all the accompaniments of time and circumstances that the statute prescribes in his favor. *Verona* v. *Allegheny Valley R. Co.*, 152 *Pa. St.* 368, 25 *Atl. Rep.* 518.

Where a public road has been opened and laid out by a company, under the Railroad Act of 1849, the reversal of proceedings in the quarter sessions, relative to the road, taken under the act of 1836, will not necessarily disturb it. *Appleby Manor Road*, 1 *Grant's Cas.* (*Pa.*) 443.

29. Rhode Island.—Under R. I. Gen. St. ch. 59, §§ 1-7, a town council, in its order declaring a highway necessary, and appointing a committee to lay it out, need not specify the width of the proposed highway. The width must be specified when driftways are laid out, or existing highways widened, or highways declared such after twenty years' use. *So held*, where a railroad company moved to quash the proceedings because the width of the highway was not designated. *Boston & P. R. Corp.* v. *Lincoln*, 13 *R. I.* 705.

30. Washington.—Under the Constitution and laws of this state cities of the first class have, as against private parties, the absolute right to extend their streets over and across the tidelands lying within their corporate limits, subject only to the rights of navigation in the waters covering such tidelands. *Columbia & P. S. R. Co.* v. *Seattle*, 6 *Wash.* 332, 33 *Pac. Rep.* 824, 34 *Pac. Rep.* 725.

Where a city, by an ordinance regularly passed, recognizes the existence of a street over a certain portion of tideland, and provides for the widening and extension thereof, and the city, by its proceedings, is estopped to deny that such location is a street, such location must be held to be a street as to the public generally, and no private person can question the city's right to establish it. *Columbia & P. S. R. Co.* v. *Seattle*, 6 *Wash.* 332, 33 *Pac. Rep.* 824, 34 *Pac. Rep.* 725.

The act authorizing a city of the first class (Laws 1889-90, p. 223, § 5, subd. 37) "to project or extend its streets over and across any tidelands within its corporate limits, and along or across the harbor areas of such city," does not empower such city to lay out over the tidelands of the state a street which is not an extension of any of the existing streets of the city. *Seattle & M. R. Co.* v. *State*, 7 *Wash.* 150, 34 *Pac. Rep.* 551.

3. *Vacating and Discontinuing. Abandonment.*

31. In general.—The vacating of a public street not adjoining or contiguous to a particular lot can in no sense be construed as either taking or damaging private property for public use, within the meaning of those terms in the Constitution. Nor will the grant of the use of the ground over which the street was laid, to a railway company, for the use of its road, render the city liable for damages to the owner of such lot. *East St. Louis* v. *O'Flynn*, 119 *Ill.* 200, 10 *N. E. Rep.* 395.

The legality of proceedings discontinuing a portion of a street and thereby changing the course of travel is not affected by the fact that a railroad company, across whose track the street lay, was authorized by the city council to erect a stone wall along the west line of its land at the end of the street, with stone steps for the use and convenience of foot passengers, thereby saving the city from any burden on account of such discontinuance. *Pillsbury* v. *Mayor, etc., of Augusta*, 79 *Me.* 71, 8 *Atl. Rep.* 150.

The construction and near completion of a railroad are a change of circumstances proper to be reported by the road commissioners as a reason for discontinuing a highway not open for travel; and it is no valid exception to the decree of the court of common pleas, discontinuing such highway accordingly, that they rejected evidence that the board of road commissioners who laid the road regarded the laying out and construction of the railroad as an event certain to happen in a few years. *Bethlehem's Petition*, 20 *N. H.* 210.

Pennsylvania Act of April 15, 1869, authorizing the municipal authorities of the city of Pittsburgh to vacate streets and alleys in the city, did not warrant the passage of an ordinance authorizing a company to build a short elevated railroad over a highway. *McAboy's Appeal*, 107 *Pa. St.* 548. —FOLLOWING Western Pa. R. Co.'s Appeal, 99 Pa. St. 155.

The authority of Pennsylvania Act of Aug. 5, 1871, providing for the erection of public buildings in the city of Philadelphia, and authorizing the commissioners to vacate so much of Market street "as they may deem needful," does not authorize them to obstruct a railroad on the street; neither have the commissioners the right to author-

ise the company to change its course. *West Phila. Pass. R. Co.* v. *Perkins*, 10 *Phila.* (*Pa.*) 20.

Where a railroad company is authorized to occupy a highway, but required to substitute a new way, the company must proceed according to the statute, otherwise the old road will not be deemed discontinued in the absence of proof of abandonment by the authorities, or of nonuser. *Barber* v. *Essex*, 27 *Vt.* 62.

Where the common council of a city is authorized to vacate or discontinue streets it must proceed, if the charter does not otherwise provide, in the manner prescribed by Wis. Rev. St. § 904. *James* v. *Darlington*, 71 *Wis.* 173, 36 *N. W. Rep.* 834.

32. Nonuser as evidence of discontinuance or abandonment.—Nonuser of a highway by the public for many years is *prima facie* evidence of abandonment; but the abandonment must be voluntary and intentional. *Hartford* v. *New York & N. E. R. Co.*, 59 *Conn.* 250, 22 *Atl. Rep.* 37.—QUOTING Beardslee *v.* French, 7 Conn. 125.

A highway can be partially discontinued by nonuser, and stands, as against long adverse possession, no better than any other property; and a highway by user only is measured, as to its width, by such use. *So held*, where a highway through plaintiff's farm was less than four rods wide as used, the remainder of the land within that limit never having been opened to the public, but having been fenced and cultivated by the landowner for thirty years as his private property. *Coleman* v. *Flint & P. M. R. Co.*, 29 *Am. & Eng. R. Cas.* 247, 64 *Mich.* 160, 31 *N. W. Rep.* 47.

An unrecorded road, laid out and constructed by a township, and actually used for eight years, becomes a public highway, under How. Mich. St. § 1315, and in the absence of any proceedings to discontinue it, its nonuser for two years will not entitle a railroad company to exclude the public by fencing in its right of way at that point. *McNamara* v. *Minneapolis, St. P. & S. St. M. R. Co.*, 95 *Mich.* 545, 55 *N. W. Rep.* 440.

33. Reinstatement after discontinuance.—A highway was opened in 1731 and continued until 1872, when the town voted to change its location at a certain place where a railroad crossed it, except that the persons living on it might improve it and keep it open as a private way. *Held*, that the road being one which the town had a right to discontinue, it could not become a highway by prescription until the lapse of twenty years after the passage of the vote to discontinue; it was therefore not "a townway, highway, or traveled place," within the meaning of Mass. Pub. St. ch. 112, § 163, though the crossing was planked and had the usual signs. *Coakley* v. *Boston & M. R. Co.*, 159 *Mass.* 32, 33 *N. E. Rep.* 930.

A road is not "a traveled place" within the meaning of the above statute, unless the selectmen have required the railroad company in writing to erect and maintain boards at the crossing, or the county commissioners have ordered the company to do so; and the facts that the crossing was planked and the signs erected over it do not in themselves show that such request or order has been made. *Coakley* v. *Boston & M. R. Co.*, 159 *Mass.* 32, 33 *N. E. Rep.* 930.

34. Review of discontinuance on certiorari. — The owner of land intersected by a railroad and abutting upon a highway crossing the same, who has no title within the railroad location and whose land at a point very near the highway is connected by a private crossing, is not entitled to maintain a petition for a writ of *certiorari* to quash the proceedings of county commissioners in discontinuing so much of the highway as crossed the location, although, by reason of the proximity of his house and land to the railroad, he has occasion to use the highway over the railroad oftener than that portion of the public who are farther off. *Hammond* v. *Worcester County Com'rs*, 154 *Mass.* 509, 28 *N. E. Rep.* 902.—FOLLOWING Davis *v.* Hampshire County Com'rs, 153 Mass. 218.

35. Restraining vacation in equity. —The legislature has plenary power over streets and highways, and, as a general rule, full discretion as to opening, improving, and vacating the same. While equity will interfere in some cases at the instance of private real-estate owners to restrain the attempted vacation of a road or street, yet it will interfere only when such owners have a special interest therein, and their property would be directly injured by the vacation. Where the vacation of a part of a street is attempted, and the owners of the lots abutting thereon do not complain, the owner of a lot in another block, in front of whose lot the street is in no respect disturbed or abridged, may not maintain an

action to restrain the vacation, although thereby the general course of travel will probably be thrown on some other street and no longer pass in front of said lot owner's property. *Heller* v. *Atchison, T. & S. F. R. Co.*, 7 *Am. & Eng. R. Cas.* 636, 28 *Kan.* 625. — DISTINGUISHING Franklin County Com'rs *v.* Lathrop, 9 Kan. 453. QUOTING Smith *v.* Boston, 7 Cush. (Mass.) 254.—APPROVED IN Central Branch U. P. R. Co. *v.* Andrews, 41 Kan. 370. QUOTED IN Ottawa, O. C. & C. G. R. Co. *v.* Larson, 40 Kan. 301.

Equity will not enjoin a municipal corporation from lawfully vacating a public street. *Meredith* v. *Sayre*, 32 *N. J. Eq.* 557.—DISTINGUISHING Paterson & P. Horse R. Co. *v.* Mayor, etc., of Paterson, 24 N. J. Eq. 158.

36. Reversion to abutting owners.—A discontinued street reverts to the original owner. Taking the adjacent land with its "appurtenances," in eminent domain, does not include the street. *Harris* v. *Elliott*, 10 *Pet.* (*U. S.*) 25.—DISTINGUISHED IN Challiss *v.* Atchison Union D. & R. Co., 45 Kan. 398. REVIEWED IN New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 12 Sup. Ct. Rep. 364.

A street dedicated by the filing of the plat of a congressional town site on vacation reverts to the abutting owners in proportion to frontage, according to Kan. Act of March 13, 1872, concerning cities of the second class, and Gen. St. 1889, par. 811. *Showalter* v. *Southern Kan. R. Co.*, 49 *Kan.* 421, 32 *Pac. Rep.* 42.

Where a public highway is vacated and abandoned as such by lawful authority, the land included therein reverts to the abutting proprietors and cannot be appropriated by a railroad company for right of way without making compensation to such proprietors. *Omaha Southern R. Co.* v. *Beeson*, 36 *Neb.* 361, 54 *N. W. Rep.* 557.

II. RIGHT OF STEAM RAILROADS TO OCCUPY.

1. *In General.**

37. Right to occupy streets and to use steam power therein.†—The title to the streets of the city of Washington is in the United States, and they cannot be used for railroad purposes except by consent of congress. *Edmonds* v. *Baltimore & P. R. Co.*, 20 *Am. & Eng. R. Cas.* 38, 114 *U. S.* 453, 5 *Sup. Ct. Rep.* 1098.—REVIEWED IN Hopkins *v.* Baltimore & P. R. Co., 6 Mackey (D. C.) 311.

The whole of a road as laid out having been dedicated as a highway, a railroad corporation has a right to construct its railroad therein, and may enjoin a grantee, whose land is adjacent to the part of the road not actually used by the public, from tearing up its track. *Southern Pac. R. Co.* v. *Ferris*, 93 *Cal.* 263, 28 *Pac. Rep.* 828.

The legislature may grant the right to lay railroad tracks in city streets; but if the road is constructed so as to obstruct the street, or in the running of its trains abutting property owners are substantially injured, either from the jarring, or smoke and dust, or otherwise, they are entitled to damages. *South Carolina R. Co.* v. *Steiner*, 44 *Ga.* 546, 3 *Am. Ry. Rep.* 86.

Neither by express grant nor by necessary implication has the East Tennessee, Virginia & Georgia railway company any authority to construct and operate its railway longitudinally upon the public streets of the city of Macon. *Davis* v. *East Tenn., V. & G. R. Co.*, 50 *Am. & Eng. R. Cas.* 137, 87 *Ga.* 605, 13 *S. E. Rep.* 567.—DISTINGUISHING Wood *v.* Macon & B. R. Co., 68 Ga. 539. FOLLOWING Daly *v.* Georgia Southern & F. R. Co., 80 Ga. 793.

Where the fee to streets is in the city, and a company has authority both from the legislature and the city to locate its tracks along a street, the abutting property owners cannot enjoin the laying of such tracks, nor recover damages for the use of the street. *Moses* v. *Pittsburgh, Ft. W. & C. R. Co.*, 21 *Ill.* 516.

A railroad constructed under the General Railroad Law may lawfully occupy a public highway to the extent of a reasonable necessity. *Long Branch Com'rs* v. *West End R. Co.*, 29 *N. J. Eq.* 566.—FOLLOWED IN National Docks R. Co. *v.* Central R. Co., 32 N. J. Eq. 755.

The Pennsylvania railroad company does not have the right, under its charter, to occupy longitudinally a public road or street in a borough, for the laying of its railway tracks. *Pennsylvania R. Co.'s Appeal*, 115 *Pa. St.* 514, 5 *Atl. Rep.* 872.—DISTINGUISH-

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* Right of company to maintain tracks in street, see notes, 37 AM. REP. 224; 31 AM. ST. REP. 733; 2 L. R. A. 59; 7 AM. & ENG. R. CAS. 15; 14 *Id.* 104; 38 *Id.* 410.

Road on street not *per se* a nuisance, see note, 5 L. R. A. 371.

† General obligations of railroad companies as to highways, see note, 20 AM. & ENG. R. CAS. 58.

ING Pittsburgh *v.* Pennsylvania R. Co., 48 Pa. St. 355.

38. Such use subordinate to use by the public.—Where a city grants to a company, not a street or any part of a street, but only the right to lay and use tracks in a street, the rights of the public in such street will be paramount to those of the company for all other purposes than that of transit; and such right of transit does not imply that it shall be enjoyed in the unlimited discretion of the company, but only that it shall be enjoyed with reference to the co-existing rights of others in the street, and in subordination to the public welfare. *Chicago, B. & Q. R. Co.* v. *Quincy*, 139 *Ill.* 355, 28 *N. E. Rep.* 1069.

In the usual understanding of the term, a highway is one which is common to all people without distinction, and which they may travel over on foot or horseback or in carriages. *Burlington, K. & S. W. R. Co.* v. *Johnson*, 33 *Am. & Eng. R. Cas.* 215, 38 *Kan.* 142, 16 *Pac. Rep.* 125.

The public easement in a street is the public and common right to use the same for the passage of persons and property, and for purposes incidental to such passage. *Newell* v. *Minneapolis, L. & M. R. Co.*, 24 *Am. & Eng. R. Cas.* 298, 35 *Minn.* 112, 27 *N. W. Rep.* 839.

The right to lay tracks on the surface of a street is *sub modo*; that is, by doing it so as not to impair or interfere with the use of the street. Whatever mode a company may adopt, it is bound to fulfil this condition, and if it cannot be fulfilled by laying the tracks on the surface of the street it must adopt some other plan. *State* v. *St. Paul, M. & M. R. Co.*, 35 *Minn.* 131, 28 *N. W. Rep.* 3.

A company whose track is laid upon a public street has no exclusive right to use such street for the purpose of running its trains thereon. *Neier* v. *Missouri Pac. R. Co.*, 12 *Mo. App.* 35.

The purchase of the fee of lands in a public street does not authorize a company to construct its road upon it as against the public, without express authority of law, or as against individuals who have the right or easement of passing over it. *Attorney-General ex rel.* v. *Morris & E. R. Co.*, 19 *N. J. Eq.* 386; *reversed in* 19 *N. J. Eq.* 575.—REVIEWED IN Dodge *v.* Pennsylvania R. Co., 43 N. J. Eq. 351.

The first use of a street is for the ordinary travel over it; the right of a railroad to operate its trains across it is subordinate to the use of the general public. *Houston & T. C. R. Co.* v *Carson*, 66 *Tex.* 345, 1 *S. W. Rep.* 107.

2. *Under Legislative Grants.**

39. Alabama.—Ala. Code of 1876, § 1842, gives to a railroad no right or license to construct its road through the streets of an incorporated town. *Columbus & W. R. Co.* v. *Witherow*, 82 *Ala.* 190, 3 *So. Rep.* 23.

40. Connecticut.—A charter authorizing the necessary alteration of highways in order that the road might be laid on the best site for the purpose, and providing that the company maintain all bridges constructed by it to conduct any highway over the road, does not authorize a change in the location of the highway made for the express purpose of avoiding altogether the expense of construct'ng a bridge. *Norwich & W. R. Co.* v. *Killingly*, 25 *Conn.* 402.

41. Florida.—A grant to a company of the right to construct its road along, upon, or across, or to use an existing highway, is not to be construed as a power to destroy the highway. This is the rule of construction, unless the language of the grant is such as to show unmistakably an intention to grant such power. A grant of the power to cut through a highway is, in the absence of an express provision to the contrary, impliedly attended by an obligation to furnish to the public a safe crossing. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

42. Georgia.—A company using steam motors cannot lay its tracks longitudinally upon the streets of a town or city without the sanction of the legislature, and this sanction must appear by express grant or necessary implication. *Daly* v. *Georgia Southern & F. R. Co.*, 36 *Am. & Eng. R. Cas.* 20, 80 *Ga.* 793, 7 *S. E. Rep.* 146.

Where a statute granting to a company part of the public domain of a city provides, in effect, that the grant shall not be operative without the assent of the municipal authorities, and that the terms, condi-

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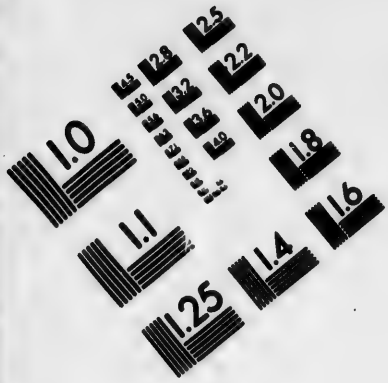
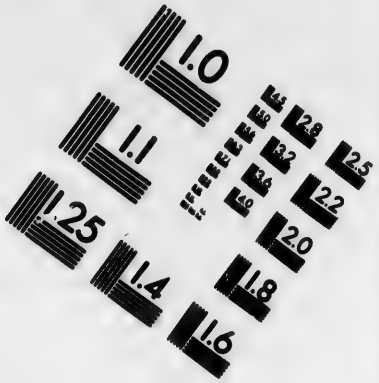
* Power of legislature to authorize use of streets for railroad purposes, see notes, 4 L. R. A. 622; 69 AM. DEC. 662.

How far legislative authorization will exempt from liability to suit for creating nuisance, see note, 26 AM. & ENG. R. CAS. 558.





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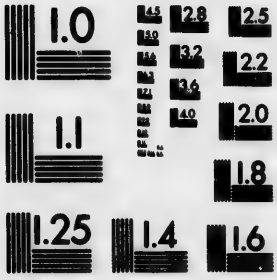

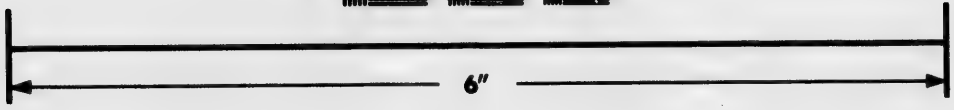

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tions, and limitations of the grant shall be matter of agreement between said authorities and the company, and where, on application of the company to the city for its consent, the municipal authorities lay down terms, conditions, or limitations, and there is not some writing, executed by the company, accepting or assenting to the same, the question of acceptance of the grant by the company is one of fact for decision by a jury. *Mayor, etc., of Macon* v. *East Tenn., V. & G. R. Co.*, 40 *Am. & Eng. R. Cas.* 462, 82 *Ga.* 501, 9 *S. E. Rep.* 1127.

If the company did accept the grant with the limitation put on it by the city in giving its consent—namely, that so long as the property should be used for railroad purposes, as specified in the statute—the property, if not appropriated to any of these purposes within a reasonable time, would cease to be affected by the statute, and would again be the public domain of the city, just as it was before; there being no consideration for the grant save the local benefits which might be expected to result from the use of the premises in the manner contemplated. *Mayor, etc., of Macon* v. *East Tenn., V. & G. R. Co.*, 40 *Am. & Eng. R. Cas.* 462, 82 *Ga.* 501, 9 *S. E. Rep.* 1127.—FOLLOWED IN Georgia R. & B. Co. *v.* Mayor, etc., of Macon, 86 Ga. 585.

If the grant was accepted, but terminated, or became subject to be terminated, by reason of nonuser, the proper party to re-enter or bring suit for the premises is not the state, but the city, whether the limitation to the uses expressed be regarded as a special limitation strictly, or only as a condition subsequent. *Mayor, etc., of Macon* v. *East Tenn., V. & G. R. Co.*, 40 *Am. & Eng. R. Cas.* 462, 82 *Ga.* 501, 9 *S. E. Rep.* 1127.

43. Illinois. — Where the legislature authorizes a company to construct its road across the public grounds and streets of an incorporated town, and the directors do so construct it, they are public agents in so doing, and such location is the act of the state, and within the legislative authority, unless such location is inconsistent with the use to which such grounds had been previously applied by the legislature. *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 *Ill.* 25.

The legislature, in creating a new county, provided that the county seat should be located in an incorporated town, and that the public buildings of said county should be erected on certain "public grounds." *Held*, that there was nothing in the use to which public ground was thus directed by the legislature from which the power of the legislature to locate a railroad over the same grounds should be denied. *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 *Ill.* 25.

A company organized under the general law of March 1, 1872, has authority to select its own route, to lay out its road, and to construct the same; and this power, by necessary implication, carries with it the power of fixing the terminal points of the proposed road, subject only to the limitation that the construction of its road upon or across any street in any city must be with the assent of the corporation of such city. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.—QUOTED IN Colorado Eastern R. Co. *v.* Union Pac. R. Co., 44 Am. & Eng. R. Cas. 10, 41 Fed. Rep. 293.

The lines selected may, without the assent of the city, cross streets, and the company may, without such assent, acquire the right of way and construct its road on every part of such line, except the parts to be constructed upon or across streets. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

It is not necessary, as a condition precedent to the location of its line within a city by a railroad company, or to the construction of its railroad within the city, or such parts of its lines as are not within any street, or to the power to condemn any private property within the city for such purpose, that an ordinance should be passed by the city council either giving assent for the construction of the road upon or across streets, or providing for the location of the road. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

A city ordinance granting permission to a company to construct and operate a railroad within the city limits is not void because it fails to designate the precise line upon which the road may be constructed, and omits to designate the precise points at which the road may be constructed across and upon the several streets to be intersected by it. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

Permission granted by a city council to a company to construct its road across streets at any points to be selected by the company within a given district is not a delegation to the company of powers which can only be exercised by the council, as the power to

locate the line of the road is given by statute to the railroad company alone, and not to the city authorities. The city of Chicago has power to make provision for the location of a railroad within its limits, but no power to locate. That power is in the company, subject to such provisions for the location as the city council may make. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

Under the general law relating to railroads, it is only necessary to procure the assent of the municipal authorities of a city to authorize a railroad company to construct its track or tracks over or along a public street therein. That act, as revised in 1874, does not require the assent of the abutting lot owners, and in the absence of any special statutory provision requiring such assent it will not be necessary. *Wiggins Ferry Co.* v. *East St. Louis Union R. Co.*, 20 *Am. & Eng. R. Cas.* 9, 107 *Ill.* 450.

In cities, towns, or villages organized under the General Incorporation Law, which requires such assent, or under special charters containing a similar provision to that in the general law, this rule does not apply, and the assent of the requisite number of the abutting property owners will be required, as well as that of the municipality. *Wiggins Ferry Co.* v. *East St. Louis Union R. Co.*, 20 *Am. & Eng. R. Cas.* 9, 107 *Ill.* 450.

Were it a matter of doubt whether a company may, under its charter, lay its track within the limits of a city, an act of the legislature confirming an ordinance of the city giving the company permission to lay its railway track in certain streets, and declaring that the ordinance shall be held to confer on the company power and authority to construct and operate its road in the streets and over the bridge mentioned therein, until the same shall be altered, changed, or amended by the common council, with the assent of the company, will remove the doubt and be regarded as a recognition of the right. *McCartney* v. *Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

Authority in a railway charter to construct a railroad from a designated point to and into a city, with the general power to cross any road or highway on the route, is to be held only as giving such power outside of the corporate limits of the city. By no fair intendment can it be held as a grant of the use of the streets of the city for tracks of the road. *Chicago, D. & V. R. Co.* v. *Chicago*, 121 *Ill.* 176, 11 *N. E. Rep.* 907, 9 *West. Rep.* 493; *affirming* 20 *Ill. App.* 665.

Before a company can construct its tracks in or through an incorporated city, upon or across streets, it must first obtain the consent of the common council of such city, acting in a legal manner. *Hickey* v. *Chicago & W. I. R. Co.*, 6 *Ill. App.* 172.

Inasmuch as the General Railroad Act of Illinois contains no provision as to how such consent may be obtained, the action of the city council must be governed by the provisions of the general statute relating to the incorporation of cities and villages. *Hickey* v. *Chicago & W. I. R. Co.*, 6 *Ill. App.* 172.

The statute requires a petition by the owners of the land representing more than one half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes; and compliance with this provision is a condition precedent to valid consent by the city. *Hickey* v. *Chicago & W. I. R. Co.*, 6 *Ill. App.* 172.

44. Iowa. — The act of 1853, p. 58, § 8, providing that any railroad corporation may lower or raise any turnpike, plank road, or other way for the purpose of having its railroad pass under or over the same, confers the right not only to cross a highway at grade, but to run lengthwise upon it. *Milburn* v. *Cedar Rapids*, 12 *Iowa* 246.—FOLLOWED IN Hughes *v.* Mississippi & M. R. Co., 12 Iowa 261.

The provision of the Code with reference to the rights of a railroad company over the streets of cities and incorporated towns does not apply to actions commenced prior to the time when it took effect. *Ingram* v. *Chicago, D. & M. R. Co.*, 38 *Iowa* 669.

The power granted to railway companies by section 1262 of the Code, to occupy the streets of cities with their tracks, is, by implication, withdrawn by the amendment contained in Laws of 1874, ch. 47. *Stanley* v. *Davenport*, 54 *Iowa* 463, 2 *N. W. Rep.* 1064, 6 *N. W. Rep.* 706.

45. Louisiana. — The state has the power to grant to a company a right of way through a street in the city of New Orleans. *New Orleans, M. & C. R. Co.* v. *New Orleans*, 26 *La. Ann.* 517.

The legislature has power to authorize the building of a steam railroad on a city street, the fee of which is in the public, and may directly exercise this power or devolve it upon the local or municipal authorities. *Harrison* v. *New Orleans Pac. R. Co.*, 34

La. Ann. 462, 44 *Am. Rep.* 438.—QUOTING Williams *v.* New York C. R. Co., 18 Barb. (N. Y.) 222.

Provided the road be so constructed as not to exclude the public from any part of the street. *Werges* v. *St. Louis, C. & N. O. R. Co.*, 35 *La. Ann.* 641.—FOLLOWED IN New Orleans, F. J. & G. I. R. Co. *v.* Barton, 43 La. Ann. 171.

46. Maine.—Under the act of 1853, ch. 41, § 3, providing that railroads shall not be carried along any existing highway, but "must cross it in the line of the railway," a corporation cannot extend a curve in a branch track partly over or along a highway, but without crossing it *Bangor, O. & M. R. Co.* v. *Smith*, 47 *Me.* 34.

47. Maryland.—Authority by the legislature to tunnel the streets of a city may be granted by implication. *Baltimore & P. R. Co.* v. *Reaney*, 42 *Md.* 117.

Where the legislature has the right to authorize a company to construct a horse railroad on the streets of a city, but not a steam railroad, an act will not be declared void which is broad enough in its terms to authorize a steam railroad, but where the company builds a horse railroad only, and renounces all intention to build any other. *Hiss* v. *Baltimore & H. Pass. R. Co.*, 4 *Am. & Eng. R. Cas.* 201, 52 *Md.* 242, 36 *Am. Rep.* 371.

The act of 1882, ch. 47, authorizing a company, incorporated under the act of 1876, ch. 242, to construct and operate passenger railways upon certain streets in the city of Baltimore, being a valid act, the use of Park avenue for that purpose is not such an invasion of the rights of the owners of property abutting on said avenue as to entitle them to enjoin such proceeding. *Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603.

48. Massachusetts.—The provisions of the Pub. St. ch. 112, § 169, which relate to the use of the streets and highways by ordinary steam railroads at crossings, and of section 224, which relates to railroads for private use, have no application to a corporation which is using the streets under a special charter. *Howard* v. *Union Freight R. Co.*, 156 *Mass.* 159, 30 *N. E. Rep.* 479.

49. Minnesota.—The use of streets for a railroad track is not such use as a dedication for streets or landings or as the statute contemplates, and the right so to use the lands cannot be given by legislative act. *Schurmeier* v. *St. Paul & P. R. Co.*, 10 *Minn.* 82 (*Gil.* 59). — FOLLOWED IN St. Paul, S. & T. F. R. Co. *v.* First Div. St. P. & P. R. Co., 26 Minn. 31.

Under the statutes the right of a company to lay its tracks on or across a street is not absolute, but is subject to the condition that it be done so as not seriously or substantially to impair or interfere with the use of the street. The grant is subject to the duty to put the street in such condition as to furnish to the public a thoroughfare substantially as capable of safe and convenient use as before. (Gilfillan, C. J., dissenting.) *State ex rel.* v. *St. Paul, M. & M. R. Co.*, 35 *Minn.* 131, 28 *N. W. Rep.* 3.—DISTINGUISHING State *v.* New Haven & N. Co., 45 Conn. 331.—DISTINGUISHED IN Kansas *v.* Kansas City Belt R. Co., 102 Mo. 633. FOLLOWED IN State ex rel. *v.* Minneapolis & St. L. R. Co., 39 Minn. 219, 39 N. W. Rep. 153.

And this duty is a continuing one. It is not fulfilled by putting the street, at the time of building the railroad, in such condition as not to impair or interfere with its use at that time, nor by maintaining it in such condition as would have accomplished that end had the state of things originally existing continued. The duty has reference to future exigencies, and requires the railroad company, from time to time, to put the street in such condition as changed circumstances may render necessary. *State ex rel.* v. *St. Paul, M. & M. R. Co.*, 35 *Minn.* 131, 28 *N. W. Rep.* 3.

Hence, although a railroad crossing may have been adequate at the time the railroad was built, yet if, by reason of the increase in the number of tracks and railway traffic, and of the increase of travel on the street, such crossing becomes unsafe and dangerous, and seriously impairs and interferes with the free and proper use of the street, it becomes the duty of the company to provide some other mode of crossing, as by carrying the street under or over the tracks. *State ex rel.* v. *St. Paul, M. & M. R. Co.*, 35 *Minn.* 131, 28 *N. W. Rep.* 3.

50. Missouri.—If a company, having built a track upon a street under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has once accepted such license will not estop it from asserting a power to build on that street which was given by its charter, and was in existence when it accepted the license. *At-*

lantic & P. R. Co. v. *St. Louis*, 66 *Mo.* 228; *reversing* 3 *Mo. App.* 315.

The Constitution of 1865, art. 4, § 27, which provided that "the general assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town," was prospective in its operation only, and did not repeal an act giving such a right in force at the time of the adoption of the Constitution. *Atlantic & P. R. Co.* v. *St. Louis*, 66 *Mo.* 228; *reversing* 3 *Mo. App.* 315.

A company cannot, under the statute (Gen. St. 1865, p. 333; Rev. St. 1879, § 765), construct its road along or upon a public highway, except with the consent of the county court; and if it does so without such consent, a court of equity will interfere and grant to the county appropriate relief. *State ex rel.* v. *St. Louis, K. & N. W. R. Co.*, 29 *Am. & Eng. R. Cas.* 607, 86 *Mo.* 288.

The profile and map of the route of the defendant company through the county was filed, as required by statute, in the office of the clerk of the county court in April, 1878, and the present action to restrain defendant from using the highway was instituted in January, 1882. *Held*, that there was no such delay on the part of the county as to preclude it from asserting its rights against the company. *State ex rel.* v. *St. Louis, K. & N. W. R. Co.*, 29 *Am. & Eng. R. Cas.* 607, 86 *Mo.* 288.

The legislature authorized a company to lay its track on the streets of a city, with the requirement, however, that it be "so constructed as not to hinder or prevent the public from using the street." *Held*, that if the character of the street should be such that the track could not be laid thereon without hindering the public from using it, then it could not be laid thereon, no matter how important it should be to the company to use the street. *Dubach* v. *Hannibal & St. J. R. Co.*, 29 *Am. & Eng. R. Cas.* 609, 89 *Mo.* 483, 1 *S. W. Rep.* 86.

The legislature may authorize the laying of a track in the streets of a city, but the track must be laid in the manner authorized. *Dubach* v. *Hannibal & St. J. R. Co.*, 29 *Am. & Eng. R. Cas.* 609, 89 *Mo.* 483, 1 *S. W. Rep.* 86.

By the charter of a company and the special act mentioned therein (Laws 1851, p. 479; Laws 1837, p. 271), power is given to the company, after having first obtained from the county court an order permitting it to do so, to build its road along or across any state or county road, or the streets and wharves of any city, town, or village, it being provided that said order may be made "if the county court is satisfied that no great injury will be done to the public." *Held*, that the right to grant the right of way is vested in the discretion of the court, and that there could be no review of its exercise in the circuit court. *St. Louis, I. M. & S. R. Co.* v. *St. Louis*, 92 *Mo.* 160, 10 *West. Rep.* 359, 4 *W. Rep.* 664.

The Missouri statute requiring railroad companies to construct and maintain suitable ditches and drains along each side of their roadbeds is not applicable to a railroad constructed along a street in a town or city; and where a company has, without the consent of the municipal authorities, dug a ditch in a public street by the side of its track, it is liable to the owners of abutting property for damages naturally resulting therefrom. *Jackson* v. *Chicago, S. F. & C. R. Co.*, 43 *Am. & Eng. R. Cas.* 145, 41 *Fed. Rep.* 656.

51. New Hampshire.—The legislature has a right to provide for and determine the mode of making such alterations in the highways as the public good may require by reason of the construction of a railroad, and such alteration, if made by the railroad company in pursuance of a liability imposed by its charter or by general statutes, cannot be made the subject of an action against the corporation. *Towle* v. *Eastern R. Co.*, 17 *N. H.* 519.

52. New Jersey.—The legislature has the power to authorize the use of a public highway for the purpose of a railroad in such a manner as not entirely to destroy its use for ordinary travel. The use of public highways belongs to the public, and they have not been dedicated to any particular mode of travel or use. *Morris & E. R. Co.* v. *Mayor, etc., of Newark*, 10 *N. J. Eq.* 352.

The legislature must be the judge as to the benefit to the public, and to its authority individuals and the public must submit. *Morris & E. R. Co.* v. *Mayor, etc., of Newark*, 10 *N. J. Eq.* 352.

Where a charter provides how the company may cross highways, and how it may take private property, but is silent as to occupying a highway longitudinally, the company will be denied the right to do so without the consent of the proper town officers. *Morris & E. R. Co.* v. *Mayor, etc.*,

of Newark, 10 *N. J. Eq.* 352.—FOLLOWED IN Attorney-General ex rel. *v.* Morris & E. R. Co., 19 N. J. Eq. 386.

The public rights in the highways of the state can be impaired or interfered with by nothing short of the authority conferred by the sovereign power. That authority must be expressly given; or if conferred by implication, it must be a necessary implication. *Morris & E. R. Co.* v. *Mayor, etc., of Newark*, 10 *N. J. Eq.* 352.

Thus the acts of defendant, upon which complainant relied as establishing consent, were not sufficient while there was no license given to the company, either by parol or in writing; and no fraud can be inferred from the fact that defendant did not interfere, but stood by in silence, while complainant expended its money in the construction of its road upon the public highways. *Morris & E. R. Co.* v. *Mayor, etc., of Newark*, 10 *N. J. Eq.* 352.

There is no legislative sanction, either in the supplement of March 2, 1836, or in the further supplement of February 22, 1838, to the company's occupying any public highway without first obtaining the consent of the proper legal authorities. These acts will not warrant such a construction. *Morris & E. R. Co.* v. *Mayor, etc., of Newark*, 10 *N. J. Eq.* 352.

The charter of a street-car company authorized it to lay rails in the streets of a city, upon first obtaining the consent of the common council. By a supplement the construction of several tracks, specified therein, was positively authorized without any condition or reference to the consent of the common council. *Held*, that as to such tracks, consent of the council was not necessary. The grant of powers of local government to a municipal corporation is not a contract, but an exercise of legislative power; and the legislature may at any time take away, resume, or limit such power. *Jersey City* v. *Jersey City & B. R. Co.*, 20 *N. J. Eq.* 360.

A grant of power, in laying out and constructing a railroad, to change the location of any public road, if the company shall find it necessary, and to occupy such portions of the road as it may deem necessary or expedient—the company to cause the changed portion of such road to be reconstructed at its own expense, in as perfect a manner as the original road—does not authorize the diversion of an ancient highway because the company finds it to its pecuniary advantage or convenience to make such diversion. The alteration or diversion must be a necessary one. *Greenwich* v. *Easton & A. R. Co.*, 24 *N. J. Eq.* 217; *affirmed in* 25 *N. J. Eq.* 565.—EXPLAINING State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537. QUOTING Warren R. Co. *v.* State, 29 N. J. L. 353. REFERRING TO Queen *v.* Sharpe, 3 Railw. Cas. 35. REVIEWING Queen *v.* Wycombe R. Co., L. R. 2 Q. B. 310.

The grant to a company by its charter of power to lay out and construct a railroad between designated *termini* carries with it, as an incident of the grant, power to cross streets and highways within the location of its road, without any special grant to that effect. *Allen* v. *Mayor, etc., of Jersey City*, 49 *Am. & Eng. R. Cas.* 289, 53 *N. J. L.* 522, 22 *Atl. Rep.* 257.

53. New York.—The Railroad Act of April 4, 1854, in relation to the construction of railroads in cities, excepts from its operation all railroads already "constructed in part." *Held*, that this meant those constructed under lawful authority, and would not include one constructed under a license or grant which was entirely unauthorized. *Wetmore* v. *Story*, 22 *Barb.* (*N. Y.*) 414.

Under the statutes the legislature confers the right upon a company to cross the streets of a city, subject to the consent of the city; but when the consent is once obtained, the right becomes absolute, as conferred by the legislature and not the city, and cannot be revoked by any subsequent act of the city. *Delaware, L. & W. R. Co.* v. *Buffalo*, 48 *N. Y. S. R.* 501, 65 *Hun* 464, 20 *N. Y. Supp.* 448.

The act of 1890, ch. 565, § 4, subd. 4, provides that a railroad company shall have the right "to construct its road across, along, or upon any stream, watercourse, highway, plank road, turnpike, or across any of the canals of the state, which the route of its road shall intersect or touch." *Held*, that this does not confer upon the company the right to build its track along a highway. *Burt* v. *Lima & H. F. R. Co.*, 48 *N. Y. S. R.* 553, 21 *N. Y. Supp.* 482.

At the time of the passage of the act of 1859, ch. 484, providing, among other things, for the relinquishment by the Long Island railroad company of the right to use steam power within the city of Brooklyn, said company was rightfully using steam on Atlantic avenue, in that city; but in pursuance of the act, and in consideration of a payment made

to it and assessed upon the property benefited, the road was thereafter operated by horse power until 1876, when the legislature passed a statute, confirming an ordinance of the city, authorizing steam power to be resumed. *Held*, that the statute of 1876 left the original charter of the company in full force, and it had a right to determine what motive power it would use, and might resume the use of steam. *People* v. *Brooklyn, F. & C. I. R. Co.*, 9 *Am. & Eng. R. Cas.* 454, 89 *N. Y.* 75; *affirming* 24 *Hun* 529, *mem.*—APPLYING Farmers' Turnpike Co. *v.* Coventry, 10 Johns. (N. Y.) 389; Mohawk Bridge Co. *v.* Utica & S. R. Co., 6 Paige (N. Y.) 554; Mason *v.* Brooklyn City & N. R. Co., 35 Barb. 377. FOLLOWING In re Gilbert El. R. Co., 70 N. Y. 361; In re New York El. R. Co., 70 N. Y. 327.—APPLIED IN People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173.—*In re Long Island R. Co.*, 50 *N. Y. S. R.* 257, 66 *Hun* 631, *mem.*, 21 *N. Y. Supp.* 489; *affirmed in* 143 *N. Y.* 67, 60 *N. Y. S. R.* 460, 37 *N. E. Rep.* 636.

The act of 1860 relative to railroads in the city of New York, ch. 10, § 1, prohibiting the building of any railroad "in, upon, or along any or either of the streets or avenues" of said city, "except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide," applies as well to a railroad crossing or intersecting a street as to one running along it. A railroad crossing a street, either at grade or under or above the surface, is at the point of crossing both "in" and "upon" it, within the meaning of said provision. (Earl, J., dissenting.) *People's Rapid Transit Co.* v. *Dash*, 46 *Am. & Eng. R. Cas.* 114, 125 *N. Y.* 93, 26 *N. E. Rep.* 25, 34 *N. Y. S. R.* 595.—FOLLOWED IN Schaper *v.* Brooklyn & L. I. C. R. Co., 124 N. Y. 630.

The provision of the General Railroad Act of 1850, ch. 140, § 28, as amended by ch. 133, Laws of 1880, and ch. 724, Laws of 1887, authorizing railroad corporations organized under it to construct their roads across streets and highways, does not grant the authority made requisite by said act of 1860. *People's Rapid Transit Co.* v. *Dash*, 46 *Am. & Eng. R. Cas.* 114, 125 *N. Y.* 93, 26 *N. E. Rep.* 25, 34 *N. Y. S. R.* 595.

54. Pennsylvania.—The provision in the Constitution that private property shall not be taken for public use without compensation does not prohibit the legislature from granting to a company the privilege of laying rails on streets, and of using the railroad so made. *Case of Philadelphia & T. R. Co.*, 6 *Whart. (Pa.)* 25.—APPROVED IN Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75. CRITICISED IN Williams *v.* New York C. R. Co., 16 N. Y. 97. DISTINGUISHED IN Starr *v.* Camden & A. R. Co., 24 N. J. L. 592. FOLLOWED IN Faust *v.* Passenger R. Co., 3 Phila. (Pa.) 164; New York & E. R. Co. *v.* Young, 33 Pa. St. 175; Branson *v.* Philadelphia, 47 Pa. St. 329; Hatch *v.* Vermont C. R. Co., 25 Vt. 49. QUOTED IN Lackland *v.* North Mo. R. Co., 31 Mo. 180; Millvale *v.* Evergreen R. Co., 46 Am. & Eng. R. Cas. 219, 131 Pa. St. 1; Patent *v.* Philadelphia & R. R. Co., 17 Phila. (Pa.) 291.

The power of the legislature to authorize the building of a railroad on a street or other public highway is indubitable; and the exercise of that power may be devolved, at discretion, upon the local authorities. *Mercer* v. *Pittsburgh, Ft. W. & C. R. Co.*, 36 *Pa. St.* 99.

Under a charter granting to a company the right to "enter upon * * * any land which may be wanted for the site of said road," the company has the right to locate its road on a street; and if the choice of location is not wisely exercised, it can only be inquired into by the commonwealth after the road is built. *Cleveland & P. R. Co.* v. *Speer*, 56 *Pa. St.* 325.—QUOTED IN Pittsburgh Junction R. Co.'s Appeal, 28 Am. & Eng. R. Cas. 266, 122 Pa. St. 511.

A street is a public franchise, and cannot be invaded except by direct legislative grant. *Pennsylvania R. Co.'s Appeal*, 3 *Am. & Eng. R. Cas.* 507, 93 *Pa. St.* 150.

But the legislature has absolute control over the streets of the city. *Com. ex rel.* v. *Baldwin*, 14 *Phila (Pa.)* 93.

A railroad company authorized to construct its tracks in the public roads, and to use steam and carry freight, has authority to lay on a street the T rails in common use, although such rails be not expressly authorized, and may obstruct travel more than those used by horse railroads. *Millvale* v. *Evergreen R. Co.*, 46 *Am. & Eng. R. Cas.* 219, 131 *Pa. St.* 1, 18 *Atl. Rep.* 993.

Where the express words of a statute do not grant to a company the right to the exclusive occupancy of a street, such a right cannot be implied unless the whole width of the street is reasonably necessary for the

construction and operation of the road. *Pennsylvania S. V. R. Co.* v. *Philadelphia & R. R. Co.*, 56 *Am. & Eng. R. Cas.* 610, 157 *Pa. St.* 42, 27 *Atl. Rep.* 683.—QUOTING Mayor, etc., of Allegheny *v.* Ohio & P. R. Co., 26 Pa. St. 355.

The presumption that a company has taken the general width of its right of way as specified in the charter has no application to the surface of public streets, where the words of the charter express, with reference to such streets, nothing more than a right of way. *Pennsylvania S. V. R. Co.* v. *Philadelphia & R. R. Co.*, 56 *Am. & Eng. R. Cas.* 610, 157 *Pa. St.* 42, 27 *Atl. Rep.* 683.

The right in such case is limited to an occupation reasonably demanded by the transaction of the business contemplated; where, by years of actual use in the business, it has been demonstrated what extent of occupancy is sufficient to accomplish the purpose of the grant, the extent of the use determines the extent of the grant. *Pennsylvania S. V. R. Co.* v. *Philadelphia & R. R. Co.*, 56 *Am. & Eng. R. Cas.* 610, 157 *Pa. St.* 42, 27 *Atl. Rep.* 683.

The act of March 20, 1860, authorizing a company to construct its road "across or along such streets as it might find expedient to use," and the act of March 29, 1871, authorizing the use of so much of certain streets as might "be necessary for the construction of their tracks, sidings, and branches," do not express a right to the exclusive occupancy of the streets. *Pennsylvania S. V. R. Co.* v. *Philadelphia & R. R. Co.*, 56 *Am. & Eng. R. Cas.* 610, 157 *Pa. St.* 42, 27 *Atl. Rep.* 683.—APPLYING Mayor, etc., of Allegheny *v.* Ohio & P. R. Co., 26 Pa. St. 355; Philadelphia & R. R. Co. *v.* Berks County R. Co., 2 Woodw. Dec. (Pa.) 361. DISTINGUISHING Jones *v.* Erie & W. V. R. Co., 144 Pa. St. 629.

A railroad chartered under the general railroad laws has the implied right to pass through a borough lying upon its lawful route, by locating its tracks longitudinally upon one of the public streets of such borough. *Philadelphia, G. & N. R. Co.* v. *Pennsylvania S. V. R. Co.*, 16 *Phila.* (*Pa.*) 636.—DISTINGUISHING Lewis *v.* Germantown, N. & P. R. Co., 16 Phila. (Pa.) 621. QUOTING Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 339; Cleveland & P. R. Co. *v.* Speer, 56 Pa. St. 333. REVIEWING Struthers *v.* Dunkirk, W. & P. R. Co., 87 Pa. St. 282; Cake *v.* Philadelphia & E. R. Co., 87 Pa. St. 307.

55. Tennessee. — The legislature has the power to authorize the building of a railroad within a town or city, or upon a street or other public highway. *Tennessee & A. R. Co.* v. *Adams*, 3 *Head* (*Tenn.*) 596.

Where the charter of a company authorizes it to build into a city, it is authorized to construct its road upon a street or alley where that is necessary. *Tennessee & A. R. Co.* v. *Adams*, 3 *Head* (*Tenn.*) 596.

56. Texas.—The right to use any of the public streets, alleys, and highways of any city or town which may be on their lines of road, without making to such city or town any compensation, is expressly conferred by law upon all railroad companies chartered by the laws of this state. *Rio Grande R. Co.* v. *Brownsville*, 45 *Tex.* 88, 13 *Am. Ry. Rep.* 223.

57. Virginia. — Under its charter the James River & Kanawha company has a right to enter upon and occupy the public streets of a town, as well and in like manner as the lands of individuals, when it shall deem the same necessary for its canal or other works, and for such entrance the company is liable to make compensation to the party injured. *James River & K. Co.* v. *Anderson*, 12 *Leigh* (*Va.*) 278.—QUOTED IN Hodges *v.* Seaboard & R. R. Co., 88 Va. 653.

58. Wisconsin. — Rev. St. §§ 1828, subd. 5, and 1836, were intended to give to railroad companies the right to use highways for passage with their cars and engines, but not for depot purposes of any kind. *Bussian* v. *Milwaukee, L. S. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 716, 56 *Wis.* 325, 14 *N. W. Rep.* 452.

Laws of 1872, ch. 119, § 5, subd. 5, providing that railroad companies should have power to construct their roads across, along, or upon any street or highway intersected or touched, gave to the company authority to lay a track in a street in Milwaukee, and after the track was so laid such authority was not taken away by Laws of 1874, ch. 184, § 3, subd. 48, giving to the common council the power "to direct and control the location of railroad tracks" within the city. *Sinnott* v. *Chicago & N. W. R. Co.*, 81 *Wis.* 95, 50 *N. W. Rep.* 1097.

59. Canada. — Under the provincial statute (14 & 15 Vict. c. 51), a permanent diversion of a highway may be made by the construction of a railway, where it is necessary or expedient. *Fredericksburgh* v. *Grand Trunk R. Co.*, 6 *Grant's Ch.* (*U. C.*) 555.

Where the evidence as to the injury done to a highway by the manner in which a railway was constructed is conflicting, the court will refuse to interfere by injunction, but will leave the parties to their legal remedy. *Fredericksburgh* v. *Grand Trunk R. Co.*, 6 *Grant's Ch.* (*U. C.*) 555.

By 22 Vict. c. 116, § 15, all highways occupied by a railway with the written assent of the municipality within which it is situated shall be declared vested in it to the extent of the user permitted or enforced by the municipality; and all proposed or contemplated streets occupied by the company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the railway, shall be deemed closed, and the occupation by the railway shall be lawful. *Reg* v. *Great Western R. Co.*, 21 *U. C. Q. B.* 555.—REVIEWED IN Pembroke Tp. *v.* Canada C. R. Co., 3 Ont. 503.

Under the statute 4 Wm. IV. ch. 29, § 9, providing that it shall be lawful for corporations to construct railways across any road or highway, provided they restore the same "to its former state, or in a sufficient manner not to impair its usefulness," a company may construct its road across a street below the surface, and fill the street and bridge the crossing, without being liable to an abutting owner, though it impedes the drainage of his property, and renders the crossing less convenient. The statute was intended wholly as a safeguard and protection to public interests. *Connors* v. *Great Western R. Co.*, 6 *U. C. C. P.* 108.

Section 11 of said act, providing that the railroad or way contemplated by the act shall not interfere with any fee simple, right, or private easement, or privilege of any individual, without permission first obtained, either by consent of the owner thereof or by virtue of a reference to assess the damages, has no application to such a case. *Connors* v. *Great Western R. Co.*, 6 *U. C. C. P.* 108.

60. England. — Where a railway act gives general power to the company to close up streets within a given area, there is nothing to prevent the company from building a station upon a street within the area described, although such street is described in the plans filed by the company as crossed by its line. *Attorney-General* v. *Great Eastern R. Co.*, *L. R.* 6 *H. L. Cas.* 367, 22 *W. R.* 281; *affirming* *L. R.* 7 *Ch.* 475, 41 *L. J. Ch.* 505, 26 *L. T.* 749, 20 *W. R.* 599.

Where a company is given the right by special act to close up certain streets and use them for its works, having stopped up one end of the street, which it required for station purposes, and having purchased all the houses in such street, it has a right to stop up and appropriate the rest of the street. *Temple* v. *Flower*, 41 *L. J. Ch.* 604, 20 *W. R.* 587, 26 *L. T.* 657.

The Railways Clauses Act of 1845, § 16, relating to the obstruction or diversion of public roads rendered necessary by the construction of a railway, restricts the powers conferred to acts which are necessary, and does not extend to acts done for saving expense or inconvenience of the company. *Queen* v. *Wycombe R. Co.*, 8 *B. & S.* 259, 36 *L. J. Q. B.* 121, *L. R.* 2 *Q. B.* 310, 15 *L. T.* 610, 15 *W. R.* 489.—APPROVED AND FOLLOWED IN Pugh *v.* Golden Valley R. Co., L. R. 15 Ch. D. 330, 49 L. J. Ch. 721, 42 L. T. 863, 28 W. R. 863. FOLLOWED UNWILLINGLY IN Pugh *v.* Golden Valley R. Co., L. R. 12 Ch. D. 274.

3. *Under Municipal Grant*

a. Necessity of Municipal Consent.

61. In general. — The legislature has the right to delegate to municipal boards the power and discretion to say whether a railroad shall be laid in the streets, and if so, where and under what conditions, and it has granted authority to construct a railroad on any highway or street subject to the condition that the consent of two thirds of the members of the council or board must be obtained before any street or avenue of an incorporated city or town can be taken for that purpose. *Arcata* v. *Arcata & M. R. R. Co.*, 92 *Cal.* 639, 28 *Pac. Rep.* 676.

Where a company has no power to construct its road in a city, except the consent of the city council, which is void, a court of equity will restrain it from proceeding to construct its road. *Hickey* v. *Chicago & W. I. R. Co.*, 6 *Ill. App.* 172.—QUOTING Cobb *v.* Illinois & St. L. R. & C. Co., 68 Ill. 235; Sanford *v.* Catawissa, W. & E. R. Co., 24 Pa. St. 378. QUOTING AND FOLLOWING Smith *v.* Bangs, 15 Ill. 400.

But where property owners bring such bill, there must be some special injury to warrant an injunction. As to complainants who charge that they are the owners of real estate, which will be taken or specially injured by the road, the bill is sufficient; but

not sufficient as to those who merely charge that their property will "be more or less injured." *Hickey* v. *Chicago & W. I. R. Co.*, 6 *Ill. App.* 172.

Where a company has no express grant for the purpose, it has no right to occupy the highways of a town without the consent of the proper officers. *Morris & E. R. Co.* v. *Mayor, etc., of Newark*, 10 *N. J. Eq.* 352.—FOLLOWED IN State (Hoboken L. & I. Co., Pros.) *v.* Mayor, etc., of Hoboken, 35 N. J. L. 205.

62. When unnecessary.—The mere existence of a power in a city council "to provide for the location, grade, and crossings" of railroads within the city, and "to change the location, grade, and crossings" of railroads, until exercised is no limitation upon the power of a company to select its route and locate its road within the city. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

Railroad companies incorporated or acting under the general statutes of Iowa have a right to occupy such portions of streets as are reasonably necessary for the purpose of their roads, without the consent of the municipal authorities, and without making compensation for such use and occupancy. *Clinton* v. *Cedar Rapids & M. R. R. Co.*, 24 *Iowa* 455.—DISTINGUISHED IN Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366. FOLLOWED IN Chicago, N. & S. W. R. Co. *v.* Mayor, etc., of Newton, 36 Iowa 299; Ingram *v.* Chicago, D. & M. R. Co., 38 Iowa 669; Cook *v.* Chicago, M. & St. P. R. Co., 83 Iowa 278.—*Cain* v. *Chicago, R. I. & P. R. Co.*, 54 *Iowa* 255, 3 *N. W. Rep.* 736, 6 *N. W. Rep.* 268.

Subject to proper equitable and police regulations. *Chicago, N. & S. W. R. Co.* v. *Mayor, etc., of Newton*, 36 *Iowa* 299.—DISTINGUISHED IN Heath *v.* Des Moines & St. L. R. Co., 10 Am. & Eng. R. Cas. 313, 61 Iowa 11. FOLLOWED IN Clinton *v.* Clinton & L. Horse R. Co., 37 Iowa 61; Ingram *v.* Chicago, D. & M. R. Co., 38 Iowa 669; Hine *v.* Keokuk & D. M. R. Co., 42 Iowa 636. QUOTED IN State *v.* Davenport & St. P. R. Co., 47 Iowa 507.—*Hine* v. *Keokuk & D. M. R. Co.*, 42 *Iowa* 636.—FOLLOWING Chicago, N. & S. W. R. Co. *v.* Mayor, etc., of Newton, 36 Iowa 299; Clinton *v.* Cedar Rapids & M. R. R. Co., 24 Iowa 455.—*State* v. *Davenport & St. P. R. Co.*, 47 *Iowa* 507.

Prior to the Code of 1873, railroad companies had the right to construct their roads, subject to equitable control, upon the streets of cities and incorporated towns, without their consent and without compensation. *Ingram* v. *Chicago, D. & M. R. Co.*, 38 *Iowa* 669.—FOLLOWING Clinton *v.* Cedar Rapids & M. R. R. Co., 24 Iowa 455; Chicago, N. & S. W. R. Co. *v.* Mayor, etc., of Newton, 36 Iowa 299.

The Chester & Delaware River R. Co., under Pa. General Law of Feb. 19, 1849, and the act of April 4, 1868, may construct a branch railroad upon Delaware avenue, a public highway of the borough of South Chester, without the approval or consent of the borough. *Philadelphia, W. & B. R. Co.* v. *Philadelphia & R. R. Co.*, 1 *Pa. Dist.* 73.

Pa. Act of April 10, 1873, relating to the Chester & Delaware River R. Co., is not a restraining, but a confirmatory, act, and does not restrict the exercise of the powers vested in the company by the acts of 1849 and 1868. *Philadelphia, W. & B. R. Co.* v. *Philadelphia & R. R. Co.*, 1 *Pa. Dist.* 73.

63. Unconditional charter right dispenses with municipal assent.—A company has the right to construct and operate its road upon and along the streets of an incorporated borough, without obtaining the consent of the borough authorities thereto, where its charter gives it, without qualification, the right to lay its tracks upon any public road. *Millvale* v. *Evergreen R. Co.*, 46 *Am. & Eng. R. Cas.* 219, 131 *Pa. St.* 1, 18 *Atl. Rep.* 993.—QUOTING Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 354; Case of Philadelphia & T. R. Co., 6 Whart. (Pa.) 25; Williamsport Pass. R. Co. *v.* Williamsport, 120 Pa. St. 1.

64. Power of city to prohibit use of steam power.*—A railroad charter provided that the company should obtain the consent of the city authorities before constructing its road within the city, and it authorized the city authorities "to regulate the time and manner of using the same." In granting the consent, the city reserved to itself the right of regulating the motive power to be used, and subsequently passed an ordinance prohibiting the use of steam. *Held*, that the condition upon which the company was authorized to build its road into the city was authorized by its charter, and the city might control the

* Prohibition by municipality of use of steam in streets, see note, 20 AM. & ENG. R. CAS. 554.

motive power to be used. *New York & N. H. R. Co.* v. *Mayor, etc., of N. Y.*, 4 *Blatchf.* (*U. S.*) 193.

In such case a subsequent act of the legislature, conferring upon a second company the right to use the track thus authorized within the city, confers upon it no greater powers, as to the motive power to be used, than the original company had; and the city has the same right to regulate the motive power of the second company as it has of the first. *New York & N. H. R. Co.* v. *Mayor, etc., of N. Y.*, 4 *Blatchf.* (*U. S.*) 193.

A statute giving to a city power to regulate the running of cars within the corporate limits authorizes the corporation to prohibit the propelling of the cars by steam through any part of the city. *Buffalo & N. F. R. Co.* v. *Buffalo*, 5 *Hill* (*N. Y.*) 209. —QUOTED IN Whitson *v.* Franklin, 34 Ind. 392. REVIEWED IN Green *v.* Delaware & H. Canal Co., 38 Hun (N. Y.) 51.

Where the charter of a company does not, in express terms or by necessary implication, vest in it the right to propel engines by steam through the streets of a city without the consent of the city, and the charter of the city gives authority to prevent the propelling of the cars by steam through the streets of the city, provided no contract is thereby violated, the council may prohibit said company from the use of steam in propelling cars in the streets. *Richmond, F. & P. R. Co.* v. *Richmond*, 26 *Gratt.* (*Va.*) 83.

65. Repeal of provision requiring assent of city.—The provision of Ill. General Railroad Act of 1849, prohibiting railroads from entering cities without municipal consent, if not repealed by implication by the act of 1872, is wholly so by the act of March 31, 1874. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

In 1860 the legislature authorized the construction of a railroad on certain streets in the city of New York, and prohibited the city from giving its consent to any company organized under N. Y. General Railroad Act of 1850 to construct a road on the same route. *Held*, that this must be considered as repealing the requirement of such assent for a road on the same route. *New York & H. R. Co.* v. *Forty-second St. & G. S. F. R. Co.*, 32 *How. Pr.* (*N. Y.*) 481, 50 *Barb.* 309; *affirming* 50 *Barb.* 285, 26 *How. Pr.* 68.

66. Settlement of disputes between city and company as to streets to be occupied.—In case of disagreement between a company and city authorities as to what streets should be occupied by the railroad, it is the duty of each to invoke the aid of the state engineer or other person to be appointed by the governor to designate the street to be taken by the railroad. *Rio Grande R. Co.* v. *Brownsville*, 45 *Tex.* 88, 13 *Am. Ry. Rep.* 223.

67. Time of consent—Estoppel.—A company constructed its railway along a highway in a municipality, the council whereof was not formally applied to for leave, but subsequently passed a resolution notifying the company to fill up the ditch existing on both sides of the railway, and to put down proper crossings. *Held*, that the corporation had thereby admitted that the company was lawfully in occupation of the highway, and could not afterwards object. *Pembroke Tp.* v. *Canada C. R. Co.*, 14 *Am. & Eng. R. Cas.* 117, 3 *Ont.* 503.—QUOTING Reg. *v.* Grand Trunk R. Co., 15 U. C. Q. B. 121. REVIEWING Reg. *v.* Great Western R. Co., 21 U. C. Q. B. 555.

The leave of the municipal or local authorities required by 31 Vict. c. 68, D., before a railway is carried along an existing highway, may be granted at any time, whether before, during, or after the construction of the railway, and need not necessarily be given by a by-law. *Pembroke Tp.* v. *Canada C. R. Co.*, 14 *Am. & Eng. R. Cas.* 117, 3 *Ont.* 503.

In such case the corporation, having stood by while the railway was constructed, and subsequently, for upwards of five years, while it was in operation, and having also by the resolution aforesaid procured further expenditure by the company, was bound by acquiescence, and could not maintain an action for the removal of the railway. *Pembroke Tp.* v. *Canada C. R. Co.*, 14 *Am. & Eng. R. Cas.* 117, 3 *Ont.* 503.

68. Rule in city of New York.—No question can now arise as to the power of the legislature to authorize the construction of a railroad upon any of the streets of the city of New York, without compensation to the corporation, or to the owners of property fronting on the street, and without the assent of the corporation, but even in direct opposition to its wishes. *New York & H. R. Co.* v. *Forty-second St. & G. S. F. R. Co.*, 32 *How. Pr.* (*N. Y.*) 481, 50 *Barb.*

309; *affirming* 50 *Barb.* 285, 26 *How. Pr.* 68. —FOLLOWING People *v.* Kerr, 27 N. Y. 188, 25 How. Pr. 258.

If it be admitted that a company has a right to construct its road in New York city without the consent of the municipal authorities, still another company claiming to be injured by the construction of such road cannot take advantage of such nonassent. *New York & H. R. Co.* v. *Forty-second St. & G. S. F. R. Co.*, 32 *How. Pr.* (*N. Y.*) 481, 50 *Barb.* 309; *affirming* 50 *Barb.* 285, 26 *How. Pr.* 68.

b. Power to Grant Right of Way.

69. Cities may authorize the use of streets by railroads.* — The mayor and council of Savannah may grant authority to lay tracks in the public streets to a railroad chartered with the privilege of running from some point within the city, which point was to be determined by the mayor and council, and if the streets be not obstructed permanently by excavations or embankments, or otherwise, such road will not constitute a public nuisance. *Coast Line R. Co.* v. *Cohen*, 50 *Ga.* 451.

A city has the power to allow the construction of a railroad upon or over its streets, and the public will be bound by whatever may be lawfully done in regard to the streets by the city. *Chicago & N. W. R. Co.* v. *People ex rel.*, 91 *Ill.* 251. *Tate* v. *Ohio & M. R. Co.*, 7 *Ind.* 479.

The construction of a railway upon a strip of land held by a city for public use, as a public highway and for other public uses, would be a public use within the meaning of the act creating such reservation, and the city may lawfully convey the same to a company for a right of way thereover, and for such other uses as justify the exercise of the right of eminent domain. *Cook* v. *Burlington*, 30 *Iowa* 94.—QUOTING Milburn *v.* Cedar Rapids, 12 Iowa 246.—FOLLOWED IN Cook *v.* Burlington, 36 Iowa 357.—*Cook* v. *Burlington*, 36 *Iowa* 357.—FOLLOWED IN Ingram *v.* Chicago, D & M. R. Co., 38 Iowa 669.

It is competent for a city to convey to a company a right of way and other uses connected with its road in respect to certain accretions to a street bounded on the Mississippi river. *Cook* v. *Burlington*, 36 *Iowa* 357.—FOLLOWING Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649.

The grant by a city of the right to construct and operate a railway through its streets will be presumed to be for such a railway as the city has power to authorize in its streets, and proof that such railway is used by its owners in transporting their own property will not establish the fact that it is a private road. *O'Neil* v. *Lamb*, 53 *Iowa* 725, 6 *N. W. Rep.* 59.

Iowa Code, § 464, as amended in 1874, ch. 7, confers upon cities the power to grant the right to construct and operate railways in their streets, and such power may be exercised by cities in their discretion, subject only to equitable control and proper police regulations. *O'Neil* v. *Lamb*, 53 *Iowa* 725, 6 *N. W. Rep.* 59.

The duty enjoined upon a city council by Iowa Code, § 527, to keep all alleys "open" and "free from all nuisances," has no reference to such obstructions as the city is specially empowered to authorize, and does not, therefore, deprive the council of the power granted by section 464, to authorize the use of alleys for railway purposes, even though such use may to a certain extent interfere with the ordinary use of such alleys. *Heath* v. *Des Moines & St. L. R. Co.*, 10 *Am. & Eng. R. Cas.* 313, 61 *Iowa* 11, 15 *N. W. Rep.* 573.

Where the fee of a street is in the county, but the control of the same is in the city, it is within the power of the latter to grant to a railroad company the right to construct and operate its road over the street. *Atchison & N. R. Co.* v. *Manley*, 42 *Kan.* 577, 22 *Pac. Rep.* 567.

The right of the authorities of a city, with legislative warrant, to permit the construction and operation through its streets of railroads upon which trains of cars are propelled by steam is not now an open question. *Cosby* v. *Owensboro & R. R. Co.*, 10 *Bush* (*Ky.*) 288.—FOLLOWED IN Fulton *v.* Short R. R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332.

Municipal corporations, empowered by their charters or otherwise to do so, may authorize the use of their streets for railroad purposes. *Iron Mountain R. Co.* v. *Bingham*, 38 *Am. & Eng. R. Cas.* 444, 87 *Tenn.* 522, 4 *L. R. A.* 622, 11 *S. W. Rep.* 705.

* Power of municipal corporations to authorize railroads in streets, see notes, 67 AM. DEC. 201; 8 *Id.* 310; 7 AM. & ENG. R. CAS. 15; 13 *Id.* 637; 14 *Id.* 109; 15 *Id.* 402.

70. They may do so under their general powers over streets.*—Under the charter of the city of Chicago, its municipal authorities are vested with the exclusive control of the streets; and where such authorities grant to a company permission to construct a railway on the streets, owners or occupants of abutting property cannot enjoin the construction of the road, nor recover damages for the use of the street. *Moses* v. *Pittsburgh, Ft. W. & C. R. Co.*, 21 *Ill.* 516.—DISTINGUISHED IN St. Louis, V. & T. H. R. Co. *v.* Capps, 67 Ill. 607; Portland & W. V. R. Co. *v.* Portland, 27 Am. & Eng. R. Cas. 353, 14 Oreg. 188. MODIFIED IN Pekin *v.* Brereton, 67 Ill 477. QUOTED IN Ligare *v.* Chicago, 139 Ill. 46; Chicago, D. & V. R. Co. *v.* Chicago, 121 Ill. 176, 11 N. E. Rep. 907, 9 West. Rep. 493; Detroit City R. Co. *v.* Mills, 85 Mich. 634. REVIEWED IN Olney *v.* Wharf, 115 Ill. 519.

A provision in a city charter giving to its council exclusive power over its streets will authorize such council to confer upon a company the right to use the streets with its track for railroad purposes. *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 *Ill.* 489, 27 *N. E. Rep.* 232; *reversing* 32 *Ill. App.* 377.

Where a county road has been included within the limits of an incorporated town, and the municipal authorities of the town have assumed control of the road, they may, under their general powers with reference to streets, alleys, etc., authorize a company to use a portion of the road for the purpose of its railway, in accordance with the statute. *Yates* v. *West Grafton*, 34 *W. Va.* 783, 12 *S. E. Rep.* 1075.

Such transfer of the use of a portion of such road to a company for the purpose of constructing its railroad thereon in the manner prescribed by statute is not a taking of the property without the consent of the owner of the fee, within W. Va. Const. art 3, § 9. *Yates* v. *West Grafton*, 34 *W. Va.* 783, 12 *S. E. Rep.* 1075.

The owner of lots and lands adjoining said road, along which the railroad is constructed, whether he owns the fee in the ground occupied by the road or not, cannot enjoin the company from constructing its railroad along the road in the manner required by the statute, unless the injury therefrom will entirely destroy the value of his property, and thereby be equivalent to a taking of it by the company. *Yates* v. *West Grafton*, 34 *W. Va.* 783, 12 *S. E. Rep.* 1075.

71. The power denied, as a proper exercise of municipal "control of streets," etc.—A general clause in the charter of a city giving to it power to control its streets is not sufficient to authorize the grant to a railroad company of the privilege of laying tracks along its streets. *Daly* v. *Georgia Southern & F. R. Co.*, 36 *Am. & Eng. R. Cas.* 20, 80 *Ga.* 793, 7 *S. E. Rep.* 146.

A city has no power to grant to a company the right to construct and operate a railway through its streets and alleys, unless it is expressly authorized to do so either by its own charter or by the charter of the company. *Com.* v. *Frankfort*, 92 *Ky.* 149, 17 *S. W. Rep.* 287.

The use of streets for a railroad track is not within the use to which they were originally dedicated; and a city cannot, by virtue of a provision in its charter that the council shall have "exclusive control of the streets, sidewalks, lanes, alleys, market places, and other public grounds within the corporate limits," authorize a railway company to construct its track along one of the city streets. *Ruttles* v. *Covington*, (*Ky.*) 38 *Am. & Eng R. Cas.* 408, 10 *S. W. Rep.* 644.

It seems that converting the streets of a city to ordinary railroad purposes is devoting them to an exclusive use, and cannot be permitted without express authority of the legislature. *New York & H. R. Co.* v. *Mayor, etc., of N. Y.*, 1 *Hilt.* (*N. Y.*) 562.

72. Power to be strictly construed.*—The Constitution and statute contemplate the use of streets in the city of Denver by ordinary railroads, and there is clearly implied, if not express, legislative sanction empowering the city council to permit such use. Under the statute this use is, however, an unusual and extraordinary use; and the authority of the council to permit the use is a "special power." There is a distinction, as to the abutting owner's right to compensation, between such use and the reasonable and careful improvement of the street for local convenience and traffic. *Denver & S. F. R. Co.* v. *Domke*, 36 *Am. & Eng. R. Cas.* 155, 11 *Colo.* 247, 17 *Pac. Rep.* 777.—FOLLOWED IN Denver, U. & P. R. Co. *v.* Barsalouz, 15 Colo. 290.

* When city council may grant authority to operate railways on streets, see note, 2 L. R. A. 59.

* See also *post*, **89.**

73. Construction of Illinois statutes.—The clause in the city act that "the city council shall have no power to grant the use of, or the right to lay down any railroad tracks in, any street" of the city, "except upon petitions of the owners of the lands representing more than one half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes," has reference only to cases where the city may propose to grant the privilege to a railroad company to run along a street for a given distance, and not to a case where the road merely crosses a street. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

The General Railroad Act of 1849, § 26, authorizing county or town officers having charge of lands belonging to their county or town to grant rights of way over the same to railroads, has application only to lands which belong to counties and towns as owners thereof, and not to lands held for a street or highway. *Pittsburg, Ft. W. & C. R. Co.* v. *Reich*, 101 *Ill.* 157.

Where a company lays its track in a city street, having the right to construct a track for passenger cars only, the city, under the General Law, art. 5, § 62, clause 90, has no power afterward to grant the use of the track for the operation of freight cars upon it, except upon a petition of property owners upon the street, as required in the statute, and a grant of the use of such track for freight purposes without the petition of property owners being void, such use is unlawful and a public nuisance, which the state may cause to be abated. *McCartney* v. *Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

A city council, under the General Incorporation Act, may grant to private individuals or to a private corporation the right to lay tracks in the streets, connecting with public-railway tracks previously laid, and extending to the manufacturing establishments or warehouses of those laying the tracks. In such case the tracks so laid become, in legal contemplation, part of the railway with which they connect, and are open to the public, and subject to public control in all respects as other railway tracks. *Chicago D. & C. Co.* v. *Garrity*, 115 *Ill.* 155, 3 *N. E. Rep.* 448.

The General Incorporation Law, art. 5, § 1, clause 90, "that the city council or board of trustees shall have no power to grant the use of, or the right to lay down any railroad tracks in, any street of the city to any steam or horse railroad company, except upon a petition of the owners of the land," is to be construed as including both corporations and individuals. The word "company," in the clause, must be held to embrace natural persons as well as corporations. *Chicago D. & C. Co.* v. *Garrity*, 115 *Ill.* 155, 3 *N. E. Rep.* 448.

74. Necessity of consent of adjoining owners.—A city may grant a right of way along one of its streets to a railroad company without the consent of adjacent lot owners. *Ingraham* v. *Chicago, D. & M. R. Co.*, 34 *Iowa* 249, 5 *Am. Ry. Rep.* 99.

A provision in a municipal charter that the common council may authorize railroad tracks in the streets, upon the consent of a majority of the abutting landowners, does not authorize a track by a manufacturing corporation, to be used as a steam railroad, authorized by a city ordinance, but without the consent of the abutting property owners. *Chamberlain* v. *Elizabethport Steam Cordage Co.*, 41 *N. J. Eq.* 43, 2 *Atl. Rep.* 775.

Where a city charter confers upon its common council power to permit the track of a railroad to be laid in, along, or across any street or public ground, this must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238.

75. Limits and exceptions to the power.—Under Georgia Acts of 1827 and 1828, providing for laying off the town of Columbus, a tract of 1200 acres was dedicated as a common for the use of the town. *Held*, that this was not a common of pasture, estovers, etc., but a common appurtenant to the town, and for its advancement and commercial prosperity; and it is within the power of the town to grant a right of way for a railroad across the common, and a site for necessary depot buildings. *Crawford* v. *Mobile & G. R. Co.*, 67 *Ga.* 405.

In permitting a street to be used for the laying of railroad tracks for the purpose of operating trains over the same, a city has no right so to obstruct the street as to deprive the public and adjacent property holders of its use as a highway. It is not competent

for a city to authorize such use of a street as will destroy it as a thoroughfare for the public use. *Ligare* v. *Chicago*, 139 *Ill.* 46, 28 *N. E. Rep.* 934.

A city council has no authority to grant to a company a right of way over private property, nor over a proposed extension of a street which has not yet been opened or extended. *Wichita & W. R. Co.* v. *Fechheimer*, 36 *Kan.* 45, 12 *Pac. Rep.* 362.

By the charter of the city of New York granted in 1830, the legislative power of the city was vested in a board of aldermen and a board of assistants, who together should form the common council. *Held*, that the adoption of a resolution or ordinance depended upon the concurrence of the two bodies. So where the board of assistants of one year pass a resolution authorizing the construction of a railroad on certain streets, it cannot be taken up by the aldermen of the following year and passed so as to give it the force of a law. *Wetmore* v. *Story*, 22 *Barb.* (*N. Y.*) 414.

A railway corporation cannot be authorized under Oreg. Laws, 530, § 26, to appropriate a public street or road to its use, unless such road or street has been legally established, according to some mode prescribed by statute. *Burns* v. *Multnomah R. Co.*, 10 *Am. & Eng. R. Cas.* 289, 8 *Sawy.* (*U. S.*) 543, 15 *Fed. Rep.* 177.

Where a statute under which a borough is laid out provides that the streets, lanes, and alleys thereof shall forever be and remain public highways, the borough authorities have no power to modify or repeal the statute by ordinance, as by granting permission to lay railroad tracks in the highways. *Com.* v. *Erie & N. E. R. Co.*, 27 *Pa. St.* 339.—QUOTED IN Millvale *v.* Evergreen R. Co., 46 Am. & Eng. R. Cas. 219, 131 Pa. St. 1; Philadelphia, W. & B. R. Co. *v.* Philadelphia, 9 Phila. (Pa.) 563.

76. Power limited to public railroads only.—A general power granted to a city to regulate the use of streets extends to public uses only, and does not authorize an ordinance permitting the construction of a railroad track and the operation of trains on the streets for the transaction of private business. *Glaessner* v. *Anheuser-Busch Brew. Assoc.*, 100 *Mo.* 508, 13 *S. W. Rep.* 707.

77. City cannot enlarge rights held under legislative grant.* — A municipality cannot enlarge the rights of a railroad company by giving it terminal rights in a street where, by legislative grant, it is confined to a mere right of passage. *Methodist Episcopal Church* v. *Pennsylvania R. Co.*, 50 *Am. & Eng. R. Cas.* 217, 48 *N. J. Eq.* 452, 22 *Atl. Rep.* 183. — DISTINGUISHING Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235.

78. Contracts with city for use of streets. — By voluntary agreement a city may grant the same rights to occupy streets and public grounds as a railroad company could acquire under a general right-of-way act. *Ingram* v. *Chicago, D. & M. R. Co.*, 38 *Iowa* 669.—FOLLOWING Cook *v.* Burlington, 36 Iowa 357.

After a company had been refused permission to use certain streets, it entered into a contract with the town by which it was authorized to lay its track on certain streets, on condition that it would extend its road to a certain distance beyond the town. Under the statutes of the state, the company had a right, after being refused by the town, to apply to the state engineer for the designation of a route through the town. *Held*, that the contract between the company and the town was neither illegal nor *ultra vires* as to either. The town had a right to make such a contract, and even if it were *ultra vires*, the company could not take advantage thereof after accepting the benefits of the contract. *Indianola* v. *Gulf, W. T. & P. R. Co.*, 11 *Am. & Eng. R. Cas.* 314, 56 *Tex.* 594.

The provision of the Texas statutes that a company may use the public streets or alleys of a city without paying therefor, and that in the event of disagreement as to which streets should be used, the dispute shall be settled by the state engineer, does not operate to prevent a company from making a contract with a city for the use of certain streets, nor prevent the city from entering into such contract; and therefore a consideration named for such a contract is not illegal. *Indianola* v. *Indianola R. Co.*, 2 *Tex. Unrep. Cas.* 337.

A municipal corporation may grant a perpetual franchise for a right of way over its streets. *Seattle* v. *Columbia & P. S. R. Co.*, 6 *Wash.* 379, 33 *Pac. Rep.* 1048.

79. Conveyance of public common or of right of way thereon.—A lease to a company, by a municipal corporation, of a public common within the city, there being a reservation of right of way

* See also *post*, **85.**

over the common, to a bridge abutting on said common, and providing for the repair of the road leading over the common to the bridge, is within the power of the city council, and an action by the owners of property abutting on the common, for obstructing travel in a straight line from the end of the bridge to their property, will not lie against the railway company. *Platt* v. *Chicago, B. & Q. R. Co.*, (*Iowa*) 31 *N. W. Rep.* 883.

A law providing that "if it shall become necessary to lay a railroad on any road, street, alley, or public highway or ground, the public authorities owning, or having charge thereof, may agree upon the terms"—*held* not to authorize city authorities to consent to the building of a railroad on a common laid out by the state, and reserved forever to the use of the inhabitants. *Bell* v. *Ohio & P. R. Co.*, 1 *Grant's Cas.* (*Pa.*) 105.

An act of the legislature in laying out a town reserved 100 acres "for a common pasture." A subsequent act conveyed the title of the commonwealth to the town, subject to the easement of the lot holders, and for such public uses as were recited in the original act, and such as the common council might ordain. *Held*, that this authorized the municipal authorities to grant to a company a portion of the land for a right of way. *Mayor, etc., of Allegheny* v. *Ohio & P. R. Co.*, 26 *Pa. St.* 355.

If a company stops its trains on a common, for the purpose of receiving and discharging freight and passengers, and does not provide necessary and suitable accommodations within its prescribed limits, the common being thus trespassed upon by its agents or customers, the company becomes a party to the intrusion. *Mayor, etc., of Allegheny* v. *Ohio & P. R. Co.*, 26 *Pa. St.* 355.

80. Power to grant land for depot purposes.—Georgia Acts 1857, page 182, conferring upon municipal corporations power or authority to grant or sanction encroachments on their streets for reasonable compensation in money, does not confer the right or authority to grant to a company a block of land 80 feet wide and 480 feet long, in one of the busiest parts of the city, for depot purposes, to the injury of adjoining property holders. *Daly* v. *Georgia Southern & F. R. Co.*, 36 *Am. & Eng. R. Cas.* 20, 80 *Ga.* 793, 7 *S. E. Rep.* 146.—FOLLOWED IN Davis *v.* East Tenn., V. & G. R. Co., 87 Ga. 605.

81. Tunnels and open cuts.—Under Md. Act of 1890, ch. 139, authorizing a company to construct a railroad in a tunnel in the city of Baltimore, and empowering the mayor and city council, by ordinance, to designate the route of said railroad, and to describe the mode, terms, and conditions of its construction, the mayor and city council may confer upon the company, by ordinance, power to construct any part of its road in a street of the city by way of open cuts. *O'Brien* v. *Baltimore Belt R. Co.*, 50 *Am. & Eng. R. Cas.* 194, 74 *Md.* 363, 22 *Atl. Rep.* 141.—QUOTING Baltimore & P. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317.

c. Validity and Effect of Ordinances and Resolutions.

82. Enactment and publication of ordinances. — The recognition by a city for over twenty years of a resolution granting a right to lay tracks in certain streets, and its acquiescence thereunder, afford presumptive evidence of its due publication, if such proof were necessary to give it force. *Quincy* v. *Chicago, B. & Q. R. Co.*, 92 *Ill.* 21.

Under Ill. General Incorporation Law, art. 3, § 13, the yeas and nays are required to be taken upon the passage of all ordinances, etc., and the concurrence of a majority of all the members elected to the city council shall be necessary to the passage of any ordinance or proposition, except that in case of the sale of city or school property a vote of two thirds of all the members elected is required. Therefore, by the provisions of the General Incorporation Law, a majority vote only of the members of the city council is required to grant the privilege of laying a railroad track in a street of a city, and this being inconsistent with the provisions of the amended charter of the city of Chicago of 1867, on the same subject, requiring a vote of three fourths of all the aldermen elected, the latter is repealed. *Chicago D. & C. Co.* v. *Garrity*, 115 *Ill.* 155, 3 *N. E. Rep.* 448.

83. Ordinances, how construed.* —A proviso, in a city ordinance granting privileges to a railroad, that such railroad should be subject to all laws and ordinances that might thereafter be passed to regulate railroads in the city, only means that the

* What amounts to permission to use streets for railway purposes, see 32 AM. & ENG. R. CAS. 270, *abstr.*

company shall be subject to all reasonable and legal ordinances for the regulation of the road. It has no such scope as that the company should abandon or take up and remove its track at the bidding of the common council. *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 *Ill.* 25.—QUOTING Yates *v.* Milwaukee, 10 Wall. (U. S.) 505.

Where a city grants to a railroad rights of user of parts of four streets for tracks, by four separate and distinct paragraphs, each granting a right and privilege, and immediately after the last grant it is provided, "said right and privilege to be enjoyed and exercised until," etc., limiting the same in respect of time, the limitation will be construed to apply only to the last of the four grants. *Quincy* v. *Chicago, B. & Q. R. Co.*, 94 *Ill.* 537.

A permission to a company to occupy a public street with its tracks must plainly appear, and not be left to be derived by doubtful implication, from the generality of the language used, which does not unmistakably manifest the intention to give such permission. *Chicago, D. & V. R. Co.* v. *Chicago*, 121 *Ill.* 176, 11 *N. E. Rep.* 907, 9 *West. Rep.* 493; *affirming* 20 *Ill. App.* 665. —QUOTING Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 515; St. Louis, V. & T. H. R. Co. *v.* Haller, 82 Ill. 208.

A city ordinance, after a careful mention and specification of what streets might be used by a company in which to lay down its tracks and side tracks, contained a general clause giving authority also to lay down all such tracks "as may be necessary to the convenient use of any depot grounds said company may now own or hereafter acquire in the vicinity of or adjoining said line of road," without the specific mention of any streets. *Held*, that such general clause gave no authority in respect to the use of streets additional to those which had been specifically named in the preceding part of the ordinance. *Chicago, D. & V. R. Co.* v. *Chicago*, 121 *Ill.* 176, 11 *N. E. Rep.* 907, 9 *West. Rep.* 493; *affirming* 20 *Ill. App.* 665.

An ordinance or resolution of a city appropriated certain streets to a company, "so far as the said company may require to appropriate the same in crossing them, in the construction of their railroad track, switches, turntables, etc., and other machinery and fixtures to be used or employed by them in operating their said road, subject, however, to this proviso: that the same shall be occupied with as little detriment and inconvenience to the public as possible," and requiring the crossings to be so graded as to make any embankment that should be made no obstruction. *Held*, that this was but a provision for a joint use with the public having occasion to use the streets by other modes of travel. *St. Louis, A. & T. H. R. Co.* v. *Belleville*, 32 *Am. & Eng. R. Cas.* 278, 122 *Ill.* 376, 12 *N. E. Rep.* 680, 10 *West. Rep.* 605.—QUOTED IN Rice *v.* Chicago, B. & N. R. Co., 30 Ill. App. 481.

In an ordinance of a city authorizing defendant company to construct its road "on, over, and along" certain alleys, and "along" the alley in question, the word "along" is used synonymously with "on" and "over," and not in the sense of "by the side of." *Heath* v. *Des Moines & St. L. R. Co.*, 10 *Am. & Eng. R. Cas.* 313, 61 *Iowa* 11, 15 *N. W. Rep.* 573.

84. Validity of ordinances, and how questioned.—Courts cannot, at the suit of a private party, no fraud being imputed to the municipal authorities, in a collateral proceeding, ignore or modify an ordinance granting the use of a street for ordinary railroad purposes on the ground of deception connected with its original adoption. *Denver & S. F. R. Co.* v. *Domke*, 36 *Am. & Eng. R. Cas.* 155, 11 *Colo.* 247, 17 *Pac. Rep.* 777.

The only authority that can call in question the right of a company to construct its track across or along a street or highway within an incorporated city or village is such city or village. The county authorities cannot even question the validity of a city or village ordinance for the construction of a railroad within such city or village. *Cook County* v. *Great Western R. Co.*, 119 *Ill.* 218, 10 *N. E. Rep.* 564.

The municipal authorities of the city of Chicago passed an ordinance permitting a certain company to construct one or more tracks, commencing at the southern line of the city "at some point within 100 feet of the west line of Stewart avenue, and thence northwardly * * * parallel to said avenue to its intersection with Grove street; thence to such terminus as it may establish between the east bank of the southern branch of the Chicago river and the west side of State street, and between Sixteenth street and the south line of Van Buren street." *Held*, that such ordinance was void for being too indefinite. *Hickey* v. *Chicago &*

W. I. R. Co., 6 *Ill. App.* 172. — QUOTING Davis *v.* Mayor, 14 N. Y. 506.

A company which has, by its charter, general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Atlantic & P. R. Co.* v. *St. Louis*, 66 *Mo.* 228; *reversing* 3 *Mo. App.* 315.

By New York Act of April 6, 1832, defendant company was authorized to extend its road along Fourth avenue to Fourteenth street in the city of New York, and through such other streets as the mayor, from time to time, might permit. *Held*, that this did not authorize a subsequent ordinance of the common council which authorized the company to lay its track in various streets extending a long distance below Fourteenth street. *People* v. *New York & H. R. Co.*, 45 *Barb.* (*N. Y.*) 73.

85. Conclusiveness—Enlargement of privilege.* — The passage by a city of an ordinance granting permission to a company to lay down tracks in certain streets, which is accepted, with a resolution of such company that the proper construction of the ordinance is that the permission granted thereby is to operate in the city cars with animal power only, and that the company shall not connect with any other railroad on which other power is used, does not create a contract, between the people represented by the city and the company, to abandon for all time to come the use of steam as a motive power within the city; but such company may afterwards, on permission of the city, use steam. Such ordinance and its acceptance confer a limited right or privilege, but do not prohibit the acquisition of a more enlarged one in the future. *McCartney* v. *Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

* See also *ante*, 77.

An ordinance of a city, granting a right of way for a railroad along a street, but restricting the company to the use of the north side of the street, is not prohibitory in such a sense that its repeal is necessary to the validity of a subsequent resolution giving the company a right to use the south side of the street for another track. *Merchants' Union Barb Wire Co.* v. *Chicago, B. & Q. R. Co.*, 70 *Iowa* 105, 28 *N. W. Rep.* 494.

An act of the legislature authorized plaintiff company to build a lateral road in the city of Baltimore, upon obtaining the consent of the city government. The city authorities passed an ordinance consenting to the construction of the road, but retained the right to regulate its construction and use. *Held*, that the right to consent or object to the road carried with it the right to impose terms upon the company; and the company was bound to conform to the regulations of the city. *Northern C. R. Co.* v. *Mayor, etc., of Baltimore*, 21 *Md.* 93.

86. Resolution sufficient — Ordinance unnecessary.—Where a city, under a resolution adopted, conveys a street absolutely to a railway, the resolution and deed will give to the company the right to construct, maintain, and operate its tracks upon the street, even when its charter provides that it may carry these powers into effect by ordinances. *Quincy* v. *Chicago, B. & Q. R. Co.*, 92 *Ill.* 21.

Under Iowa Code, § 464, a city may grant to a company a right of way in its streets, by resolution or vote duly recorded. An ordinance is not necessary. *Merchants' Union Barb Wire Co.* v. *Chicago, B. & Q. R. Co.*, 70 *Iowa* 105, 28 *N. W. Rep.* 494.

d. What Rights Pass. Conditions.

87. What the grant carries with it, generally.* — In Illinois an incorporated municipality owns the land in its streets, and when it authorizes a company to construct and operate a railroad in a street, the company acquires the right to build and operate such road without interference by the public or individuals, subject, however,

* What grant of right to lay track in streets carries with it. Use of street as depot, see note, 46 AM. & ENG. R. CAS. 111.

Where railroad will be deemed as having the implied authority to tunnel under a street from grant and from necessity, see 32 AM. & ENG. R. CAS. 262, *abstr.*

to the liability to respond to the owners of land abutting on the streets for such injuries sustained by them in consequence thereof as are to be deemed legal elements of damage. *Chicago & W. I. R. Co.* v. *Berg*, 10 *Ill. App.* 607.—QUOTING Chicago & E. I. R. Co. *v.* Hall, 8 Ill. App. 621.—FOLLOWED IN Chicago & W. I. R. Co. *v.* George, 10 Ill. App. 646; Chicago & W. I. R. Co. *v.* Phillips, 10 Ill. App. 648.

A grant to a company of power to construct its road upon or across a highway which the route of its road may intersect, the corporation to restore the road or highway to its former state, or so near that state as not to impair its usefulness, is equivalent to allowing a joint use of the highway by the company and the public. *Pittsburg, Ft. W. & C. R. Co.* v. *Reich*, 101 *Ill.* 157.

A city, being desirous of having the location of a railroad changed in certain parts of the city, agreed to furnish a roadbed if the company would make the change. Accordingly the city condemned a strip of 110 feet, described as "for railroad and sewer purposes." After constructing a roadbed thereon the city conveyed it to the company, describing it as the "roadbed, bridges, and right of way." *Held*, that the company took nothing but the roadbed. *Long* v. *Louisville & N. R. Co.*, (*Ky.*) 14 *S. W. Rep.* 78.

88. The easement acquired. — A clause in a grant excepting the sidewalk of a street from use by the company for tracks or otherwise, and requiring the company so to grade the streets in which the privileges are granted, and so to lay its tracks thereon, that carriages, wagons, drays, and vehicles of all kinds may conveniently cross the same, is conclusive evidence that a conveyance or grant of the fee in the street was not intended, but simply of a right or privilege for the use of that part of the street occupied by the company for tracks. *Chicago, B. & Q. R. Co.* v. *Quincy*, 139 *Ill.* 355, 28 *N. E. Rep.* 1069.

Where a company lays its tracks on a street, under authority from the town, it acquires a perpetual easement in the street, consisting of the right to maintain, use, and enjoy its railroad free from hindrance or molestation, save such as is incident to the proper and ordinary use of the street by the public; and such easement is property, and as much protected from unlawful invasion as any other property. *Chicago & W. I. R. Co.* v. *Chicago, St. L. & P. R. Co.*, 15 *Ill. App.* 587.

89. Rule of strict construction in favor of public.* — A grant to a company of special privileges in the use of public streets is to be construed strictly against the grantee and liberally in favor of the public; and nothing, therefore, can be implied in favor of the grantee beyond the express letter of the grant, unless it shall be indispensable to give effect to the grant. *Chicago, B. & Q. R. Co.* v. *Quincy*, 139 *Ill.* 355, 28 *N. E. Rep.* 1069.

A grant to a corporation by a county court, under Oreg. Corporation Act, § 26, of the use of a street for the purpose of constructing and operating a railway thereon, is a grant of a franchise, and the order or agreement making the same must be construed most strongly against the corporation and in favor of the public, so that nothing shall pass thereby but what clearly appears to have been intended. *Burns* v. *Multnomah R. Co.*, 10 *Am. & Eng. R. Cas.* 289, 8 *Sawy.* (*U. S.*) 543, 15 *Fed. Rep.* 177.

A grant of a right of way fifty feet wide for a railroad, through a small strip of land in a densely populated city, will only convey so much ground as is necessary for the line of the road, and will not carry by implication the right to erect, within such line, depots, car-houses, or other structures for the convenience or business of the road. *Mayor, etc., of Allegheny* v. *Ohio & P. R. Co.*, 26 *Pa. St.* 355.—APPLIED AND QUOTED IN Pennsylvania S. V. R. Co. *v.* Philadelphia & R. R. Co., 157 Pa. St. 42. REVIEWED IN Junction Pass. R. Co. *v.* Williamsport Pass. R. Co., 154 Pa. St. 116.

Such grant does not confer on the company the right to permit cars and locomotives to remain on the tracks within the fifty feet for a longer time than is necessary to receive and discharge freight and passengers. *Mayor, etc., of Allegheny* v. *Ohio & P. R. Co.*, 26 *Pa. St.* 355.

90. Rights and powers remaining in city or town.—A grant by a city, under legislative authority, to a company, of "the right and privilege of using that portion" of a street described, "for the use and construction thereon of as many railroad tracks, side tracks, switches, and frogs as may be necessary," is not a grant of the street in fee or otherwise, but simply of the

*See also *ante*, 72.

right to use the street, leaving in the grantor the title of the street, and the right of every other use which may be enjoyed consistently with the right granted. *Chicago, B. & Q. R. Co.* v. *Quincy*, 139 *Ill.* 355, 28 *N. E. Rep.* 1069.

The grant by a city to a company of the right to lay and use its tracks in a public street cannot deprive the city of its right to improve the parts of the street so used by the company, as well as of other parts, and its judgment of the necessity and character of the improvements, in the absence of evidence of bad faith, must be conclusive. Grants of the use of public streets are subject, by implication, to the exercise of such power by the city. *Chicago, B. & Q. R. Co.* v. *Quincy*, 139 *Ill.* 355, 28 *N. E. Rep.* 1069.

A company has no authority over that portion of any street upon which its switches or turnouts do not lie, but the city's dominion over it remains unchanged and unimpaired, and is as full and complete for all purposes as it was over the entire street before the privilege of constructing a road upon it was granted. If, therefore, the city should choose to grant to another company the privilege of laying a track upon the same street, the company already operating a road there would have no right to object, so long as the free and unobstructed use of its own track was not interfered with; and the new grant may, with the consent of the legislature, be made. *Gulf City St. R. Co.* v. *Galveston City R. Co.*, 65 *Tex.* 502.

91. Conditions, generally.—A provision in a city ordinance that the permission to construct a railroad within the city is upon condition that the company shall permit other companies, not exceeding two in number, which have not then the right of entrance into the city, to use the main track of the road jointly with such road so authorized, does not render the ordinance invalid, as it confers upon the company no power not given it by law, nor does it deprive the city of any power whatever. *Chicago & W. I. R. Co.* v. *Dunbar*, 5 *Am. & Eng. R. Cas.* 253, 100 *Ill.* 110.

Where a company has the right to occupy the streets of a city with its track, without consent by the municipal authorities, such city cannot, by an ordinance granting the right of way, impose conditions upon the use of the street which shall be binding upon the company, and create an obligation for the performance of the conditions. *Council Bluffs* v. *Kansas City, St. J. & C. B. R. Co.*, 45 *Iowa* 338.

Under the general statutes of Kansas, railroad companies cannot construct their roads upon the streets of an incorporated city without the consent of the corporate authorities. *Held*, that this statute does not confine the city authorities to a simple permission to build or a denial; but authorizes them to prescribe conditions on which their consent will be given, and so far as they are lawful and proper, and accepted, they will be binding. *Pacific R. Co.* v. *Leavenworth*, 1 *Dill.* (*U. S.*) 393.

92. —— as to time of completion of road. — A city granted a license to a company to construct its road across streets, upon condition that the tracks should be constructed within one year, but the company was prevented from completing its track within the year by injunctions, and also by the police officers of the city, acting under the direction of the mayor. *Held*, that the right of the company was not lost, and the city might be enjoined from interfering with the laying of tracks after the expiration of the year. *Chicago* v. *Chicago & W. I. R. Co.*, 105 *Ill.* 73.

A city ordinance gave plaintiff company an option of routes, but required it to complete its road within two years from the passage of the ordinance. Plaintiff proceeded at once, executed contracts, made large expenditures, and incurred large liabilities. *Held*, that the time mentioned was not of the essence of the contract, because the city could derive no benefit from its performance, nor sustain any injury from its breach. *Pittsburgh, Ft. W. & C. R. Co.* v. *Pittsburgh*, 1 *Pittsb.* (*Pa.*) 392.—QUOTING *Com. v.* Erie & N. E. R. Co., 27 Pa. St. 354.

Although an ordinance of a city granting a company a right of way over a certain street may impose a condition that the railway must be constructed within a certain time, yet the city is estopped to urge that the grant is void by reason of a failure to comply with such conditions, when the ordinance has never been repealed and the city has permitted the company to operate its road continuously for several years. *Seattle* v. *Columbia & P. S. R. Co.*, 6 *Wash.* 379, 33 *Pac. Rep.* 1048.

93. —— as to bridges, fences, and crossings.* — Where a city ordinance

*Conditions imposed by municipalities in

granted to a company the right to build into the city on condition that it build suitable walls or fences to protect persons and property, such walls or fences to be of such materials and of such height as the council might direct, the duty to fence is absolute, and the company cannot shield itself from a failure to do so by the plea that the council had not directed the character of the work. *Hayes* v. *Michigan C. R. Co.*, 15 *Am. & Eng. R. Cas.* 394, 111 *U. S.* 228, 4 *Sup. Ct. Rep.* 369.

A statute requiring a railroad company to maintain so much of a highway as is within the limits of its road, where it is crossed at grade, at the expense of the company is constitutional. The power of the legislature to impose such burdens for the general safety is a proper exercise of its police power. *Boston & M. R. Co.* v. *York County Com'rs*, 32 *Am. & Eng. R. Cas.* 271, 79 *Me.* 386, 10 *Atl. Rep.* 113.

As to the right generally to require companies to construct crossings, see *Illinois C. R. Co.* v. *Bloomington*, 76 *Ill.* 447. *Albany Northern R. Co.* v. *Brownell*, 24 *N. Y.* 345. —OVERRULING Miller *v.* New York & E. R. Co., 21 Barb. (N. Y.) 513.

94. —— for use of tracks by other roads.—A city ordinance granting a right of way to one company upon condition that it allow other companies to use its tracks within the city limits does not apply to the use of tracks laid since the ordinance was passed, and on land not granted by the ordinance. *Chicago, St. P. & K. C. R. Co.* v. *Kansas City, St. J. & C. B. R. Co.*, 52 *Fed. Rep.* 178.—APPLYING Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 29 Fed. Rep. 546.

95. Provisions for forfeiture. — A city ordinance granting a right of way over streets provided that the grant should be null and void if the company should ever remove its shops from the city. *Held*, that this was a condition subsequent, in which no one but the company and the city had any legal interest, and a removal of the shops would not *ipso facto* render the ordinance null and void, nor entitle an abutting lot owner to maintain an action against the company for unlawfully occupying the street. *Knight* v. *Kansas City, St. J. & C. B. R. Co.*, 70 *Mo.* 231.—FOLLOWED IN Hovelman *v.* Kansas City Horse R. Co., 20 Am. & Eng. R. Cas. 17, 79 Mo. 632.

96. Imposing liability for injury to property.—Where an ordinance of a town, authorizing a company to build its road on a street, provides that the company shall be bound to pay all damages that may accrue to property owners on such street by reason of the construction of said railroad, an action will lie against the company in favor of any one whose property is injured, either by depreciation in value or loss of business sustained during the building of the road and after its construction. *St. Louis, V. & T. H. R. Co.* v. *Haller*, 82 *Ill.* 208.— FOLLOWING St. Louis, V. & T. H. R. Co. *v.* Capps, 67 Ill. 607.—QUOTED IN Chicago, D. & V. R. Co. *v.* Chicago, 121 Ill. 176, 11 N. E. Rep. 907, 9 West. Rep. 493.

In such case the parties will be governed and their rights measured by the ordinance, without reference to the constitutional provision in regard to compensation for property taken or damaged for corporate purposes, or to the common law on the subject. *St. Louis, V. & T. H. R. Co.* v. *Haller*, 82 *Ill.* 208.—REVIEWED IN Peoria G. L. & C. Co. *v.* Peoria Terminal R. Co., 146 Ill. 372.

A company accepted a city ordinance giving it permission to lay its tracks along a street on condition that it pay the city for the erection of a viaduct over the street, which would be made necessary by the road, and should indemnify the city from all legal damages, judgments, decrees, and costs and expenses of the same which it might suffer, or which might be recovered or obtained against it for or by reason of the granting of such privileges and authority, or resulting from the passage of the ordinance, or any matter or thing connected therewith. The city built the viaduct, and the owner of lots recovered $10,000 damages against the city for injury to his lots by destroying the means of ingress and egress to and from them. *Held*, that the company was liable to the city for the amount so recovered. *Chicago, B. & Q. R. Co.* v. *Chicago*, 134 *Ill.* 323, 25 *N. E. Rep.* 514; *affirming* 35 *Ill. App.* 206.

97. Transfer of the right.—Where a city has, by ordinance, granted to the lessor the privilege of laying down a track along one of its streets, that he might connect his elevator with a railroad, such grant being made specially to the lessor, the leasing of his elevator to a third person will not pass to the lessee any of the rights secured to the

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granting to company right of way in streets, see note, 10 L. R. A. 771.

lessor under the ordinance. *People ex rel.* v. *Chicago & N. W. R. Co.*, 57 *Ill.* 436, 10 *Am. Ry. Rep.* 457.

Where a city grants to a railroad the right to use certain parts of its streets for tracks, the grant containing no clause restricting the use of the streets to the grantee, the right to such use of the streets may be transferred to another company which is authorized by law to acquire and succeed to all the property, etc., of the grantee. *Quincy* v. *Chicago, B. & Q. R. Co.*, 94 *Ill.* 537.

c. Exclusive Privileges.

98. Grants of such privileges are illegal, and ultra vires the city.*— The power to grant to a company the exclusive use of streets is in the nature of a monopoly, and must be derived either from some provision in the municipal charter, from the laws of the state under which the company is organized, or from the state Constitution. *Birmingham & P. M. St. R. Co.* v. *Birmingham St. R. Co.*, 79 *Ala.* 465.

The provision of Ala. Const. of 1875, art. 14, § 24, that "no street passenger railway shall be constructed within the limits of any city or town, without the consent of its local authorities," is merely prohibitory in its nature, and does not confer any exclusive privilege to use the streets. *Birmingham & P. M. St. R. Co.* v. *Birmingham St. R. Co.*, 79 *Ala.* 465.

The charter of the city of Birmingham, granted March 1, 1881, has no direct provision on the subject of street railways. It contains a provision authorizing the city authorities "to regulate and control the running of cars or locomotives upon or across the streets, avenues, or alleys of said city, and to regulate and control the speed of such cars, engines, or trains, within the corporate limits of the city." *Held*, that, even if this provision relates to street railways, it confers no right on the city authorities to grant an exclusive privilege to use the streets without limit as to duration. *Birmingham & P. M. St. R. Co.* v. *Birmingham St. R. Co.*, 79 *Ala.* 465.

Ala. Code of 1876, § 1921, under which the company was organized, provides that it shall have power to construct, maintain, and use a street railway "upon the streets, and upon the line, and between the *termini* named, * * * upon such terms and in such manner as may be authorized by an ordinance or other lawful act of the corporate authorities. And such railroad company may contract with the city or town therefor, and the contract may be altered when both parties agree to the change." *Held*, that the power to contract thus conferred does not extend to an exclusive, perpetual privilege. *Birmingham & P. M. St. R. Co.* v. *Birmingham St. R. Co.*, 79 *Ala.* 465.

The use of the streets of a city, whether for vehicles drawn by animals, for riding upon animals, for footmen, or for the passage of cars, must be for the public. No corporation or individual can acquire an exclusive right to their use or one for merely private purposes. *Chicago D. & C. Co.* v. *Garrity*, 115 *Ill.* 155, 3 *N. E. Rep.* 448.—QUOTED IN St. Louis, A. & T. H. R. Co. *v.* Belleville, 20 Ill. App. 580.

A railroad company, under authority to condemn property for its right of way, cannot condemn property for a street of a city; neither can a city, under authority to condemn property for streets, condemn property for a railroad track. In this respect a city will not be permitted to do indirectly what it may not do directly. The law looks to the substance rather than to the form. A city may not first condemn property for a street and then afterwards allow railroad tracks to be laid in it to the extent of excluding all other uses. *Ligare* v. *Chicago*, 139 *Ill.* 46, 28 *N. E. Rep.* 934.—FOLLOWING Chicago & N. W. R. Co. *v.* Galt, 133 Ill. 657.

An ordinance of a city for the widening of a part of a street, which gives the use of all the old street and a part of the new street added by the widening exclusively to steam-railroad companies for laying and operating their tracks and for the filling up of a public waterway, is illegal and void, and cannot form the basis for the condemnation of land for the purposes intended. *Ligare* v. *Chicago*, 139 *Ill.* 46, 28 *N. E. Rep.* 934.

City authorities may, under legislative authority, grant the use of a public street to a company for laying tracks thereon and using the same by operating its cars and trains over the same, yet it is not competent for a city, under legislative authority merely authorizing tracks to be laid in streets, to grant the exclusive use of a street to a company. It is not material that the public is

* Grants of exclusive privileges by municipal corporations, see notes, 36 AM. & ENG. R. CAS. 116; 9 *Id.* 595.

not expressly deprived of the use of a street upon which railroad tracks are laid, but the result and effect of the grant will control in that regard. *Ligare* v. *Chicago*, 139 *Ill.* 46, 28 *N. E. Rep.* 934.—FOLLOWING AND QUOTING Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516. QUOTING Stack *v.* East St. Louis, 85 Ill. 377.

Under proper authority, a company has a right to use streets in common with the public, but this use must be such as not unreasonably to obstruct the public travel thereon; and an exclusive use, thereby depriving the streets of their character as public highways, cannot be granted. *St. Louis, A. & T. H. R. Co.* v. *Belleville*, 20 *Ill. App.* 580.—QUOTING Stack *v.* East St. Louis, 85 Ill. 377; Pittsburg, Ft. W. & C. R. Co. *v.* Reich, 101 Ill. 157; Chicago D. & C. Co. *v.* Garrity, 115 Ill. 155.

The city of St. Louis cannot confer on a railroad corporation the exclusive right to the use of one of its streets for the company's business. *St. Louis Transfer R. Co.* v. *St. Louis M. B. T. R. Co.*, 111 *Mo.* 666, 20 *S. W. Rep.* 319.

The common council of a city, under its power to pass ordinances to regulate or prevent the use of streets for any other purposes than public travel, has no power to confer upon a company, by ordinance, a right to occupy exclusively twelve feet of a fifteen-foot sidewalk by the erection thereon of a freight platform and roof. *State* (*Traphagen, Pros.*) v. *Jersey City*, 28 *Am. & Eng. Corp. Cas.* 182, 52 *N. J. L.* 65, 18 *Atl. Rep.* 586.—REVIEWING State (Montgomery, Pros.) *v.* Trenton, 36 N. J. L. 79.

Ohio Rev. St. § 3283, does not confer upon a municipal corporation authority to agree with a company for the exclusive occupation of its streets by the latter. *Cleveland, C., C. & St. L. R. Co.* v. *Cincinnati*, 1 *Ohio Prob.* 269.

99. What grants do not convey exclusive privileges. — A decree was entered by consent condemning land for street purposes, which provided that the company "shall have the right to keep and maintain its present tracks and switches upon said land, and shall have the right to construct such other tracks, switches, and turnouts upon said land and across said street, when opened, as it may deem necessary for the transaction of its business." *Held*, that such reservation is not the grant of an exclusive privilege, but only the usual permission to occupy the street with its tracks. *Kansas City, St. J. & C. B. R. Co.* v. *St. Joseph Terminal R. Co.*, 97 *Mo.* 457, 3 *L. R. A.* 240, 10 *S. W. Rep.* 826.

Under W. Va. Code 1887, ch. 54, § 50, a company, with the assent of the municipal authorities, may construct and operate its railroad along a public street of a city, in a cut or excavation below the common level of the remaining portion of the street, in such manner as will appropriate a portion of the street to the exclusive use of the company, provided such excavation does not occupy the entire street or such considerable portion thereof as would substantially prevent the use of the street by the general public, and provided, further, that it does not unnecessarily impair the usefulness of the street as a highway for the general public. *Arbens* v. *Wheeling & H. R. Co.*, 40 *Am. & Eng. R. Cas.* 284, 33 *W. Va.* 1, 5 *L. R. A.* 371, 10 *S. E. Rep.* 14.—DISTINGUISHING Stevens *v.* Erie R. Co., 21 N. J. Eq. 259.—See also *Yates* v. *West Grafton*, 34 *W. Va.* 783, 12 *S. E. Rep.* 1075.

100. Grant to be construed as not exclusive. — When a "right of way" on the public streets is granted by a municipality to a railroad corporation, such grant cannot be construed to mean an absolute and unrestricted right of way, but it is to be understood that the street on which a right of way is thus secured must still be subject to the proper and ordinary public uses as a public highway; and though the license by which a second company is permitted to occupy the same street contains a provision "that the tracks of said company shall be so laid as not to injure or destroy any tracks now laid by any other corporation, and that the location of said railway shall not in any manner interfere with any unforfeited rights of way herebefore granted by the municipal assembly by proper ordinance," said first-named company cannot prevent the second company from occupying with it the same street and crossing its tracks. *St. Louis Transfer R. Co.* v. *St. Louis M. B. T. R. Co.*, 55 *Am. & Eng. R. Cas.* 17, 111 *Mo.* 666, 20 *S. W. Rep.* 319.

101. Use of tracks by other roads. —Under a contract with a company by a city, in accordance with which it permits the company to construct a track through its streets, on condition that the company permit any other company to use the track on paying a *pro rata* share of the cost of con-

struction, without placing any limit on the time when other roads may come in, or their number, a delay in making application of nine years after its completion, during which two other roads have come in, is no ground for excluding an applicant where it is proved that the line will not be overburdened by its entrance, or that the parties or court have power to prevent such result. *Louisville & N. R. Co.* v. *Mississippi & T. R. Co.*, 92 *Tenn.* 681, 22 *S. W. Rep.* 920.

Under such contract no other company, upon entering, is subordinate to the original builder. *Louisville & N. R. Co.* v. *Mississippi & T. R. Co.*, 92 *Tenn.* 681, 22 *S. W. Rep.* 920.

And the company is estopped from excluding other companies on the ground that it purchased or condemned private lands for the use of the road for about one seventh of the way. *Louisville & N. R. Co.* v. *Mississippi & T. R. Co.*, 92 *Tenn.* 681, 22 *S. W. Rep.* 920.

And the company cannot exclude another company from using the track on the ground that the applicant, by the terms of its charter, can use only animal power, when such applicant has for years used steam power, and the city sanctions such use by joining in the petition and otherwise. *Louisville & N. R. Co.* v. *Mississippi & T. R. Co.*, 92 *Tenn.* 681, 22 *S. W. Rep.* 920.

Neither can the company exclude a foreign company seeking to obtain such use, upon compliance by the latter with the provisions of the contract. *Louisville & N. R. Co.* v. *Mississippi & T. R. Co.*, 92 *Tenn.* 681, 22 *S. W. Rep.* 920.

In such case a decree that another company, upon being allowed the use of a track through the city, shall pay one fourth of the operating expenses so long as it, the original road, and two other lines which had previously entered on the use of the track shall continue to use them, is proper. *Louisville & N. R. Co.* v. *Mississippi & T. R. Co.*, 92 *Tenn.* 681, 22 *S. W. Rep.* 920.

f. Withdrawal of Consent. Revocation

102. Ordinance may be revoked before acceptance.—Where a municipality passes an ordinance granting a right of way through its streets, it has a right to revoke the same at any time before it has been accepted by the company, and before the company has acquired any vested rights thereunder by the expenditure of money on the faith of such ordinance. *East St. Louis Union R. Co.* v. *East St. Louis*, 39 *Ill. App.* 398.

103. After consent acted on and money expended, city cannot revoke.—An order of the board of trustees of a municipality, granting to a company the right to lay and maintain a side track upon certain streets, but containing no conditions as to the time within which the work is to be commenced or completed, is not a mere license revocable at the pleasure of the board. After the company has acted upon the order and expended money in the construction of the side track, the board cannot rescind or recall the privileges it had granted, unless the company fails to comply with the terms or conditions of the grant. *Arcata* v. *Arcata & M. R. R. Co.*, 92 *Cal.* 639, 28 *Pac. Rep.* 676.

Where a railroad is authorized by statute to occupy streets upon obtaining the consent of the municipal authorities, the company's franchise is complete when such consent is given, and such consent cannot be subsequently withdrawn by an ordinance so as to require further consent or additional conditions. *Brooklyn Heights R. Co.* v. *Brooklyn*, 46 *N. Y. S. R.* 299, 18 *N. Y. Supp.* 876.

City authorities, after having granted consent to a company to use a street, cannot, by revoking the city ordinance granting such authority, deprive the company of its right to use such street if, prior to the repeal, the company has made expenditures on the strength of the consent. *Rio Grande R. Co.* v. *Brownsville*, 45 *Tex.* 88, 13 *Am. Ry. Rep.* 223.

104. Privilege used for many years without objection not to be withdrawn.—Where a company is authorized by its charter to build its track through any street or highway, a grant to it by a city ordinance of the right of way through certain streets is the grant of a franchise, notwithstanding the privileges are not conferred directly by legislative enactment, since the municipality will be regarded as a political agent for the state. *Port of Mobile* v. *Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106.

Where, in addition to such privilege, the company is authorized to lay necessary sidings and turnouts in such manner as it

may deem expedient and necessary for its business and necessities, and the company has laid its track and has for many years, without hindrance or opposition by the municipal authorities, loaded and unloaded its cars at the adjacent streets and warehouses, it cannot be deprived by the city of the right so to load and unload in future, as this right will be construed as included by necessary implication in the grant of the privilege of laying sidings, etc. *Port of Mobile* v. *Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106. —FOLLOWED IN Montgomery City Council *v.* Louisville & N. R. Co., 84 Ala. 127, 4 So. Rep. 626.

105. If ordinance reserves no tolls, subsequent ordinance cannot impose them.—The grant to a company of the right to lay and maintain its track over a bridge belonging to the city, and to use and operate the same, in an ordinance which contains no reservation respecting tolls or other charges, is within municipal authority; and the city cannot, by a subsequent ordinance, impose such charges. If the ordinance grants a mere license revocable at the pleasure of the city, still tolls cannot be recovered under the latter ordinance until actual revocation of the license has been made. Such a grant is not impaired by the fact that the company has increased its use of the bridge by the construction of another line whose business passes over it. The company has the right of use for all of its business. *Des Moines* v. *Chicago, R. I. & P. R. Co.*, 41 *Iowa* 569.—DISTINGUISHED IN Sioux City St. R. Co. *v.* Sioux City, 46 Am. & Eng. R. Cas. 169, 138 U. S. 98; Sioux City St. R. Co. *v.* Sioux City, 78 Iowa 742, 34 N. W. Rep. 498.

4. *Under Condemnation Proceedings.*

a. Necessity of and Right to Institute.

106. Necessity of condemnation proceedings or consent of abutters. —A decree enjoining a city from interfering with the construction of a railway through certain streets cannot be construed to prevent the city from the exercise of any legal remedies to prevent laying a track across school lots without acquiring the right of way over the same. *Chicago* v. *Chicago & W. I. R. Co.*, 105 *Ill.* 73.

Where a railroad charter provides that in all cases where the owner of lands necessary for the use and construction of the road "shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor," it shall be lawful for the corporation to enter and take possession of and use such lands, and that the owner shall make application to a justice of the peace for an appraisement of damages, and that there shall be no recovery by such owner unless such an application be made by him within two years, such provisions will be strictly construed as against the owner of the land taken; and such limitation will not apply as against the owner of a lot abutting upon a public street of a city or town, upon his side of which street such company has maintained its track for fifteen years, upon a level with the grade of the street, with the authority of such city but without the consent of the owner of such lot, without having demanded of him a relinquishment of his title to the street and without having offered him a fair compensation; and, against the company so occupying the street, such adjoining proprietor may have the usual remedies for the protection of rights in real property. *Terre Haute & I. R. Co.* v. *Scott*, 3 *Am. & Eng. R. Cas.* 208, 74 *Ind.* 29.

When the closing up of one end of a street or alley leaves to the owner of property bordering on the street or alley no convenient means of access to other streets to which he has theretofore had convenient access, he is entitled to his action for damages; or the corporation, whether municipal or private, seeking to appropriate the street to its own use, must resort to the writ of *ad quod damnum*, and under it compensate the owner for the injury sustained. The city cannot, either for its own use or for the use of a private corporation, appropriate the street to the injury of the property holder without making just compensation. *Gargan* v. *Louisville, N. A. & C. R. Co.*, 89 *Ky.* 212, 12 *S. W. Rep.* 259.—DISAPPROVING Smith *v.* Boston, 7 Cush. (Mass.) 255. FOLLOWING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289; Transylvania University *v.* Lexington, 3 B. Mon. (Ky.) 27. REVIEWING Fulton *v.* Short R. R. Transfer Co., 85 Ky. 640.

Where a company occupies a public street without proceedings for its condemnation, its occupancy is a continuous wrong to abutting owners, who may recover the amount of damages accruing year by year,

Grand Rapids & I. R. Co. v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich.* 393, 11 *N. W. Rep.* 212.

The public easement of a common street or highway does not include the right to construct and operate a railroad upon such street or highway, even where the charter, in force when the street was dedicated, authorizes the company to construct its road upon and along, across, under, or over any public or private highway, road, street, plank road, or railroad, if the same shall be necessary. *Gray* v. *First Div. St. P. & P. R. Co.*, 13 *Minn.* 315 (*Gil.* 289). — QUOTING Williams *v.* New York C. R. Co., 16 N. Y. 109.—FOLLOWED IN Molitor *v.* First. Div. St. P. & P. R. Co., 14 Minn. 285 (Gil. 212); Harrington *v.* St. Paul & S. C. R. Co., 17 Minn. 215 (Gil. 188); Adams *v.* Hastings & D. R. Co., 18 Minn. 260 (Gil. 236).

Appropriating a public street to use for an ordinary commercial railroad is not a proper street use. *Adams* v. *Chicago, B. & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 7, 39 *Minn.* 286, 39 *N. W. Rep.* 629, 1 *L. R. A.* 493, 38 *Alb. L. J.* 388.

By N. Y. Act of 1873, ch. 531, "to open, lay out, and improve Gravesend avenue, in the county of Kings, and to authorize the construction of a railroad thereon," the fee of the land appropriated for the avenue was not taken, but only the use. Section 13, authorizing a company to construct and operate its road upon said avenue, simply gave legislative consent to such use; it conferred no power to occupy the street for that purpose without the consent of the proprietors of the soil or a condemnation of the land by proceedings under the General Railroad Act. *Washington Cemetery* v. *Prospect Park & C. I. R. Co.*, 68 *N. Y.* 591, 4 *Abb. N. Cas.* 15; *affirming* 7 *Hun* 655.—FOLLOWING People *v.* Kerr, 27 N. Y. 188.—APPLIED IN Murdock *v.* Prospect Park & C. I. R. Co., 73 N. Y. 579.

It seems that in all cases where parties are obliged to appeal to the legislature for a grant of the right or power to construct a railway or other improved mode of locomotion, a new assessment of damages should be provided for and made. *People* v. *Law*, 34 *Barb.* (*N. Y.*) 494, 22 *How. Pr.* 109.

Where this has been done, and provision is made in the company's charter for obtaining title in case any person shall own any private right or interest in the streets or avenues over or upon which the railroad is to be laid, and the company has accepted the grant with that condition, it must be deemed to have conceded that the nature of the improvement called for a new assessment of damages, or to have stipulated to make the same, in consideration of the benefits acquired by it under the grant. *People* v. *Law*, 34 *Barb.* (*N. Y.*) 494, 22 *How. Pr.* 109.

If the company neglects or refuses to make or provide for such compensation, an injunction will be granted to prevent such an appropriation until compensation is provided; but such injunction cannot issue in the name of the people. *People* v. *Law*, 34 *Barb.* (*N. Y.*) 494, 22 *How. Pr.* 109.

The location of a street or alley on a borough plan, with the view of being regularly opened thereafter, of itself gives to a company no power to take and occupy the same in the construction of its roadway without compensation to the owner of the land. *Quigley* v. *Pennsylvania S. V. R. Co.*, 121 *Pa. St.* 35, 15 *Atl. Rep.* 478.

For injuries done to the owner by such taking and occupation of an unopened street or alley, even though no excavation or embankment be made in the construction of the roadway, jurisdiction is given for the assessment of damages by the report of viewers to be appointed under the statute. *Quigley* v. *Pennsylvania S. V. R. Co.*, 121 *Pa. St.* 35, 15 *Atl. Rep.* 478.

107. Condemnation proceedings—When unnecessary. — Notwithstanding the constitutional provision that private property shall not be damaged for public use without just compensation, a company acquiring the right to lay its tracks in the streets of a city is not required to institute condemnation proceedings in respect of damages which may accrue to owners of property abutting such streets. *Penn Mutual L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

When no part of the land of an abutting lot owner is entered upon or sought to be condemned for public use, such owner is not entitled to have proceedings instituted under the Eminent Domain Law to ascertain what damages his property may sustain in consequence of the construction and operation of a railroad in an adjoining street, but the landowner is remitted to his action at law to recover his damages. *Penn Mutual L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

Where the legislature authorizes a company to lay its track in certain streets, and the city government consents thereto, no writ of *ad quod damnum* is necessary unless the road is so constructed or used as to be a purpresture or nuisance in itself; and where it appears that a free passage is left through the streets, and their ordinary use is not interrupted, such use of the streets does not constitute a nuisance, nor justify an injunction to restrain the running of cars in a proper manner. *Lexington & O. R. Co.* v. *Applegate*, 8 *Dana* (*Ky.*) 289.—FOLLOWING O'Hara *v.* Lexington & O. R. Co., 1 Dana 232.—APPROVED IN Anderson *v.* Rochester, L. & N. F. R. Co., 9 How. Pr. (N. Y.) 553. CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 38 Alb. L. J. 388. DISTINGUISHED IN Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366; Donnaher *v.* State, 16 Miss. 649; Williams *v.* New York C. R. Co., 16 N. Y. 97; Portland & W. V. R. Co. *v.* Portland, 27 Am. & Eng. R. Cas. 353, 14 Oreg. 188. FOLLOWED IN Newport & C. Bridge Co. *v.* Foote, 9 Bush (Ky.) 264; Fulton *v.* Short R. R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332; Gargan *v.* Louisville, N. A. & C. R. Co., 89 Ky. 212. QUOTED IN Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush 382; Caro *v.* Metropolitan El. R. Co., 14 J. & S. (N. Y.) 138; Sargent *v.* Ohio & M. R. Co., 1 Handy (Ohio) 52. REVIEWED IN Louisville & P. R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175; Louisville & F. R. Co. *v.* Brown, 17 B. Mon. (Ky.) 763; Chapman *v.* Albany & S. R. Co., 10 Barb. (N. Y.) 360.

When private property has been taken for a specific public use and compensation made, it should not be used for a foreign purpose without a new legal taking, or the consent of the party from whom it was derived; but it may be applied to any new mode of user tending to the primary or general purpose. Therefore a railroad may be laid over a highway, provided it is so constructed as not to be incompatible with the use of the highway in the other usual modes of passage and conveyance. *Fulton* v. *Short R. R. Transfer Co.*, 32 *Am. & Eng. R. Cas.* 256, 85 *Ky.* 640, 7 *Am. St. Rep.* 619, 4 *S. W. Rep.* 332.

108. Right to institute proceedings.—The failure of a company to locate its road within a city within the time required by its charter does not work a forfeiture of its right to condemn lands, where the consent of the city was not given within the time prescribed for the location of the road. *Illinois C. R. Co.* v. *Rucker*, 14 *Ill.* 353.

Where a city council has granted to a company the right to lay its track along an alley, under Iowa Code, § 464, equity will not interfere to restrain the company from having the damages to abutting property owners assessed, as provided in said section, and from appropriating the alley upon the payment of such damages. The fact that the damages to abutting property will be very great can make no difference as to the right of the company to proceed under the law. *Heath* v. *Des Moines & St. L. R. Co.*, 10 *Am. & Eng. R. Cas.* 313, 61 *Iowa* 11, 15 *N. W. Rep.* 573.—DISTINGUISHING Chicago, N. & S. W. R. Co. *v.* Mayor, etc., of Newton, 36 Iowa 299; Davis *v.* Chicago & N. W. R. Co., 46 Iowa 389.

The statute confers upon a city council no authority to devote the streets or alleys to a railway track for the private benefit simply of an individual; and a person to whom the council has granted authority to lay down a private side track along an alley takes thereunder no right which he can oppose to the right of a company to appropriate the same alley, under authority from the council. *Heath* v. *Des Moines & St. L. R. Co.*, 10 *Am. & Eng. R. Cas.* 313, 61 *Iowa* 11, 15 *N. W. Rep.* 573.—EXPLAINING Clarke *v.* Blackmar, 47 N. Y. 150.

City authorities authorized a company to construct and maintain its road through a certain street on condition that it would maintain a swing bridge across a certain canal so as not to impair navigation, and not to infringe vested private rights. In constructing said bridge it was necessary to swing it over private lands. *Held*, that the company had the right to institute proceedings to condemn said land, though no part of its road proper passed over the land. *In re New York, L. & W. R. Co.*, 33 *Hun* (*N. Y.*) 148; *affirmed* (?) 98 *N. Y.* 664.

109. When landowner may institute the proceedings.—Where a company occupies a public highway for its track, without appropriating or otherwise acquiring the right to do so, an owner of abutting lands, having the fee in the lands covered by the highway, may proceed, under 69 Ohio L. 95, § 21, to compel

the company to appropriate the right of way for its road. *Lawrence R. Co.* v. *Williams*, 35 *Ohio St.* 168.—APPLIED IN Grafton *v.* Baltimore & O. R. Co., 17 Am. & Eng. R. Cas. 200, 21 Fed. Rep. 309. DISTINGUISHED IN Columbus, S. & C. R. Co. *v.* Mowatt, 35 Ohio St. 284.

The remedy for obstructing, by a railroad track, an alley over which plaintiff has a right of way is not by action denying the right of entry to take the land, but by application for the assessment of damages. *Philadelphia, W. & B. R. Co.* v. *Williams*, 54 *Pa. St.* 103.—DISTINGUISHING Workman *v.* Mifflin, 30 Pa. St. 371; Voegtly *v.* Pittsburgh & Ft. W. R. Co., 2 Grant's Cas. (Pa.) 245.—FOLLOWED IN Phillips *v.* St. Clair Incline Plane Co., 153 Pa. St. 230.

110. —— and when not. — Prior to the enactment of Wis. Laws of 1889, ch. 255, the owner of land on one side of a street was not entitled to maintain condemnation proceedings by reason of the building of a track along the other side of the street, wholly beyond the centre line thereof. *Sinnott* v. *Chicago & N. W. R. Co.*, 81 *Wis.* 95, 50 *N. W. Rep.* 1097.—ADHERING to Smith *v.* Eau Claire, 78 Wis. 457.

A finding of the trial court that a track so built before the enactment of the above law was illegally laid down is not sufficient to give the owner of land on the opposite side of the street a right to maintain condemnation proceedings under said act, since the track might, nevertheless, have become legally established, and thus be within the saving proviso of section 1. *Sinnott* v. *Chicago & N. W. R. Co.*, 81 *Wis.* 95, 50 *N. W. Rep.* 1097.

The fact that when the track was built the street was not restored to its former usefulness, or that the track has since been used in an unlawful manner, is immaterial upon the question of the right to maintain condemnation proceedings. *Sinnott* v. *Chicago & N. W. R. Co.*, 81 *Wis.* 95, 50 *N. W. Rep.* 1097.

If the lot owners on the side of the street on which the track is laid make no objection, the lot owners on the opposite side cannot object for them that the right to lay the track was never acquired by condemnation proceedings. *Sinnott* v. *Chicago & N. W. R. Co.*, 81 *Wis.* 95, 50 *N. W. Rep.* 1097.

111. The necessity for the taking. —General authority to a corporation to condemn a site for its railway will not authorize the condemnation of a highway already constructed by authority of law and running longitudinally therewith. In the absence of evidence tending to show a necessity for such appropriation, an abandonment by the road corporation to the railroad will be presumed voluntary and without the assent of the state. *Kenton County Court* v. *Bank Lick Turnpike Co.*, 10 *Bush* (*Ky.*) 529.

In the absence of an express statute to that effect, a company cannot have condemned and appropriated to its use *ad libitum* land already dedicated to the public for streets, and unless such precise right be shown to exist, not only the municipal corporation, but the owner of the fee, may have an injunction to prevent such condemnation, upon the ground that the use of the streets for such unauthorized purpose is a special injury to him. *Cornwall* v. *Louisville & N. R. Co.*, 87 *Ky.* 72, 9 *Ky. L. Rep.* 924, 7 *S. W. Rep.* 553.

112. Only property described in ordinance can be condemned.—Under Ill. Rev. St. ch. 24, art. 5, § 1, conferring upon city councils the power "to provide for and change the location, grade, and crossing of any railroad" within a city, a company that has located its road through a city, under an ordinance, cannot, under the right of eminent domain, acquire property not included in the location specified in the ordinance. *Tudor* v. *Chicago & S. S. R. T. R. Co.*, (*Ill.*) 27 *N. E. Rep.* 915.—REVIEWING Metropolitan City R. Co. *v.* Chicago W. D. R. Co., 87 Ill. 317; Chicago & W. I. R. Co. *v.* Dunbar, 100 Ill. 110; Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589.

A city ordinance located a railroad "immediately adjacent to and parallel with one of the alleys or alley lines" between certain designated streets, and limited the right of way to thirty feet. *Held*, that this did not authorize the company to condemn thirty-one feet for a right of way, twenty-five feet of which is on one side, and six feet of which is on the other side, of the west line of such alley. *Tudor* v. *Chicago & S. S. R. T. R. Co.*, (*Ill.*) 27 *N. E. Rep.* 915.

113. Right to condemn before obtaining consent of city. — Conceding that the streets of a city cannot be used by a company until the right to use the same has been granted by the city as prescribed in Cal. Code, § 470, it is not necessary that such grant shall first be obtained in order

to maintain an action to condemn the rights of adjacent landowners in such streets. *California Southern R. Co.* v. *Kimball*, 61 *Cal.* 90.

114. Right to enter and begin work before instituting proceedings.—A company may lawfully enter and occupy streets for its works, and proceed with its works, before instituting proceedings to ascertain the damages that may result to others. *James River & K. Co.* v. *Anderson*, 12 *Leigh* (*Va.*) 278.

b. Statutory Provisions.

115. Connecticut.—A provision in the charter of a railroad company that land may be taken for a railroad implies that it may be taken for necessary passenger stations and freight depots. And land that is a part of a highway can be taken, with the approval of the railroad commissioners, as well as any other land. And it can be taken, with such approval, by a railroad company whose line has been already established, for the purpose of changing the location of its stations, under Conn. Gen. St. § 3461. *State ex rel.* v. *Railroad Com'rs*, 36 *Am. & Eng. R. Cas.* 510, 56 *Conn.* 308, 15 *Atl. Rep.* 756.

116. Kansas.—Kan. Comp. Laws 1885, ch. 28, § 47, subd. 4, authorizing the construction of railroads in streets, is not in contravention of Kan. Const. art. 12, § 4, or of the fifth amendment to the Constitution of the United States, as the constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but is indirectly or consequentially injured. *Ottawa, O. C. & C. G. R. Co.* v. *Larson*, 36 *Am. & Eng. R. Cas.* 163, 40 *Kan.* 301, 2 *L. R. A.* 59, 19 *Pac. Rep.* 661.—EXPLAINING Central Branch U. P. R. Co. *v.* Twine, 23 Kan. 585; Central Branch U. P. R. Co. *v.* Andrews, 26 Kan. 702. QUOTING Atchison & N. R. Co. *v.* Garside, 10 Kan. 552.—FOLLOWED IN Ottawa, O. C. & C. G. R. Co. *v.* Peterson, 40 Kan. 310.

117. Mississippi.—A statute of 1823 vests the title to the streets of Jackson in the city, and deprives the legislature of the power to dispose of them, except so far as the *jus publicum* or the rights of eminent domain may authorize it; the right to the streets, therefore, being in the city, they cannot be subjected to the use of a railroad without the consent and contract of the city, or without the assessment and payment of damages according to law. *Donnaher* v. *State*, 16 *Miss.* 649.

118. New York.—The General Railroad Act of April 2, 1850, § 28, provides that corporations formed thereunder shall have the power to construct their roads across, along, and upon any stream of water, watercourse, street, highway, plank road, turnpike, or canal, which the route of the road shall intersect or touch. *Held*, that this only grants the right which the public may have in such streams or highways, and does not give the right to appropriate the private property therein, without the consent of the owner, or compensation. *Ellicottville & G. V. Plank Road Co.* v. *Buffalo & P. R. Co.*, 20 *Barb.* (*N. Y.*) 644.

A right of way in a village street, appurtenant to an abutting lot, may be condemned for railroad purposes. *Buffalo, N. Y. & P. R. Co.* v. *Overton*, 35 *Hun* (*N. Y.*) 157.

The act of April 9, 1867, for the construction of what is known as the Southern boulevard, in New York city, provided that the owners of the land taken therefor should have a right to claim the full value of the land from any person or corporation who should subsequently be authorized by the legislature to construct a railroad thereon. *Held*, that the fee to such land was not taken for the purpose of the boulevard, and, independently of the statute, such owners might recover damages if a railroad was subsequently laid thereon. *Spofford* v. *Southern Boulevard R. Co.*, 15 *Daly* 162, 4 *N. Y. Supp.* 388, 22 *N. Y. S. R.* 246.—REVIEWING Washington Cemetery *v.* Prospect Park & C. I. R. Co., 68 N. Y. 591; Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404.

In 1887 the legislature passed an act amending the act of 1867, which permitted the construction of a railroad on such boulevard, by any company organized under the General Railroad Act of 1884, upon complying with that statute by obtaining the consent of the local authorities and the property owners; but the provision as to full compensation was omitted. *Held*, that the right of the landowners to additional compensation still existed, and the act of 1887 would be unconstitutional if it attempted to defeat the right to recover further compensation. *Spofford* v. *Southern Boulevard R. Co.*, 15 *Daly* 162, 4 *N. Y. Supp.* 388, 22 *N. Y. S. R.* 246.

The above act of 1887 is not unconstitutional in so far as it authorizes a company

organized under the General Railroad Act to construct a road on said boulevard, in view of the fact that the act of 1867 provided that only a company authorized by a special act of the legislature should construct such road, and that the state Constitution had been consequently amended so as to prohibit the granting of such special statute. *Spofford* v. *Southern Boulevard R. Co.*, 15 *Daly* 162, 4 *N. Y. Supp.* 388, 22 *N. Y. S. R.* 246.

The above act of 1867 constitutes a contract between the landowners and the state, which the legislature has no power by subsequent action to impair, and upon condemnation by a railroad the owners are entitled to receive the actual value of their land, as though no street had ever been opened. *In re Southern Boulevard R. Co.*, 35 *N. Y. S. R.* 550, 12 *N. Y. Supp.* 466, 58 *Hun* 497; *appeal dismissed in* 128 *N. Y.* 93, 38 *N. Y. S. R.* 844, 27 *N. E. Rep.* 1073.

119. Pennsylvania. — The rights enjoyed by the Sunbury & Erie and the Pennsylvania railroad companies "for settling and obtaining the right of way," under the act of 1859, do not include the mode of settling differences between township authorities and a railroad company which had taken possession of a public road, but relate to private property, which, under the Constitution, cannot be taken without compensation. *Danville, H. & W. R. Co.* v. *Com.*, 73 *Pa. St.* 29.

The laying of an additional track on a street, in front of plaintiff's property, which took none of it, but obstructed the approach thereto, does not come within the Pa. Act of Feb. 19, 1849, § 11, providing for the assessment of damages sustained "by reason of any excavation or embankment made in the construction of the road." *Cumberland Valley R. Co.* v. *Rhoadarmer*, 107 *Pa. St.* 214.

c. What is a Taking or Injuring. Rights Acquired by Company.

120. What constitutes a "taking." —Where the property of an abutting lot owner is damaged by the construction and operation of a railroad upon a public street under license of the municipal authorities, there will be a forced deprivation of property, or damaging of the same, without the owner's consent, and this in every just sense is a taking of private property of such owner to the extent to which his property is thus damaged. *Penn Mutual L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

Where abutting lot owners own the fee to the middle of the street, subject only to the public easement in the street, the appropriating of such street for railway purposes is a taking of private property for public use, and can only be done upon making full compensation to such owners. *People* v. *Law*, 34 *Barb.* (*N. Y.*) 494, 22 *How. Pr.* 109.

The construction and operation of a steam railroad in a public highway, impairing access to an abutting owner's property, obstructing the free passage of light and air, and subjecting him to inconvenience, annoyance, and danger by the emission of smoke and sparks from its locomotive engines, the ringing of bells and blowing of steam whistles, and the jarring of buildings by passing trains, is a "taking" of property, within the meaning of the Constitution, entitling him to compensation. *Cincinnati, I., St. L. & C. R. Co.* v. *Pfitser*, 1 *Ohio Prob.* 248.

121. What is not a "taking." — The erection by a municipal government, within the limits of a street and for street purposes and under street conditions justifying it, of a viaduct for the purpose of changing the grade of the street, and in the exercise of its power to change such grades, is not a "taking" or "appropriation" of private property, within the constitutional guaranty against such taking or appropriation, even though the abutting owners' rights of ingress, egress, light, and air are destroyed; nor is this result of law changed by the mere fact that other corporate bodies than the municipality have contributed to the expense of the erection of the viaduct. Whether, however, it would not be a diversion of the street from the street purposes, and a "taking" and "appropriation" for which compensation must be made, if the necessity for the viaduct was created by railroad tracks crossing the street, not presented. *Selden* v. *Jacksonville*, 28 *Fla.* 558, 10 *So. Rep.* 457.—DISTINGUISHING Corning *v.* Lowerre, 6 Johns. Ch. (N. Y.) 439; Barney *v.* Keokuk, 94 U. S. 324; People *v.* Kerr, 27 N. Y. 188; Kellinger *v.* Forty-second St. & G. S. F. R. Co., 50 N. Y. 206.

The fee to the streets of New York city opened in pursuance of the act of 1813 vests in the city, and authorizing a corporation to use such streets for the purposes of a railroad does not take any property be-

longing to the abutting owners. *Sixth Ave. R. Co.* v. *Gilbert El. R. Co.*, 11 *J. & S.* (*N. Y.*) 292, 3 *Abb. N. Cas.* 372; *reversing* 9 *J. & S.* 489.

A company removed its track in a public street nearer to a landholder's lot, but within the limits of the street. *Held*, that this was not taking his land within the meaning of the Constitution, although his line may have been the middle of the street. *Snyder* v. *Pennsylvania R. Co.*, 55 *Pa. St.* 340.

The regulation or enlargement of the use of a street, the property of the state, by the legislature, so as to permit the construction of a railroad track thereon, whereby the owners of adjacent lots may suffer inconvenience and injury, is not a taking of property within the meaning of the Constitution of 1869. *Houston & T. C. R. Co.* v. *Odum*, 2 *Am. & Eng. R. Cas.* 503, 53 *Tex.* 343.

122. What is a "damaging," "injuring," or "injuriously affecting." —Abutting lot owners have a peculiar interest in the street not shared by others. Their easement is property within the meaning of our Constitution, and any interference therewith which results in injury will (with certain exceptions) be justly compensated, there being a damaging, if not a taking, of private property. Whatever interference with the street permanently diminishes the value of their premises is as much a damage as though caused by direct physical injury thereto. *Denver* v. *Bayer*, 7 *Colo.* 113, 2 *Pac. Rep.* 6.—DISTINGUISHING Colorado C. R. Co. *v.* Mollandin, 4 Colo. 154. QUOTING Rigney *v.* Chicago, 102 Ill. 64. REVIEWING M'Carthy *v.* Metropolitan Board of Works, L. R. 7 C. P. 508; East & W. I. Docks *v.* Gattke, 3 Macn. & G. 155; Beckett *v.* Midland R. Co., L. R. 3 C. P. 82; Ricket *v.* Metropolitan R. Co., L. R. 2 H. L. 175; Northern Transp. Co. *v.* Chicago, 99 U. S. 635.—APPLIED IN Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. Rep. 715.

Sometimes interferences and the resulting injury may properly be held to be *damnum absque injuria*, as where they are occasioned by a reasonable improvement of the street by the proper authorities for the greater convenience of the public, or where a temporary inconvenience or injury results from a legitimate use thereof by the public. In purchasing his lot or dedicating the easement to the public, the abutting owner is conclusively presumed to have contemplated the power and authority of the city council to make reasonable changes and improvements skilfully, by raising or lowering the grade, or otherwise. But these presumptions attach only when the purpose of the change is to render the street more convenient and useful as a public highway. *Denver* v. *Bayer*, 7 *Colo.* 113, 2 *Pac. Rep.* 6.

Where a railroad is constructed upon town lots abutting on a street, so near to the street as to cause an embankment therein, across from and opposite to either end of respondent's lot, depriving him of the free use of the streets adjacent to and abutting on his lot, the lot being thereby depreciated in value, to his damage, he may recover his damages from the railroad company, even though no part of his lot be taken, and no part of the street in front thereof be occupied by the railroad. *Chicago, K. & N. R. Co.* v. *Hazels*, 26 *Neb.* 364. —APPLIED IN Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240.

A company built its track along an alley and across a street at an elevation of twenty feet above the level of the ground, upon trestle work, the benches of the foundation of which rested mostly in the alley, but extended over on the lots adjacent and into the street, being about twenty feet apart. The company condemned twenty-five feet of certain lots next to the alley for right of way. *Held*, that the construction of the track was a direct injury to the property, for which the owner was entitled to recover damages. *Atchison & N. R. Co.* v. *Forney*, 35 *Neb.* 607, 53 *N. W. Rep.* 585.

If a railroad track is laid so close to the curbstone on the side of the street next to plaintiff's property that the access thereto, if not actually cut off, is rendered dangerous, plaintiff's property is "injured" by the construction of the railroad, within the meaning of Pennsylvania Constitution, and not merely by the use and operation of the road, and plaintiff is entitled to compensation. *Pennsylvania S. V. R. Co.* v. *Walsh*, 38 *Am. & Eng. R. Cas.* 466, 124 *Pa. St.* 544, 17 *Atl. Rep.* 186.—DISTINGUISHING Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541; Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472.—FOLLOWED IN Pennsylvania S. V. R. Co. *v.* Ziemer, 124 Pa. St. 560.

A company, under its acts of incorporation, and under a by-law of a municipality, ran its road through and along a street to which the lands of appellant were adjacent. *Held*, upon application for a mandamus on

the company, that if the works complained of amounted to a public nuisance, it would not be a case for private compensation, and, if authorized by law, that the works did not injuriously affect the applicant within the meaning of the statute (14 & 15 Vict. c. 51, § 4) providing for compensation for lands "taken or injuriously affected." *Day* v. *Grand Trunk R. Co.*, 5 *U. C. C. P.* 420.—REVIEWED IN Queen *v.* Barry, 2 Can. Exch. 333.

123. What passes — Interest acquired.—The condemnation of land in a street for the use of a railroad company, to enable it to lay and operate its track, gives it no title to the land condemned, nor any interest therein except a mere easement, in common with the general public. *Southern Pac. R. Co.* v. *Reed*, 41 *Cal.* 256, 3 *Am. Ry. Rep.* 46.

Plaintiff was the owner of certain lots in a city of the first class; an ordinance was duly passed vacating the street in front of her lots; thereafter condemnation proceedings were had in behalf of a railroad company for the condemnation of those lots, they being described simply by number, etc., without any addition of boundaries or other description. *Held*, that, under Kan. Laws 1881, ch. 37, § 34, if the title to such portion of the vacated street as was situated in front of the lots passed to her, such portion became, as it were, an accretion to the lots, a part or parcel of them, and passed under any conveyance or transfer of the lots, *eo nomine*. *Atchison, T. & S. F. R. Co.* v. *Patch*, 28 *Kan.* 470.—FOLLOWED IN Challiss *v.* Atchison Union D. & R. Co., 45 Kan. 398.

Where, in condemnation proceedings by a company, a village lot is appropriated under the description thereof in a survey and plat of the same, the company takes presumptively to the centre of the street. And, subject to the public easement and control of the proper public authorities, the company acquires the same interest in that portion of the lot so taken lying in the street as in the remainder thereof, and may apply it to the same uses. *Witt* v. *St. Paul & N. P. R. Co.*, 38 *Minn.* 122, 35 *N. W. Rep.* 862.

124. Nature of the company's occupancy. — Where a railway corporation locates and constructs its road upon a public highway, under an appropriation thereof authorized by the statute, its occupation of the highway is a kind of sufferance. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

125. Boundaries of the right of way.—A company authorized by charter to take for a right of way a strip not exceeding sixty feet wide may limit the width to less than sixty feet; but unless such limitation affirmatively appears, it will be presumed that it appropriated the full sixty feet. *Jones* v. *Erie & W. V. R. Co.*, 144 *Pa. St.* 629, 23 *Atl. Rep.* 251.

The right of way appropriated is not defined by the extent of the company's actual possession and use of the land. So, the lines of a street on which a company locates the centre line of its road and lays its tracks are not necessarily, nor even presumptively, the boundaries of its right of way; these may be within, beyond, or upon the lines of the street. *Jones* v. *Erie & W. V. R. Co.*, 144 *Pa. St.* 629, 23 *Atl. Rep.* 251.—DISTINGUISHED IN Pennsylvania S. V. R. Co. *v.* Philadelphia & R. R. Co., 157 Pa. St. 42.

d. Procedure; Pleading; Defenses.

126. In general.—A company seeking to acquire a right of way through the streets of a city is entitled only to such investigation, judicially or otherwise, as the people have seen fit to grant it as a condition precedent to obtaining a vested right over a public street. *Fort St. Union Depot Co.* v. *State R. Crossing Board*, 45 *Am. & Eng. R. Cas.* 113, 81 *Mich.* 248, 45 *N. W. Rep.* 973. —DISTINGUISHING Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462.

127. Notice to occupants. — A rule of court requiring notice to the person occupying, or the owner of, improved land over which a road is laid out applies to land occupied by a railroad, and requires notice to the company. *Road in Lancaster City*, 68 *Pa. St.* 396.

128. Endeavor to agree with landowner. — A corporation organized under N. Y. Act of 1884, ch. 252, providing for the construction of street surface railroads, and proposing to construct its road through different streets of a city, upon failure to obtain the requisite consent of the property owners upon one street, or any number less than all that are named in its articles of association, may apply to court for the appointment of commissioners to determine whether the road shall be constructed along

those streets, upon petition setting forth the fact of such failure as to them, without including all the streets named in the articles. And the company is not confined to one application. *In re People's R. Co.*, 112 *N. Y.* 578, 21 *N. Y. S. R.* 496, 20 *N. E. Rep.* 367; *affirming* 48 *Hun* 617, *mem.*

Those persons only who are interested in property along the street or streets in regard to which the petition is presented are proper parties. *In re People's R. Co.*, 112 *N. Y.* 578, 21 *N. Y. S. R.* 496, 20 *N. E. Rep.* 367; *affirming* 48 *Hun* 617, *mem.*

The affidavit accompanying the petition upon which such a proceeding was based gave a list of the property owners who had been applied to and who had refused their consent, a list of the streets in which the persons so applied to lived, and the valuation in each street of the property owned by each person so refusing. The petition showed the total valuation of property upon that portion of each street mentioned along which the company proposed to construct its road, and it appeared therefrom that the refusals represented more than half of the total valuation. *Held*, that the papers were sufficient to confer jurisdiction. *In re People's R. Co.*, 112 *N. Y.* 578, 21 *N. Y. S. R.* 496, 20 *N. E. Rep.* 367; *affirming* 48 *Hun* 617, *mem.*—DISTINGUISHING In re Broadway Underground R. Co., 23 Hun 693; In re Broadway Surface R. Co., 36 Hun 644; In re New York Cable R. Co., 36 Hun 355.

Such petition further alleged that the consent of the common council of the city in which the road was proposed to be constructed was duly given on a day named. *Held*, sufficient. Nothing in the statute requires an averment that such consent has been filed in the clerk's office as a condition precedent to the application. *In re People's R. Co.*, 112 *N. Y.* 578, 21 *N. Y. S. R.* 496, 20 *N. E. Rep.* 367; *affirming* 48 *Hun* 617, *mem.*

129. Pleading. — In a proceeding to condemn land, including certain streets in a city, for the use of plaintiff's railroad, it was objected on demurrer that the complaint did not allege that the authorities of the city had granted to plaintiff the right to use the streets. *Held*, that the demurrer was properly overruled. *California Southern R. Co.* v. *Kimball*, 61 *Cal.* 90.

130. Defenses, generally.—Where a railway corporation is limited by the authorities of an incorporated village or town to thirty feet in the centre of a public street on which to locate its main track, and it becomes necessary to construct a switch or side track, it is no objection to the condemnation of land for that purpose that it runs at right angles with the main track, there not being room enough in the right of way along the street for the side track in addition to its two main tracks. *South Chicago R. Co.* v. *Dix*, 17 *Am. & Eng. R. Cas.* 157, 109 *Ill* 237.

The right of the public to use a street cannot be set up as a defense by a lot owner whose rights are to be appraised. *Buffalo, N. Y. & P. R. Co.* v. *Overton*, 35 *Hun* (*N. Y.*) 157.

131. —— expiration of period allowed by charter within which to build road.—Individuals may resist the condemnation of their lands for a right of way for a railroad after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time over a right of way acquired before the expiration. A city is an individual within the meaning of this rule, so that where a company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets on the ground that the time limited by charter for the completion of the road has expired. The state alone can proceed against the company to arrest the work on that ground. *Atlantic & P. R. Co.* v. *St. Louis*, 66 *Mo.* 228; *reversing* 3 *Mo. App.* 315.—DISTINGUISHING Brooklyn C. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 364, 1 Am. Ry. Cas. 150; Morris & E. R. Co. *v.* Central R. Co., 31 N. J. L. 207; Attorney-General *v.* West Wis. R. Co., 36 Wis. 466. QUOTING Peavy *v.* Calais R. Co., 30 Me. 499; Land *v.* Coffman, 50 Mo. 252; Mississippi & T. R. Co. *v.* Devaney, 42 Miss. 555. REVIEWING AND QUOTING Ross *v.* Chicago, B. & Q. R. Co., 77 Ill. 127.

132. —— questioning corporate existence.—A municipal corporation has the same right to question the corporate existence and the rights of a railroad corporation seeking to use its streets as a private owner would have where the use of his property is sought. *Brooklyn Steam Transit*

Co. v. *Brooklyn*, 78 *N. Y.* 524.—FOLLOWING In re Brooklyn, W. & N. R. Co., 72 N. Y. 245.

III. RIGHTS OF ABUTTING OWNERS.

1. *In General.*

133. Nature of abutter's interest in the street.*—The owner of property abutting upon a street has certain rights in said street which attach to his property, and are known in law as an easement. This easement is property in constitutional intent, and is subject to taking just as the land itself is, and when this easement is interfered with, in whole or in part, the party interfering must pay for the damage done the same. *Streyer* v. *Georgia Southern & F. R. Co.*, 51 *Am. & Eng. R. Cas.* 638, 90 *Ga.* 56, 15 *S. E. Rep.* 637. *Elizabethtown, L. & B. S. R. Co.* v. *Combs*, 10 *Bush* (*Ky.*) 382.—FOLLOWING Gardner *v.* Newburgh, 2 Johns. Ch. (N. Y.) 166. QUOTING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 302; Newport & C. Bridge Co. *v.* Foote, 9 Bush 264. REVIEWING Hooker *v.* New Haven & N. Co., 14 Conn. 151; Stevens *v.* Middlesex Canal, 12 Mass. 466; Louisville & F. R. Co. *v.* Brown, 17 B. Mon. (Ky.) 772; Cosby *v.* Owensboro & R. R. Co., 10 Bush 288.—CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 38 Alb. L. J. 388. —*Tate* v. *Ohio & M. R. Co.*, 7 *Ind.* 479.

The reservation, in a plat of an addition to a city, of the right to occupy streets for railroad purposes is only a reservation as against the city, and cannot be used to oppress private property owners. *Riedinger* v. *Marquette & W. R. Co.*, 29 *Am. & Eng. R. Cas.* 611, 62 *Mich.* 29, 28 *N. W. Rep.* 775.

Plaintiff was owner and occupant of an unplatted tract of land, adjoining a platted tract, and abutting, in part, upon the head of a street laid out on such platted tract. *Held*, that plaintiff, simply as owner and occupant aforesaid, had no estate or interest in a part of such street upon which his tract did not abut, and that, therefore, he could not complain of obstructions maintained in such part by a railroad company, upon the ground of an appropriation of the same without compensation to him made or secured. *Shaubut* v. *St. Paul & S. C. R. Co.*, 21 *Minn.* 502, 19 *Am. Ry. Rep.* 223.—FOLLOWED IN Rochette *v.* Chicago, M. & St. P. R. Co., 17 Am. & Eng. R. Cas. 192, 32 Minn. 201; Barnum *v.* Minnesota Transfer R. Co., 33 Minn. 365.

An act of the legislature, or an ordinance of a city, authorizing a company to construct its road in a public street, gives it the right to do so only as against the public, but not as against owners of the abutting premises having private property rights in the street. And where a member of a city council votes for such an ordinance, his assent is referable only to the public easement, and not to his own private rights of property in the street. *Lamm* v. *Chicago, St. P., M. & O. R. Co.*, 26 *Am. & Eng. R. Cas.* 42, 45 *Minn.* 71, 47 *N. W. Rep.* 455.

The owners of property bounded upon streets in a city have rights in such streets, and an interest in the maintenance of them in their integrity; but such rights and interest consist merely in the use, benefit, and enjoyment of them as public streets or highways for the legitimate uses and purposes of streets. They have no private or exclusive right to, or property in, the use or enjoyment of them. *Drake* v. *Hudson River R. Co.*, 7 *Barb.* (*N. Y.*) 508.—QUOTED IN Anderson *v.* Rochester, L. & N. F. R. Co., 9 How. Pr. (N. Y.) 553; Purdy *v.* Manhattan El. R. Co., 36 N. Y. S. R. 43, 13 N. Y. Supp. 295. REAFFIRMED IN Greene *v.* New York C. & H. R. R. Co., 65 How. Pr. 154, 12 Abb. N. Cas. 124. REVIEWED IN Kellinger *v.* Forty-second St. & G. S. F. R. Co., 50 N. Y. 206.

All other citizens have an equal right with such owners to the use of the public streets as such. And a railroad company, as part of that public, has the same right, in common with others, to use the same, under the rules and regulations prescribed by the proper authority, for the purposes to which the lands forming the streets were dedicated to the public, or taken by the corporation for public purposes. *Drake* v. *Hudson River R. Co.*, 7 *Barb.* (*N. Y.*) 508.

134. Easements of access, light, and air.*—The owner of lots abutting on

*Construction of railroads in streets. Rights of abutters, see notes, 7 AM. & ENG. R. CAS. 623; 38 *Id.* 468; 46 *Id.* 52; 31 AM. ST. REP. 733; 3 L. R. A. 565; 4 *Id.* 623; 14 *Id.* 381.
Right of abutting owner on street where lot is conveyed by metes and bounds, see note, 4 L. R. A. 624.

*Injury to abutting owner's easement in light, air, and access to street, see notes, 14 L. R. A. 370; 56 AM. & ENG. R. CAS. 703.

a public street has such a special interest in the street, different from that of the general public, as to entitle him to maintain a private suit for damages against a party who wrongfully obstructs the street in front of or near his property, not upon his soil, yet so as practically to cut off all public access to it. *Brakken* v. *Minneapolis & St. L. R. Co.*, 7 *Am. & Eng. R. Cas.* 593, 29 *Minn.* 41, 11 *N. W. Rep.* 124.— FOLLOWED IN Hayes *v.* Chicago, St. P., M. & O. R. Co., 46 Minn. 349.

The owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee of the street, an easement in the street to the full width thereof, in front of the lot, for admission of light and air to his lot; which easement is subordinate only to the public right in the street. (Vanderburgh, J., dissenting.) *Adams* v. *Chicago, B. & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 7, 39 *Minn.* 286, 39 *N. W. Rep.* 629, 1 *L. R. A.* 493, 38 *Alb. L. J.* 388.—CRITICISING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush (Ky.) 382; Protzman *v.* Indianapolis & C. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Stone *v.* Fairbury, P. & N. W. R. Co., 68 Ill. 394; Tate *v.* Ohio & M. R. Co., 7 Ind. 479; Lackland *v.* North Mo. R. Co., 31 Mo. 180; Cincinnati & S. G. A. St. R. Co. *v.* Cumminsville, 14 Ohio St. 523; Scioto Valley R. Co. *v.* Lawrence, 38 Ohio St. 41. QUOTING Grand Rapids & I. R. Co. *v.* Heisel, 38 Mich. 62. REVIEWING AND APPROVING Story *v.* New York El. R. Co., 90 N. Y. 122; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268.— FOLLOWED IN Carroll *v.* Wisconsin C. R. Co., 36 Am. & Eng. R. Cas. 648, 40 Minn. 168, 41 N. W. Rep. 661; Demueles *v.* St. Paul & N. P. R. Co., 44 Minn. 436; Lamm *v.* Chicago, St. P., M. & O. R. Co., 45 Minn. 71.—*Lamm* v. *Chicago, St. P., M. & O. R. Co.*, 46 *Am. & Eng. R. Cas.* 42, 45 *Minn.* 71, 47 *N. W. Rep.* 455. —APPROVING Story *v.* New York El. R. Co., 90 N. Y. 122; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268; Fobes *v.* Rome, W. & O. R. Co., 121 N. Y. 505. FOLLOWING Adams *v.* Chicago, B. & N. R. Co., 39 Minn. 286.

The fact that a company has erected an embankment in a street 200 to 300 feet from plaintiff's property does not give him a right of action, unless his right of access to his property has been cut off thereby. *Rummel* v. *New York, L. & W. R. Co.*, 30 *N. Y. S. R.* 235.—QUOTING Hier *v.* New York, W. S. & B. R. Co., 40 Hun 310.

135. Right to unobstructed ingress and egress.* — An owner of real property has a right to the use of the public road or street upon which it abuts, for the purposes of ingress and egress to and from the same. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899. *Ford* v. *Santa Cruz R. Co.*, 59 *Cal.* 290. *Jackson* v. *Kiel*, 40 *Am. & Eng. R. Cas.* 297, 13 *Colo.* 378, 22 *Pac. Rep.* 504.—REVIEWED IN Gilbert *v.* Greeley, S. L. & P. R. Co., 40 Am. & Eng. R. Cas. 300, 13 Colo. 501.— *Selden* v. *Jacksonville*, 28 *Fla.* 558, 10 *So. Rep.* 457. *Decker* v. *Evansville S. & N. R. Co.*, 133 *Ind.* 493, 33 *N. E. Rep.* 349.

This right is appurtenant to his premises, and constitutes such a property interest that it cannot be taken away or seriously impaired, against his will, for any purpose, without payment of just compensation therefor. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

Adjoining property owners are compelled to submit to the ordinary inconveniences and annoyances which the operation of a railway located upon a public road occasions; but they cannot be deprived of the rights of ingress and egress to and from their premises, without their consent. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

Where a corporation locates its road, under the provisions of such a statute, in such close proximity to the premises of an adjoining lot owner that its use obstructs his communication with the street, and interferes with its enjoyment by those who occupy the premises, to such an extent as materially to depreciate the value thereof, the lot owner is entitled to recover the amount of such depreciation. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

In an action against a corporation to recover damages in consequence of its locating and constructing its road upon certain streets in a certain city, it was alleged that plaintiff was the owner of premises at the

* Damages for obstruction of access to premises, see notes, 2 AM. & ENG. R. CAS. 464; 14 *Id.* 146; 20 *Id.* 35

corner of two of the streets; that defendant had located its road above the grade thereof, and made a large curve in its road; had built it so near plaintiff's premises that a wagon could not pass between the curb and its road; that it had so taken and appropriated such part of the streets at the corners of plaintiff's premises as to interrupt and greatly obstruct access thereto. Evidence was introduced upon the part of plaintiff tending to prove the truth of said allegations. *Held*, that it was the duty of the trial court to have submitted to the jury the question as to whether the location and operation of defendant's road interfered with plaintiff's ingress and egress to and from his premises, so as to depreciate the value thereof. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

In such case plaintiff was entitled to recover damages for the amount of any depreciation in the value of his premises caused by defendant in locating, conducting, and operating its railroad so near them as to prevent or materially affect access thereto by plaintiff, or those occupying said premises, if found that they had suffered depreciation from such cause. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

Where a railroad is built in a street so as to cut off the access to and from abutting property, a right of action therefor accrues to the owner which extends to another company subsequently purchasing the road and franchises. *Ft. Scott. W. & W. R. Co.* v. *Fox*, 40 *Am. & Eng. R. Cas.* 331, 42 *Kan.* 490, 22 *Pac. Rep.* 583. — DISTINGUISHING Central Branch U. P. R. Co. *v.* Twine, 23 Kan. 585.

And in such case the owner is not deprived of damages by the fact that he has access to and from his property by another street, situated on the other side of the property. *Ft. Scott, W. & W. R. Co.* v. *Fox*, 40 *Am. & Eng. R. Cas.* 331, 42 *Kan.* 490, 22 *Pac. Rep.* 583.

The mere failure of a company properly to ballast its roadbed, where sufficient space is left in the street for ordinary vehicles and teams to pass in front of abutting property, will not authorize a recovery for damages alleged to have been sustained for the destruction of one's right of ingress and egress, where there is no evidence to show the terms and conditions upon which the privilege to build such railroad was conferred by the city authorizing the same. *Wichita & C. R. Co.* v. *Smith*, 46 *Am. & Eng. R. Cas.* 53, 45 *Kan.* 264, 25 *Pac. Rep.* 623.

To entitle a person owning lots abutting on a street to recover damages, there must be such a practical obstruction of the street in front of the lots that he is denied ingress to and egress from them. *Kansas, N. & D. R. Co.* v. *Cuykendall*, 42 *Kan.* 234, 21 *Pac. Rep.* 1051.—FOLLOWED IN Kansas, N. & D. R. Co. *v.* Mahler, 45 Kan. 565.

136. Right to have street open for public use. — A person who owns lots fronting on a street dedicated by himself to the public use is entitled to damages if a company lays its track along the street and by that means obstructs it for the use of teams and vehicles, if the value of his lots is diminished thereby. *Southern Pac. R. Co.* v. *Reed*, 41 *Cal.* 256, 3 *Am. Ry. Rep.* 46.

A city or village may authorize the laying of railroad tracks in streets, and such a use is not inconsistent with the trust for which they are held, but in doing so the city has no right so to obstruct the streets as to deprive the public and adjacent property holders of their use as highways. Their primary purpose is for ordinary passage and travel, and the public or individuals cannot rightfully be deprived of such use. *Stack* v. *East St. Louis*, 85 *Ill.* 377.—FOLLOWING Pekin *v.* Brereton, 67 Ill. 477.—DISTINGUISHED IN Denver *v.* Bayer, 7 Colo. 113. QUOTED IN Ligare *v.* Chicago, 139 Ill. 46; St. Louis, A. & T. H. R. Co. *v.* Belleville, 20 Ill. App. 580. REVIEWED IN Torpey *v.* Independence, 24 Mo. App. 288. REVIEWED AND DISTINGUISHED IN Olney *v.* Wharf, 115 Ill. 519.—*Tate* v. *Ohio & M. R. Co.*, 7 *Ind.* 479.

Although an obstruction may not wholly prevent access to the property, if it is such as practically to preclude the ordinary and reasonable use of the alley as a means of entering and leaving the rear of the lot, the company is liable for the injury suffered. *Leavenworth, N. & S. R. Co.* v. *Curtan*, 56 *Am. & Eng. R. Cas.* 636, 51 *Kan.* 432, 33 *Pac. Rep.* 297.

When land is laid off into lots, streets, and alleys, and lots are sold, each lot owner has the right not only to use the streets as ways of ingress and egress, but also to have them thrown open for use by the public in any manner consistent with the uses for

which they are established. *Elizabethtown & P. R. Co.* v. *Thompson*, 14 *Am. & Eng. R. Cas.* 111, 79 *Ky.* 52.

A mining company owned certain land near a city, which it platted, reserving "the exclusive right to lay a plank or railroad track through and across any of the streets reserved on the map." The street down which it had been intended to run the road was laid out much wider than the rest, and was partially occupied for such purposes. Subsequently the mining company assigned all its rights to a railroad company which proceeded to build four tracks down this street, after having gained the city's permission to do so. A property owner on this street obtained an injunction. *Held*, that the company had no right to blockade the street without compensating property owners, and that the foregoing reservation in the plat did not give to it the privilege of destroying the usefulness of private property. *Riedinger* v. *Marquette & W. R. Co.*, 29 *Am. & Eng. R. Cas.* 611, 62 *Mich.* 29, 28 *N. W. Rep.* 775.—FOLLOWED IN Ward *v.* Detroit, M. & M. R. Co., 62 Mich. 46; Com'rs of Parks, etc., *v.* Chicago, D. & C. G. T. J. R. Co., 91 Mich. 291.

Adjoining proprietors by agreement closed a dedicated highway, and in place of it opened a road upon another site. *Held*, that whether the road so opened was a public highway or a private right of way, they and those claiming under them had such an interest in it as entitled them to recover damages from a railroad company crossing it in such a manner as to obstruct its free use. *Kansas City, St. L. & C. R. Co.* v. *Farrell*, 76 *Mo.* 183.

Abutting owners have an easement in the street in common with the whole public to pass and repass, and also to have free access to and from their premises. *Clark* v. *Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 903, 50 *Hun* 600, 2 *N. Y. Supp.* 563.

137. Right to insist on proper use of street.—The right to the use of a street is an incorporeal hereditament legally attached to the ground contiguous thereto, and incident to the title assured by law—a right of which the owners of such contiguous property cannot be deprived without compensation. *Cosby* v. *Owensboro & R. R. Co.*, 10 *Bush* (*Ky.*) 288.—FOLLOWING Louisville & F. R. Co. *v.* Brown, 17 B. Mon. 763.

The construction of a railroad along a street is not *per se* an encroachment upon the individual right of the abutting lot owner, and whether he can complain depends not upon the fact of the existence of the railroad, but upon the manner of its construction and operation. If he is thereby deprived of the reasonable use of the street he may appeal to the courts for relief, but if he is merely inconvenienced thereby, and suffers some remote consequential injury, he is without relief. *Fulton* v. *Short R. R. Transfer Co.*, 32 *Am. & Eng. R. Cas.* 256, 85 *Ky.* 640, 7 *Am. St. Rep.* 619, 4 *S. W. Rep.* 332.—DISTINGUISHING Louisville & F. R. Co. *v.* Brown, 17 B. Mon. 772; Newport & C. Bridge Co. *v.* Foote, 9 Bush 264; Cosby *v.* Owensboro & R. R. Co., 10 Bush 288. FOLLOWING Lexington & O. R. Co. *v.* Applegate, 8 Dana 289; Wolfe *v.* Covington & L. R. Co., 15 B. Mon. 409; Louisville & F. R. Co. *v.* Brown, 17 B. Mon. 772; Newport & C. Bridge Co. *v.* Foote, 9 Bush 264; Jeffersonville, M. & I. R. Co. *v.* Esterle, 13 Bush 675.—REVIEWED IN Gargan *v.* Louisville, N. A. & C. R. Co., 89 Ky. 212.

A railroad company may be compelled to use the streets in such a manner as to inflict the least possible injury upon private individuals compatible with the reasonable convenience of the public who make use of its road. *Laviosa* v. *Chicago, St. L. & N. O. R. Co.*, 4 *Am. & Eng. R. Cas.* 128, *McGloin* (*La.*) 299.

The courts will afford a remedy against the use of streets, by railroads, in a manner that is needlessly and unreasonably injurious to private persons, even though such particular mode of use is expressly authorized by municipal legislation. *Laviosa* v. *Chicago, St. L. & N. O. R. Co.*, 4 *Am. & Eng. R. Cas.* 128, *McGloin* (*La.*) 299.

The owner of the soil over which a street is laid has the right to insist that a street shall be used for the legitimate purposes of its creation and existence, and in a manner proper to effect the same. *Newell* v. *Minneapolis, L. & M. R. Co.*, 24 *Am. & Eng. R. Cas.* 298, 35 *Minn.* 112, 27 *N. W. Rep.* 839.

When a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the mode of use, the question of rightfulness depends upon whether the use objected to is consistent or inconsistent with the common public use in which every person is entitled to share. This question of consistency or inconsistency is a question of law. That is

to say, the facts of a given case being ascertained, it is for the court to pronounce upon their effect, and to determine whether a manner of using a street complained of is or is not, all things considered, a substantial infringement upon the common public right. *Newell* v. *Minneapolis, L. & M. R. Co.*, 24 *Am. & Eng. R. Cas.* 298, 35 *Minn.* 112, 27 *N. W. Rep.* 839.

138. What is a proper use of street. — Owners of lots bordering on streets hold them subject to the right of the appropriation of the street to such public uses, promotive of commerce and business, as the general good of the city or town may require, provided such appropriation is not incompatible with the ends for which the street was established—as a public way for foot passengers, horsemen, and the vehicles in ordinary use. *Cosby* v. *Owensboro & R. R. Co.*, 10 *Bush* (*Ky.*) 288.—DISTINGUISHED IN Fulton *v.* Short R. R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332. REVIEWED IN Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush (Ky.) 382.

A company has no right to use a highway as a part of its freight yard; but it has a right to pass and repass over a highway in making up its trains and shifting its cars, provided this is done only to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it. *Gahagan* v. *Boston & L. R. Co.*, 1 *Allen* (*Mass.*) 187.

The streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it. *Detroit City R. Co.* v. *Mills*, 46 *Am. & Eng. R. Cas.* 608, 85 *Mich.* 634, 48 *N. W. Rep.* 1007.

Any use of a street which is limited to an exercise of the right of passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not, in any substantial degree, destroy the street as a means of free passage, common to all the people, is a legitimate use and within the purposes for which the public acquired the land. *Halsey* v. *Rapid Transit St. R. Co.*, 46 *Am. & Eng. R. Cas.* 76, 47 *N. J. Eq.* 380, 20 *Atl. Rep.* 859.

Land taken for a street is taken for all time, and compensation is made once for all, and by the taking the public acquire the right to use it for travel, not only by such means as were in use when the land was acquired, but by such other means as new wants and the improvements of the age may render necessary. *Halsey* v. *Rapid Transit St. R. Co.*, 46 *Am. & Eng. R. Cas.* 76, 47 *N. J. Eq.* 380, 20 *Atl. Rep.* 859.—FOLLOWED IN Koch *v.* North Ave. R. Co., 75 Md. 222.

To allow a street in a city to be used for a railroad track, either upon its natural surface or by tunneling, is not a misapplication of it, provided such use does not interfere with the free and unobstructed use of it by the public as a highway for passage and repassage. *Plant* v. *Long Island R. Co.*, 10 *Barb.* (*N. Y.*) 26.—FOLLOWING Drake *v.* Hudson River R. Co., 7 Barb. 508.

The temporary inconvenience to which the adjoining proprietors are subjected while the work of excavation and tunneling is going on is *damnum absque injuria*, and will not entitle an individual to damages. *Plant* v. *Long Island R. Co.*, 10 *Barb.* (*N. Y.*) 26.—DISTINGUISHING Fletcher *v.* Auburn & S. R. Co., 25 Wend. (N. Y.) 462; Waterloo Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill (N. Y.) 567.—DISTINGUISHED IN Williams *v.* New York C. R. Co., 16 N. Y. 97.

Where the land of an individual is taken for a street, and compensation is made for it, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes as custom and the public good require in respect to a street. *Plant* v. *Long Island R. Co.*, 10 *Barb.* (*N. Y.*) 26.

The use to which a street in a city or village is devoted is far more extensive than the mere right of the public to pass over it. It may be used in any way which shall best promote the interests and business of the city or village where it is located. What will so promote those interests and that business is to be determined by the municipal authority to whom the control of the streets is committed. Those who purchase lands adjacent to such streets must be deemed to take their title subject to the appropriation of the streets to such purposes and objects as the public interests shall require. The only restriction upon this appropriation is that the use to be made of the streets must not be incompatible with the ends for which they were established. *Chapman* v. *Albany & S. R. Co.*, 10 *Barb.* (*N. Y.*) 360.—DISTINGUISHED IN Williams

v. New York C. R. Co., 16 N. Y. 97. QUOTED AND APPROVED IN Louisville & F. R. Co. *v.* Brown, 17 B. Mon. (Ky.) 763.

It seems that streets in a city, laid out and opened under charter provisions, may, under legislative and municipal authority, be used for any public use consistent with their preservation as public streets, although the use may be new, may impose an additional burden, and may subject lot owners to injury, and the mere disturbance of rights of light, air, and access occasioned thereby is *damnum absque injuria*. *Kane* v. *New York El. R. Co.*, 46 *Am. & Eng. R. Cas.* 137, 125 *N. Y.* 164, 26 *N. E. Rep.* 278, 34 *N. Y. S. R.* 876.

It seems, also, that the use of a city street for an ordinary horse or steam railway, unless it practically closes the street, is lawful, and abutting owners whose lots are bounded by the side of the street have no legal redress, in the absence of negligence in the construction or operation of the railroad, although it may seriously interfere with the value of their property. *Kane* v. *New York El. R. Co.*, 46 *Am. & Eng. R. Cas.* 137, 125 *N. Y.* 164, 26 *N. E. Rep.* 278, 34 *N. Y. S. R.* 876.

The use of a street for an ordinary steam railroad is not a legitimate use of the street for public purposes, and neither the legislature nor city can authorize such a railroad to be constructed and operated thereon against the abutting proprietor's will without compensation. *White* v. *Northwestern N. C. R. Co.*, 56 *Am. & Eng. R. Cas.* 706, 113 *N. Car.* 610, 18 *S. E. Rep.* 330.

Necessity may justify the use of a street for the purpose of transporting things in an unusual manner, or for the purpose of transporting such things as necessarily obstruct the street for a time, but such uses are not necessarily illegal, for streets as passways must frequently be subjected to uses not strictly in the line of the purpose for which they exist, but unusual because of the nature of the things to be transported or of the vehicles necessary to their transportation. *Taylor* v. *Dunn*, 80 *Tex.* 652, 16 *S. W. Rep.* 732.

2. *Ownership of Fee in Street. New Servitude.*

139. Building steam road a new servitude entitling owner of the fee to damages.* — The construction of a railroad on land dedicated as a country road, being a use of the land foreign to the purpose for which it was dedicated, constitutes an additional burden or easement, for which the owner of the fee is entitled to compensation; and the state cannot deprive the owner of his right to compensation for such additional burden or easement. *Western R. Co.* v. *Alabama G. T. R. Co.*, 96 *Ala.* 272, 11 *So. Rep.* 483.—FOLLOWING Columbus & W. R. Co. *v.* Witherow, 82 Ala. 190.—*Hastings & G. I. R. Co.* v. *Ingalls*, 20 *Am. & Eng. R. Cas.* 60, 15 *Neb.* 123, 16 *N. W. Rep.* 762.—FOLLOWING Williams *v.* New York C. R. Co., 16 N. Y. 97; Waterloo Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill 567. REVIEWING Williams *v.* New York C. R. Co., 18 Barb. 222; Story *v.* New York El. R. Co., 90 N. Y. 122.

And the same rule applies to land used for an ordinary street or highway. *Indianapolis, B. & W. R. Co.* v. *Hartley*, 67 *Ill.* 439, 2 *Am. Ry. Rep.* 59. *Chicago & N. W. R. Co.* v. *Jefferson*, 14 *Ill. App.* 615. *Cox* v. *Louisville, N. A. & C. R. Co.*, 48 *Ind.* 178, 8 *Am. Ry. Rep.* 296.—QUOTING Indianapolis, B. & W. R. Co. *v.* Hartley, 67 Ill. 439, 2 Am. Ry. Rep. 59. REVIEWING Williams *v.* New York C. R. Co., 16 N. Y. 97.—REVIEWED IN Terre Haute & I. R. Co. *v.* Scott, 3 Am. & Eng. R. Cas. 208, 74 Ind. 29.—*Van Bokelen* v. *Brooklyn City R. Co.*, 5 *Blatchf.* (*U. S.*) 379. *Carli* v. *Stillwater St. R. & T. Co.*, 3 *Am. & Eng. R. Cas.* 226, 28 *Minn.* 373, 41 *Am. Rep.* 290, 10 *N. W. Rep.* 205. *Jones* v. *Erie & W. V. R. Co.*, 151 *Pa. St.* 30, 25 *Atl. Rep.* 134.—QUOTED IN Stroudsburg *v.* Wilkes-Barre & E. R. Co., 2 Pa. Dist. 507.

A railroad bridge constructed over a street, under authority of the city, at a height of twenty-three feet, imposes a new servitude upon abutting property for which the owner in fee may recover damages; but consequential damages cannot be recovered on account of abutments built upon the defendant's land to support the bridge. *Jones* v. *Erie & W. V. R. Co.*, 56 *Am. & Eng. R. Cas.* 664, 151 *Pa. St.* 30, 25 *Atl. Rep.* 134.

140. Limitations of above rule. — It is within the discretion of municipal authorities to permit steam-railroad tracks to be laid and trains operated in public streets, and such appropriation is not a new use thereof, or an additional burden thereon,

* When appropriation of a highway for railway purposes is new servitude thereon, see notes, 28 AM. REP. 267; 9 AM. ST. REP. 546; 17 L. R. A. 474.

in such sense as will entitle an abutting property owner to enjoin such use of the street on which his property fronts. The remedy in such case is at law. *Corcoran* v. *Chicago, M. & N. R. Co.*, 37 *Ill. App.* 417; *affirmed in* 149 *Ill.* 291, 37 *N. E. Rep.* 68.

The owner of the fee in a city street cannot object to the use of the street by a passenger street railway, either on the ground that such use imposes an additional servitude on him, or on the ground that the corporation operating the railway is acting beyond the powers conferred by its charter. Nor does it matter that steam is used, and that the business done is largely in transporting persons to a point eighteen miles beyond the city limits, as well as from point to point within the city. *Newell Minneapolis, L. & M. R. Co.*, 24 *Am. & Eng. R. Cas.* 298, 35 *Minn.* 112, 27 *N. W. Rep.* 839.—DISTINGUISHING Carli *v.* Stillwater St. R. & T. Co., 28 Minn. 373, 10 N. W. Rep. 205. —DISAPPROVED IN East End St. R. Co. *v.* Doyle, 88 Tenn. 747, 9 L. R. A. 100, 13 S. W. Rep. 936. FOLLOWED IN Williams *v.* City El. St. R. Co., 43 Am. & Eng. R. Cas. 215, 41 Fed. Rep. 556.

141. Rule where ownership of the fee is in state or city.—(1) *Right to compensation denied.*—A person who has no title to the soil of the street adjoining his lot is not entitled to compensation for the appropriation of it for the purposes of a railroad. *Carson* v. *Central R. Co.*, 35 *Cal.* 325. *Simplot* v. *Chicago, M. & St. P. R. Co.*, 16 *Fed. Rep.* 350, 5 *McCrary* (*U. S.*) 158. *Lorie* v. *North Chicago City R. Co.*, 32 *Fed. Rep.* 270. *Stetson* v. *Chicago & E. R. Co.*, 75 *Ill.* 74. *Clinton* v. *Cedar Rapids & M. R. R. Co.*, 24 *Iowa* 455.—APPROVING Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.—FOLLOWED IN Hine *v.* Keokuk & D. M. R. Co., 42 Iowa 636.—*Davenport* v. *Stevenson*, 34 Iowa 225, 5 *Am. Ry. Rep.* 107. —FOLLOWING Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148.—*Franz* v. *Sioux City & P. R. Co.*, 55 *Iowa* 107, 7 *N. W. Rep.* 472. *Cosby* v. *Owensboro & R. R. Co.*, 10 *Bush* (*Ky.*) 288. *Rummel* v. *New York, L. & W. R. Co.*, 9 *N. Y. Supp.* 404, 30 *N. Y. S. R.* 235.—QUOTING Hier *v.* New York, W. S. & B. R. Co., 40 Hun 310.—*Dilley* v. *Wilkes-Barre & K. Pass. R. Co.*, 2 *Pa. Dist.* 91.

(2) *Illustrations.* — The legislature can grant the right to construct a railroad upon public streets without providing for compensation to the owners of property along such streets, provided such owners are not the owners of the contiguous land *ad filum viæ*. *Carson* v. *Central R. Co.*, 35 *Cal.* 325.

The owner of property abutting on a street in an addition to the city of Denver, in which the city had only a qualified fee, sued to recover damages incurred by the construction of a railroad in the street. *Held*, that since the injuries to the property were done after the present state Constitution, providing that private property shall not be taken or damaged for public or private use without just compensation, went into effect, it applied, and the owner was entitled to recover. *Denver Circle R. Co.* v. *Nestor*, 10 *Colo.* 403, 15 *Pac. Rep.* 714. See also *Denver Circle R. Co.* v. *Wiggins*, 10 *Colo.* 426, 15 *Pac. Rep.* 726. *Denver Circle R. Co.* v. *Clark*, 10 *Colo.* 427, 15 *Pac. Rep.* 726. *Denver Circle R. Co.* v. *Bigler*, 10 *Colo.* 428, 15 *Pac. Rep.* 726. *Denver Circle R. Co.* v. *Martin*, 10 *Colo.* 428, 15 *Pac. Rep.* 726.

It seems that, for the purpose of managing and regulating the public streets in the city of New York, and the use of them for the trusts and purposes of their dedication or establishment; prescribing the width of the sidewalks and of the carriage-way; licensing the partial and temporary use of parts of them for necessary private purposes; and permitting or prohibiting special uses for particular objects, the legal title to the land or soil of the streets is vested in the city corporation, subject to the public use of them as public streets of the city. *Drake* v. *Hudson River R. Co.*, 7 *Barb.* (*N. Y.*) 508.

Where the right of way over a common is granted to a railroad company by the authorities of a city, in whom the title vests, the city alone has the right to complain if the company has exceeded or is about to exceed the powers conferred by the grant. *Bell* v. *Ohio & P. R. Co.*, 25 *Pa. St.* 161.

(3) *Limits and exceptions to above rule.*— An abutting lot owner who does not own the fee to the street cannot support an action against a horse-railroad company for constructing its road in the street, without showing some special injury to himself different from that suffered by lot owners generally. *Osborne* v. *Brooklyn City R. Co.*, 5 *Blatchf.* (*U. S.*) 366.—APPROVED IN McCall *v.* Hancock, 20 Blatchf. 344.

For injury and annoyance occasioned by an ordinary railroad which are peculiar to an abutting owner, and not shared by the

general public—which affect his property and impair its value without injuring that of his neighbor—he ought to receive compensation, though the city holds the fee and grants the right of way. *Denver* v. *Bayer*, 7 *Colo.* 113, 2 *Pac. Rep.* 6.

An incorporated city or town may lawfully grant the right and privilege of constructing and operating a railroad in a public street, the fee of which is in the city or town, if it makes all proper and reasonable provisions to protect lot owners and the public in the free use of the same, and in so doing will incur no liability to owners of lots abutting on such street, who must look to the company for any damage thereby caused to their property. *Olney* v. *Wharf*, 115 *Ill.* 519, 5 *N. E. Rep.* 366.—REVIEWING Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Murphy *v.* Chicago, 29 Ill. 286. REVIEWING AND DISTINGUISHING Pekin *v.* Brereton, 67 Ill. 477; Stack *v.* East St. Louis, 85 Ill. 377; Rigney *v.* Chicago, 102 Ill. 64.

In Iowa the owners of lots abutting upon streets do not own the fee of the streets, yet the courts recognize the doctrine that they have a peculiar interest in the streets which neither the local nor general public can claim, and which is an easement attaching to the lots, and partakes of the nature of property. *Cadle* v. *Muscatine Western R. Co.*, 44 *Iowa* 11.—FOLLOWING Cook *v.* Burlington, 30 Iowa 94.—QUOTED IN McQuaid *v.* Portland & V. R. Co., 40 Am. & Eng. R. Cas. 308, 18 Oreg. 237.

But this easement or interest in the street is subordinate to the right of the general public to a proper use of the street for public purposes, and for such use no damages can be recovered. But if a railroad company negligently and carelessly appropriates the street, and thereby unnecessarily enhances the injury of the adjoining proprietor, he may have redress, though the road be authorized by statute or an ordinance; not for the appropriation of the street, but for the negligent manner in which it is done. *Cadle* v. *Muscatine Western R. Co.*, 44 *Iowa* 11.

Where, under authority from a city council, a company lays its track in a street the fee-simple title to which is in the public, no cause of action for damages accrues to the owner of abutting property, under Iowa Code, § 464, because of such occupation of the street, unless his property has been actually damaged thereby. *Cook* v. *Chicago, M. & St. P. R. Co.*, 83 *Iowa* 278, 49 *N. W. Rep.* 92.—FOLLOWING Milburn *v.* Cedar Rapids, 12 Iowa 246; Clinton *v.* Cedar Rapids & M. R. R. Co., 24 Iowa 455; Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148.

The owner of property fronting on a street of which the fee is in the town or village is entitled to damages for the construction of a railroad on the street, upon proving special damage. *Omaha & R. V. R. Co.* v. *Rogers*, 20 *Am. & Eng. R. Cas.* 79, 16 *Neb.* 117, 19 *Pac. Rep.* 603.—FOLLOWING Burlington & M. R. R. Co. *v.* Reinhackle, 15 Neb. 279.—APPLIED IN Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240.

Owners of lots abutting on a city street the fee of which is in the municipality for street uses, although they have no title to the soil, are entitled to the benefit of the street in front of their premises for access and other purposes, and cannot be deprived thereof without compensation. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238.

The right of such owners is not so absolute in its character that they can resist or prevent any and all interference with the street, to their detriment; nor can they assert it to stay the municipality in the control, regulation, or improvement of the streets in the public interest, although it may be made to appear that the privileges said owners had enjoyed and the benefits they had derived from the street would be curtailed or impaired, to their injury, by the changes proposed. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 15 *N. Y. Supp.* 238.

A company grading and improving a street, under a contract with the city, upon consideration of being permitted to construct its road thereon, is liable to owners of adjoining lots who do not own the fee in the street for such injury only, resulting from such grading and improvement of the street and construction of road, as the city would have been liable for if it had done the work itself. It is otherwise where the railroad is constructed on a street in which the abutting owners hold the fee. *Iron Mountain R. Co.* v. *Bingham*, 38 *Am. & Eng. R. Cas.* 444, 87 *Tenn.* 522, 4 *L. R. A.* 622, 11 *S. W. Rep.* 705.

Where the municipality owns the fee of streets, having acquired the same under the town-site law, abutting owners have equitable rights by way of easements in the streets of which they cannot be deprived by the municipality except in a manner provided by law. *Dooly Block* v. *Salt Lake Rapid Transit Co.*, 56 *Am. & Eng. R. Cas.* 513, 9 *Utah* 31, 33 *Pac. Rep.* 229.

(4) *Remedy at law not in equity.*—Abutting lot owners having no title to the fee of a street have no other right to recover damages from a company for the use of the street by the construction of its road therein, and the running of its trains over the same (no part of the property of complainants being touched by the railroad), than that which accrued to them by the increased burden put upon the street and the injury done to their particular estates. Against wrongs of this character only, equity does not relieve, but the party must resort to an action at law, where his damages may be estimated. *Denver, U. & P. R. Co.* v. *Barsaloux*, 15 *Colo.* 290, 25 *Pac. Rep.* 165. —FOLLOWING Denver & S. F. R. Co. *v.* Domke, 11 Colo. 247.

In such case, where a company constructs a narrow-gauge road through a street, and operates the same through a long series of years without protest or objection from the adjoining lot owners, the implied assent to such use presumed from their silence precludes them from seeking any equitable relief against the continued operation of the road as originally constructed. *Denver, U. & P. R. Co.* v. *Barsaloux*, 15 *Colo.* 290, 25 *Pac. Rep.* 165.

Nor are such lot owners entitled to injunctive relief for the damages occasioned by the laying of a third rail on the roadbed as originally constructed, and the operation of broad-gauge cars thereon, no change being made in the width of the roadbed or length of the ties used for the purpose. *Denver, U. & P. R. Co.* v. *Barsaloux*, 15 *Colo.* 290, 25 *Pac. Rep.* 165.

A decree which does not undertake to adjudicate the rights of the parties to the use of such street, but assumes to prohibit the company from continuing to broaden the gauge beyond the point reached when the injunction suit is commenced, which is beyond the complainant's property, cannot be permitted to stand in any event. *Denver, U. & P. R. Co.* v. *Barsaloux*, 15 *Colo.* 290, 25 *Pac. Rep.* 165.

Where a track is constructed upon a public street, the fee of which is in the municipal corporation, the property of an adjoining proprietor is not taken for public use and there is no reason for condemning any portion of his property. If such owner has sustained any damages as a result from the laying and use of such track, redress can be had in an appropriate action at law; a court of equity has no jurisdiction to determine his right to damages. (Sheldon, C.J., and Dickey and Breese, JJ., dissenting.) *Peoria & R. I. R. Co.* v. *Scherts*, 84 *Ill.* 135.

142. Rule where ownership of the fee is in abutting owner.* — (1) *In general.*—In Indiana the abutting landholders own the fee in the streets of cities and towns. *Terre Haute & I. R. Co.* v. *Scott*, 3 *Am. & Eng. R. Cas.* 208, 74 *Ind.* 29.

The exclusive use of a street is in the public, even when the fee to the centre of the street is in the abutting lot owners. The owners of abutting lots have and can have no possession, or right to the possession, in fact or in law, of the street or any part of it. *Jeffersonville, M. & I. R. Co.* v. *Esterle*, 13 *Bush* (*Ky.*) 667, 17 *Am. Ry. Rep.* 111.—FOLLOWED IN Fulton *v.* Short R. R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332.

Where a public street is lawfully vacated, the owner of abutting property holds the fee of the former street, presumably to the centre line, discharged from all easements in favor of either the public or the owners of other property abutting on the street. *Lamm* v. *Chicago, St. P., M. & O. R. Co.*, 46 *Am. & Eng. R. Cas.* 42, 45 *Minn.* 71, 47 *N. W. Rep.* 455.

A grantee of land abutting on a public street, if his grantor owns the fee of the street, takes to the middle of the street, by mere force of legal construction, unless a contrary intention is apparent. *Dodge* v. *Pennsylvania R. Co.*, 36 *Am. & Eng. R. Cas.* 180, 43 *N. J. Eq.* 351, 10 *Cent. Rep.* 655, 11 *Atl. Rep.* 751; *affirmed in* 45 *N. J. Eq.* 366, 19 *Atl. Rep.* 622.

And where lands are conveyed as abutting on a proposed street, and the street

* In whom is the fee of highway, see note, 3 AM. & ENG. R. CAS. 218.

Rights of abutting owner where fee of street is owned by him, and where it is not, see notes, 20 AM. & ENG. R. CAS. 65; 7 L. R. A. 548; 56 AM. & ENG. R. CAS. 663, *abstr.*

Fee to one half of the street in the abutting owner, see 29 AM. & ENG. R. CAS. 580, *abstr.*

extends over other lands of the grantor than those conveyed, a right to the use of the proposed street, as a means of passage to and from the lands conveyed, will arise by implication in favor of the grantee on the delivery of the deed, and will continue in force until the proposed street becomes a public highway. *Dodge* v. *Pennsylvania R. Co.*, 36 *Am. & Eng. R. Cas.* 180, 43 *N. J. Eq.* 351, 10 *Cent. Rep.* 655, 11 *Atl. Rep.* 751; *affirmed in* 45 *N. J. Eq.* 366, 19 *Atl. Rep.* 622. —FOLLOWING Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557.

Whether such private right will merge in the public right when the proposed street becomes a public highway, and will be extinguished with the public right if the street is afterwards vacated, or will revive on vacation, is a question on which judicial opinion is at variance, and is, as a matter of law, unsettled in this state. *Dodge* v. *Pennsylvania R. Co.*, 36 *Am. & Eng. R. Cas.* 180, 43 *N. J. Eq.* 351, 10 *Cent. Rep.* 655, 11 *Atl. Rep.* 751; *affirmed in* 45 *N. J. Eq.* 366, 19 *Atl. Rep.* 622.—NOT FOLLOWING Clark *v.* Elizabeth, 40 N. J. L. 172. REVIEWING Attorney-General ex rel. *v.* Morris & E. R. Co., 19 N. J. Eq. 386.

Where a lot is described in the deed conveying it as bounded on certain streets, it extends to the middle of the streets, subject to the public easement therein. This is the general rule as to land in the country, and it is applicable to city property also. *People* v. *Law*, 34 *Barb.* (*N. Y.*) 494, 22 *How. Pr.* 109.

Where the title to abutting lots extends only to the border of the street, the owner is not entitled to damages where the street is taken for railroad purposes; but it is otherwise where his title extends to the middle of the street. *Wetmore* v. *Law*, 22 *How. Pr.* (*N. Y.*) 130.

Where a grantor conveys a lot bounded by a piece of ground laid out as a street upon a map in reference to which the sale is made, but which is not, in fact, a public street or highway, such conveyance carries with it the fee to the centre of the street, as part and parcel of the grant. There is no distinction in this respect between city streets and the highways of a town. Whether the public has ever accepted its use as a street or not cannot affect the matter as between grantor and grantee. *Bissell* v. *New York C. R. Co.*, 23 *N. Y.* 61.—APPLIED IN Perrin *v.* New York C. R. Co., 36 N. Y. 120. FOLLOWED IN Lozier *v.* New York C. R. Co., 42 Barb. (N. Y.) 465.

In Wisconsin the proprietors of lots bounded by a public street within a recorded town plat or village take to the centre of the street and own the soil, subject to the public easement. *Ford* v. *Chicago & N. W. R. Co.*, 14 *Wis.* 609.—FOLLOWING Kimball *v.* Kenosha, 4 Wis. 321; Goodall *v.* Milwaukee, 5 Wis. 32; Milwaukee *v.* Milwaukee & B. R. Co., 7 Wis. 85; Mariner *v.* Schulte, 13 Wis. 692.

(2) *Compensation allowed.* — Where the public has only an easement in a street or highway, and the fee of the soil is in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against the will of the abutting owner and without any compensation to him. *White* v. *Northwestern N. C. R. Co.*, 56 *Am. & Eng. R. Cas.* 706, 113 *N. Car.* 610, 18 *S. E. Rep.* 330.—FOLLOWING Grand Rapids & I. R. Co. *v.* Heisel, 47 Mich. 393; Southern Pac. R. Co. *v.* Reed, 41 Cal. 256; Imlay *v.* Union Branch R. Co., 26 Conn. 249; South Carolina R. Co. *v.* Steiner, 44 Ga. 546; Daly *v.* Georgia Southern & F. R. Co., 80 Ga. 793; Cox *v.* Louisville, N. A. & C. R. Co., 48 Ind. 178; Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366; Indianapolis, B. & W. R. Co. *v.* Hartley, 67 Ill. 439; Phipps *v.* West Md. R. Co., 66 Md. 319; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; Harrington *v.* St. Paul & S. C. R. Co., 17 Minn. 215; Hastings & G. I. R. Co. *v.* Ingalls, 15 Neb. 123; Chamberlain *v.* Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Lawrence R. Co. *v.* Williams, 35 Ohio St. 168; Ford *v.* Chicago & N. W. R. Co., 14 Wis. 609; Carl *v.* Sheboygan & F. du L. R. Co., 46 Wis. 625; Buchner *v.* Chicago, M. & N. W. R. Co., 60 Wis. 264; Indianapolis & C. R. Co. *v.* McAhren, 12 Ind. 552; Theobold *v.* Louisville, N. O. & T. R. Co., 66 Miss. 279; Barney *v.* Keokuk, 94 U. S. 324; Adams *v.* Chicago, B. & N. R. Co., 39 Minn. 286.—*Reichert* v. *St. Louis & S. F. R. Co.*, 38 *Am. & Eng. R. Cas.* 453, 51 *Ark.* 491, 11 *S. W. Rep.* 696.—QUOTING Springfield *v.* Connecticut River R. Co., 4 Cush. 71; Wager *v.* Troy Union R. Co., 25 N. Y. 533; Williams *v.* New York C. R. Co., 16 N. Y. 109.—*Weyl* v. *Sonoma Valley R. Co.*, 69 *Cal.* 202, 10 *Pac. Rep.* 510.—DISTINGUISHED IN Finch *v.* Riverside & A. R. Co., 46 Am. & Eng. R. Cas. 107, 87 Cal. 597.—

Board of Trade Tel. Co. v. *Barnett*, 107 *Ill.* 507. *Egbert* v. *Lake Shore & M. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 648, 6 *Ind. App.* 350, 33 *N. E. Rep.* 659. *Kucheman* v. *Chicago, C. & D. R. Co.*, 46 *Iowa* 366.—CRITICISING Porter *v.* North Mo. R. Co., 33 Mo. 128; Barney *v.* Keokuk, 94 U. S. 324. DISTINGUISHING Milburn *v.* Cedar Rapids, 12 Iowa 246; Clinton *v.* Cedar Rapids & M. R. R. Co., 24 Iowa 455; Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148; Ingraham *v.* Chicago, D. & M. R. Co., 38 Iowa 669; Morris & E. R. Co. *v.* Mayor, etc., of Newark, 10 N. J. Eq. 352; Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289. FOLLOWING Williams *v.* New York C. R. Co., 16 N. Y. 97. NOT FOLLOWING Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506.—REVIEWED IN Small *v.* Chicago, R. I. & P. R. Co., 50 Iowa 338. DISSENTING OPINION REVIEWED AND APPROVED IN Blesch *v.* Chicago & N. W. R. Co., 48 Wis. 168.—*Theobold* v. *Louisville, N. O. & T. R. Co.*, 38 *Am. & Eng. R. Cas.* 462, 66 *Miss.* 279, 4 *L. R. A.* 735, 6 *So. Rep.* 230. *Lackland* v. *North Mo. R. Co.*, 31 *Mo.* 180.—APPLIED IN Conlon *v.* City R. Co., 8 Nov. Sc. 209. CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 38 Alb. L. J. 388. FOLLOWED IN Gaus & S. Mfg. Co. *v.* St. Louis, K. & N. R. Co., 113 Mo. 308. QUOTED IN Virginia & T. R. Co. *v.* Lynch, 13 Nev. 92. *Hodges* v. *Seaboard & R. R. Co.*, 88 *Va.* 653, 14 *S. E. Rep.* 380. —QUOTING, James River & K. Co. *v.* Anderson, 12 Leigh (Va.) 278.

(3) *Illustrations.* — When the fee of a street is in the abutting lot owners, the fact that a company has authority by statute and by municipal ordinance to construct its track upon the same constitutes no defense to an action brought by the lot owners against the company to recover possession of the land, the use of the street for a railroad not being within the scope of the public easement. *Reichert* v. *St. Louis & S. F. R. Co.*, 38 *Am. & Eng. R. Cas.* 453, 51 *Ark.* 491, 11 *S. W. Rep.* 696.

The state of Indiana laid out the city of Indianapolis, as its seat of government, on lands donated by the United States. *Held*, that the right to the streets vested in the city for the use of the public, the same as it would had the city been laid out by private citizens in the same way; and a conveyance by its number of a lot abutting on a street vests in the grantee the fee to one half of the street adjacent, subject to the public use, entitling him to damages for its appropriation for railroad purposes. *Terre Haute & I. R. Co.* v. *Scott*, 3 *Am. & Eng. R. Cas.* 208, 74 *Ind.* 29.

In such case a statute authorizing railroad companies to enter upon land desired for a right of way, where the same cannot be purchased, and requiring the owner to apply for an assessment of damages within two years, or, failing to do so, he shall be barred, does not apply where a company has only occupied the street; and he may have a right of action against the company after the two years, if it has entered without attempting to agree upon the compensation, as required by its charter. *Terre Haute & I. R. Co.* v. *Scott*, 3 *Am. & Eng. R. Cas.* 208, 74 *Ind.* 29. — DISTINGUISHING Swinney *v.* Ft. Wayne, M. & C. R. Co., 59 Ind. 205. RECONCILING Indiana C. R. Co. *v.* Oakes, 20 Ind. 9. REVIEWING Cox *v.* Louisville, N. A. & C. R. Co., 48 Ind. 178.

(4) *Measure of compensation.*—Where an abutting owner owns the fee to one half of the street, his damages against a railroad company occupying the street are the value of his interest in the land taken, together with the damage to the lot, which is the difference in its value at the time when the road was commenced and its value when such road is completed. *Muller* v. *Southern Pac. Branch R. Co.*, 83 *Cal.* 240, 23 *Pac. Rep.* 265.

Where a lot is conveyed as bounded on a street or highway, or where no street or highway is specifically mentioned, but the lot abuts thereon, the owner of the lot owns the soil to the centre of the street or highway, subject to the rights of the public therein; and he is entitled to damages for laying a railroad track in the street without his consent and without compensation, measured by the decreased market or rental value of his premises, or the injury to business or family occupation. *Florida Southern R. Co.* v. *Brown*, 23 *Fla.* 104, 1 *So. Rep.* 512.

An abutting owner who does not own the soil in a street cannot recover damages resulting from the presence of a railroad in the street, but only such damages as arise from the misconduct of the company in creating a nuisance, such as leaving cars standing for an unreasonable time in front of his premises. *Grand Rapids & I. R. Co.* v. *Heisel*, 38 *Mich.* 62; *further appeal* 47

Mich. 393, 11 *N. E. Rep.* 212.—APPROVED IN O'Brien *v.* Baltimore Belt R. Co., 74 Md. 363. QUOTED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 38 Alb. L. J. 388; Columbus, H. V. & T. R. Co. *v.* Gardner, 32 Am. & Eng. R. Cas. 243, 45 Ohio St. 309, 11 West. Rep. 264, 13 N. E. Rep. 69.

A street-railway track may be authorized on a street without compensating the abutting lot owners, but an ordinary railroad cannot. Where a railroad has been built in a city street without compensating the abutting owners, who own the soil of the street, they have a right of action for the injury that results to their freehold, such as an injury to the market or rental value, or annoyances of business or family occupation. *Grand Rapids & I. R. Co.* v. *Heisel*, 38 *Mich.* 62; *further appeal* 47 *Mich.* 393, 11 *N. E. Rep.* 212.

(5) *Compensation denied.*—The occupation and use of the street of a city or town as the site of a steam railroad do not entitle owners of the fee adjacent thereto to the centre of the street to compensation, as for property taken for public uses. *Elizabethtown & P. R. Co.* v. *Thompson*, 14 *Am. & Eng. R. Cas.* 111, 79 *Ky.* 52.—QUOTING Rowan *v.* Portland, 8 B. Mon. 232; Wickliffe *v.* Lexington, 11 B. Mon. 155.

In a conveyance of land bounded by a public road or street, the grantee ordinarily takes a legal title to the centre thereof, subject to the rights of the public therein; but he does not thereby secure such a title to the land embraced in the road or street as will enable him to claim compensation from a railway corporation which locates and operates its road thereon, under an appropriation of the same authorized by statute. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

(6) *Matters of procedure.*—Plaintiff, as owner of the soil of a street, has no right to object to defendant's use of the same on the ground that it imposes a servitude additional to the proper street easement, and defendant being in possession (so far as necessary for the purposes of its railway) of the street with the sanction and acquiescence of the public authorities, plaintiff is not in a position to object that defendant, in its use of the streets and the operation of its railway, is acting *ultra vires*, or that it is invading the franchise of another corporation. *Newell* v. *Minneapolis, L. & M. R. Co.*, 24 *Am. & Eng. R. Cas.* 298, 35 *Minn.* 112, 27 *N. W. Rep.* 839.

The common-law presumption that proprietors of land adjoining a public highway are the owners of the fee of said highway applies to the streets of New York city as well as to highways in the country; and the burden of overthrowing this presumption is upon a company which appropriates such streets. It seems that the fee to such streets as were opened under the act of 1813 is in the city. *Hochhalter* v. *Manhattan R. Co.*, 31 *N. Y. S. R.* 112, 56 *Hun* 642, *mem.*, 9 *N. Y. Supp.* 341.

In Wisconsin abutting lot owners own the soil to the centre of the street. Therefore, a city, in its corporate capacity, has not such an interest in streets or public squares as will enable it to maintain an injunction to restrain the laying of railroad tracks thereon. *Milwaukee* v. *Milwaukee & B. R. Co.*, 7 *Wis.* 85.—FOLLOWED IN Ford *v.* Chicago & N. W. R. Co., 14 Wis. 609. REVIEWED IN Sheboygan *v.* Sheboygan & F. du L. R. Co., 21 Wis. 667.

143. When ownership of the fee is immaterial.—(1) *In general.*—In Iowa streets of towns or cities may be occupied by railway tracks without the consent of the adjacent proprietor, and without compensation; but this extends only to tracks, and not to permanent obstructions like depot buildings. *Barney* v. *Keokuk*, 94 *U. S.* 324.

And the right thus to use streets exists even though the fee of the street is in the adjacent proprietor, or in a third person. In the city of Keokuk the fee to the streets is in the adjacent proprietors. *Barney* v. *Keokuk*, 94 *U. S.* 324.—DISTINGUISHED IN Selden *v.* Jacksonville, 28 Fla. 558.

There is no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein. *Barney* v. *Keokuk*, 94 *U. S.* 324.

Under Colo. Const. art. 2, § 15, providing that private property shall not be taken or damaged for public or private use without just compensation, the owners of lots abutting on a street in a city are entitled to compensation for the use of the street for railroad purposes; and the right to compensation is the same whether the lot owner owns to the middle of the street or not. *Mollandin* v. *Union Pac. R. Co.*, 4 *McCrary*

(*U. S.*) 290, 14 *Fed. Rep.* 394.—REVIEWED IN Gottschalk *v.* Chicago, B. & Q. R. Co., 14 Am. & Eng. R. Cas. 157, 14 Neb. 550.

Where an abutting lot owner does not own the soil to the middle of the street he cannot recover incidental damages for mere annoyance resulting from the laying of a railroad track thereon, such as annoyance from smoke and noise; but he may recover any special damage which he may suffer by the track being so laid as to curtail his use of the street, or for any injury resulting from negligence or improper acts in operating the road. *Florida Southern R. Co.* v. *Brown*, 23 *Fla.* 104, 1 *So. Rep.* 512.

Whether an abutting landowner can maintain an action for damages does not depend upon his ownership of the fee to the land included in the public road or street, but upon whether the location and the operation of the railway destroy or materially interfere with his access to his premises. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.—QUOTING Cadle *v.* Muscatine Western R. Co., 44 Iowa 11.

The use of a street for the operation of a steam railroad is a perversion of the street from its original and proper public purposes, imposing a new and additional burden, for which the abutting owner is entitled to compensation whether the fee of the street is in the city or in the abutting owners. *White* v. *North Western N. C. R. Co.*, 56 *Am. & Eng. R. Cas.* 706, 113 *N. Car.* 610, 18 *S. W. Rep.* 330. *Jeffersonville, M. & I. R. Co.* v. *Esterle*, 13 *Bush* (*Ky.*) 667, 17 *Am. Ry. Rep.* 111. *Virginia & T. R. Co.* v. *Lynch*, 13 *Nev.* 92.—QUOTING Lackland *v.* North Mo. R. Co., 31 Mo. 180. RECONCILING Slatten *v.* Des Moines Valley R. Co., 29 Iowa 152; Porter *v.* North Mo. R. Co., 33 Mo. 128. REVIEWING Tate *v.* Ohio & M. R. Co., 7 Ind. 480.

(2) *Where abutting owners do not own the fee.*—Under Arkansas Constitution of 1874, which provides that "private property shall not be taken, appropriated, or damaged without just compensation," the owner of premises abutting upon a street may recover from a railroad company damages resulting to his premises by the construction of its road along the street in such manner as to obstruct access to the premises, though he have no interest in the fee of the street, and no part of his premises be taken, and the road or other structure be skilfully and properly built. *Hot Springs R. Co.* v. *Williamson*, 45 *Ark.* 429. — QUOTING Metropolitan Board of Works *v.* McCarthy, L. R. 7 H. L. 243; Widder *v.* Buffalo & L. H. R. Co., 29 U. C. Q. B. 154. REVIEWING Caledonian R. Co. *v.* Walker, 35 Moak Rep. 177. —FOLLOWED IN Little Rock, M. R. & T. R. Co. *v.* Shelton, 45 Ark. 446.

One owning a lot abutting on a street, though he does not own the fee to the street, has such an easement therein as will enable him to maintain an action against a railroad company for occupying the street with a steam surface railroad so as to impair his easement. *Falker* v. *New York, W. S. & B. R. Co.*, 17 *Abb. N. Cas.* (*N. Y.*) 279. —APPLYING Story *v.* New York El. R. Co., 90 N. Y. 122; Mahady *v.* Bushwick R. Co., 91 N. Y. 148.

In such case a court may grant an injunction against the operation of the road, to be avoided by the payment of the damages ascertained and the execution of a release by the plaintiff. *Falker* v. *New York, W. S. & B. R. Co.*, 17 *Abb. N. Cas.* (*N. Y.*) 279.

Abutting lot owners who do not own the fee in the street may recover of a company, operating its road by permission upon a public street, such damages as result to them from an unlawful and improper use of the street by the company. *Iron Mountain R. Co.* v. *Bingham*, 38 *Am. & Eng. R. Cas.* 444, 87 *Tenn.* 522, 4 *L. R. A.* 622, 11 *S. W. Rep.* 705.

(3) *Remedy — Damages.* — The abutting lot owners on a street, part of which is occupied by a railroad company, whether they own the fee in the ground covered by the street or not, will not be entitled to enjoin excavation and construction along the street in a careful and proper manner, unless in doing so the injury to the lot owners will be such as will entirely destroy the value of their property, and therefore be equivalent to a virtual taking of it by the company. *Arbenz* v. *Wheeling & H. R. Co.*, 40 *Am. & Eng. R. Cas.* 284, 33 *W. Va.* 1, 5 *L. R. A.* 371, 10 *S. E. Rep.* 14. — EXPLAINING Spencer *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 406.

Such injunction can be obtained only under peculiar circumstances. *Spencer* v. *Point Pleasant & O. R. R. Co.*, 23 *W. Va.* 406. —FOLLOWED IN Campbell *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 448; Smith *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 451; Hale *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 454. QUOTED IN Taylor *v.* Balti-

more & O. R. Co., 39 Am. & Eng. R. Cas. 259, 33 W. Va. 39, 10 S. E. Rep. 29.

But such lot owners, whether they own such fee in the street or not, may by an action at law recover of the company such damages as they might have recovered in a common-law suit, had the company built its road in said street without proper authority; for while the company has built its road by proper authority, conferred directly by the legislature or by a town council authorized so to do by the legislature, it cannot be regarded as committing a nuisance in so building its road and using it in a careful and proper manner. Yet under W. Va. Const. art 3, § 9, the company is liable for the permanent damages it inflicts on such adjoining lots in the same manner as if it had built its road without such proper authority; but after it has been once sued for such damages it is not liable to be sued for the nuisances which necessarily result from the running of its cars through such street, for in so doing it is only exercising its rights and is not committing a nuisance. *Spencer* v. *Point Pleasant & O. R. R. Co.*, 23 *W. Va.* 406. — QUOTING Morris & E. R. Co. *v.* Mayor, etc., of Newark, 10 N. J. Eq. 352. REVIEWING Richardson *v.* Vermont C. R. Co., 25 Vt. 465; Stone *v.* Fairbury, P. & N. W. R. Co., 68 Ill. 394. — FOLLOWED IN Campbell *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 448; Smith *v.* Point Pleasant & O. R. R. Co., 23 W. Va 451; Hale *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 454.

3. *Location of Track. Turnouts and Side Tracks.*

144. Validity of ordinance granting leave to lay tracks.—A city council acts in a legislative capacity in granting to a railroad company the right to locate its track over streets, and the location of the road should be prescribed with reasonable certainty; and an ordinance is void which leaves it to the discretion of the company to locate the track. *Hickey* v. *Chicago & W. I. R. Co.*, 6 *Ill. App.* 172.

145. Only so much of the street to be used as is necessary for the operation of the road.—Neither a state nor a municipal corporation can permit a railroad company to construct tracks in a street and use them in such a manner as to render abutting lands less valuable. *St. Paul & P. R. Co.* v. *Schurmeir*, 7 *Wall.* (*U. S.*) 272. —FOLLOWED IN St. Paul, S. & T. F. R. Co. *v.* First Div. St. P. & P. R. Co., 26 Minn. 31.

A width of nineteen feet on each side of a track, excluding the sidewalks, which are twelve feet, is a sufficient passway, and therefore plaintiff, an abutting owner, cannot complain that his right of ingress or egress is unreasonably obstructed. *Louisville & N. R. Co.* v. *Orr*, 91 *Ky.* 109, 15 *S. W. Rep.* 8.

And defendant, having purchased from another company the road upon which plaintiff's property abuts, is not liable for injuries resulting from the improper operation of the road by its vendor. *Louisville & N. R. Co.* v. *Orr*, 91 *Ky.* 109, 15 *S. W. Rep.* 8.

A franchise to use a public highway for a railroad authorizes the appropriation of so much only as is necessary for the road, and this privilege is exhausted by the appropriation in fact of so much of the roadway as the proper construction of the road actually requires. *Sixth Ave. R. Co.* v. *Gilbert El. R. Co.*, 11 *J. & S.* (*N. Y.*) 292, 3 *Abb. N. Cas.* 372; *reversing* 9 *J. & S.* 489.

146. Right to lay double or additional tracks.—A lot owner has a right of action to recover damages to his lot from the unauthorized laying of additional railroad tracks in the street fronting his lot, whereby the use of the street for purposes of a highway is destroyed, and access to the lot is cut off, and for creating a nuisance by allowing stock cars to stand in the street adjoining the lot. *Pittsburg, Ft. W. & C. R. Co.* v. *Reich*, 101 *Ill.* 157.

Defendant company was authorized by an ordinance to lay two tracks in a street. Soon after the ordinance was passed defendant laid one track, but ten years afterwards it moved the first track nearer to plaintiff's property and put down a second track. *Held*, that the damages to plaintiff's property could not be claimed to have fully accrued at the time the first track was laid, so as to prevent a further recovery. *Maltman* v. *Chicago, M. & St. P. R. Co.*, 41 *Ill. App.* 229.

A city granted to a company a right of way to lay its track in a street upon condition that it grade and gravel the street, and make and maintain all necessary culverts and crossings, the grade to be established so as not to interfere materially with the convenience of the public in crossing the track where other streets intersected such street.

Another condition was that the "line of the railroad" should "be located so as not to approach the sidewalk curbstone nearer than fifteen feet." The company also prosecuted proceedings of appropriation, and had the damages sustained by all the adjacent landowners assessed. The use to be made of the property was in no way limited. *Held*, that the company had a right to lay one or more tracks in the street; that the words "line of the railroad," as used in the ordinance, had reference to the outer rail of the track, and so long as there was a clear fifteen feet between such outer rail and the curbstone, and the track was not raised above the established grade of the street, an abutting landowner could not object. *Chicago, St. L. & P. R. Co.* v. *Eisert*, 127 *Ind.* 156, 26 *N. E. Rep.* 759.

Where the right to occupy the streets of a city has been granted to a company, the construction of an additional track, without the consent of the municipal authorities, does not of itself constitute a nuisance, or entitle abutting property owners to recover damages. *Davis* v. *Chicago & N. W. R. Co.*, 46 *Iowa* 389, 16 *Am. Ry. Rep.* 45.—DISTINGUISHED IN Heath *v.* Des Moines & St. L. R. Co., 10 Am. & Eng. R. Cas. 313, 61 Iowa 11.

A company was authorized by charter to use a public street. At the time of the location and construction of the railroad there were no outside facts pointing to a necessity for more than one track on the street. The company laid one track and continued to use it for twenty years. *Held*, in a controversy with another company over the occupancy of the remaining portion of the street, that the power under the grant was exhausted, not by delay in appropriation, but by the full exercise of the power in the beginning. *Pennsylvania S. V. R. Co.* v. *Philadelphia & R. R. Co.*, 157 *Pa. St.* 42, 27 *Atl. Rep.* 683.

Where the law gives authority to councils to grant the right to lay railroad tracks, and they authorize a company to occupy certain streets with a double track "where the width of the street shall render the same practicable," the company will not be enjoined from the use of tracks laid in accordance with the permission of the city, when the city does not intervene and the affidavits of the complainants do not show the construction of the double track to be impracticable. *Knickerbocker Ice Co.* v. *Philadelphia & R. R. Co.*, 15 *Phila.* (*Pa.*) 48.—FOLLOWING Black *v.* Philadelphia & R. R. Co., 58 Pa. St. 249.

147. Alteration of location of track.—A company, desiring to make an alteration in its track that would involve the closing of parts of certain streets, made a written contract with the city that, in consideration of no opposition being made to the change, it would refer all claims for damages to arbitrators, and would, within thirty days after the award, pay the sums awarded. The contract was made at the request and for the protection of the property holders. The change of location was not opposed, damages were awarded, and the company not paying the awards, the city brought an action on the contract. *Held:* (1) that while the city could have entered into such a contract for its own benefit so far as any damage to the municipality itself was concerned, it had no power to do it for the benefit of private parties; (2) that the city had no power to act as trustee for such private parties. *New Haven* v. *New Haven & D. R. Co.*, 62 *Conn.* 252, 25 *Atl. Rep.* 316.

The power of a court to require a considerable and important lateral change in the location of railroad tracks, in order to restore the street to a proper condition of usefulness, should not be exercised unless that is reasonably necessary. *State ex rel.* v. *Minneapolis & St. L. R. Co.*, 35 *Am. & Eng. R. Cas.* 250, 39 *Minn.* 219, 39 *N. W. Rep.* 153.

148. Location on side of street—Rights of owner on other side.—The owner of property on one side of a street is not entitled to compensation by reason of the building of a track along the other side of the street, wholly beyond the centre line thereof, where such track was legally built prior to the enactment of Wis. Act of 1889, ch. 255; and where the city makes no complaint, such owner cannot claim compensation under that statute on the ground that the track was not legally built because not located in the centre of the street, as required by a city ordinance. *First Congregational Church* v. *Milwaukee & L. W. R. Co.*, 43 *Am. & Eng. R. Cas.* 182, 77 *Wis.* 158, 45 *N. W. Rep.* 1086.

149. Branch roads.—Where the legislature authorizes the common council of a city to grant permission to lay railroad tracks along or across the streets, subject to the right of property owners to recover damages

under the general railroad statute, the council can authorize a branch track running to an elevator belonging to private parties, but to be used by a railroad company in transferring grain to and from the elevator; but it is not necessary that the ordinance should provide for compensation to the property owners, as that is provided for in the general statute. *Clarke* v. *Blackmar*, 47 *N. Y.* 150. — EXPLAINED IN Heath *v.* Des Moines & St. L. R. Co., 10 Am. & Eng. R. Cas. 313, 61 Iowa 11.

The request of a company for the assent of the city is in law an acceptance of the present Constitution of the state, and by virtue of the acceptance a citizen can recover compensation for any injury to his property sustained by the construction of a branch road in a public street. *Duncan* v. *Pennsylvania R. Co.*, 13 *Phila.* (*Pa.*) 68.

150. Side tracks. — The presumption of law is that a side track or turnout in a street is necessary and proper, and the burden of proving the contrary is upon the plaintiff who seeks to have the turnout abated as a nuisance. *Carson* v. *Central R. Co.*, 35 *Cal.* 325.

Where the trustees of a municipality, without express conditions, grant to a company the right to lay a side track upon streets, even if the principle is applicable that the grantee must signify its acceptance by commencing the work within a reasonable time and prosecuting it to completion with ordinary diligence, yet, in the absence of a statutory provision or municipal ordinance or order declaring a forfeiture for a failure to complete the work within a reasonable time, the right of the company to the use of the street can be determined only by a judgment of forfeiture in an action commenced directly for that purpose, and cannot be considered in an action of ejectment. *Arcata* v. *Arcata & M. R. R. Co.*, 92 *Cal.* 639, 28 *Pac. Rep.* 676.

The unauthorized occupation of a street in a city by a side track, and with cars and engines, amounts to a public nuisance, and if an abutting owner suffers special damage therefrom, in which the public does not participate, he is entitled to maintain an action. And if the injury, from its nature, is not susceptible of being adequately compensated by damages at law, or is such that, from its continuance, a permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented, equity will enjoin it. *Kavanagh* v. *Mobile & G. R. Co.*, 32 *Am. & Eng. R. Cas.* 267, 78 *Ga.* 271, 2 *S. E. Rep.* 636.

A temporary injunction restraining the construction of a side track or turnout for a steam railway in city streets may be granted at the instance of a citizen alleging special damage to his real estate located in the vicinity of the nuisance, and though the evidence be conflicting as to whether he will sustain special damage or not, the discretion of the judge in granting the injunction will not be controlled unless abused. *Savannah & W. R. Co.* v. *Woodruff*, 86 *Ga.* 94, 13 *S. E. Rep.* 156.

The erection by the company of a side track upon a right of way granted by landowners cannot be complained of by such owners, though such side track interfered with their use of such right of way as a street. *Indianapolis, P. & C. R. Co.* v. *Rayl*, 3 *Am. & Eng. R. Cas.* 182, 69 *Ind.* 424.

A company laid a side track upon a city street within six feet of the line of the street, in violation of a city ordinance, granting it the right of way, which prohibited the construction of any track within eighteen feet of such line. *Held*, that such track, and the use thereof, constituted a nuisance, for the maintenance of which a property holder who had sustained special damages by reason thereof might maintain an action, the discretion necessary to be exercised in determining the limits to be imposed upon the use of the street by the railroad being vested in the city council. *Cain* v. *Chicago, R. I. & P. R. Co.*, 54 *Iowa* 255, 3 *N. W. Rep.* 736, 6 *N. W. Rep.* 268, 21 *Am. Ry. Rep.* 235. — DISTINGUISHED IN Merchants' Union Barb-Wire Co. *v.* Chicago, R. I. & P. R. Co., 43 Am. & Eng. R. Cas. 121, 79 Iowa 613. FOLLOWED IN Eslich *v.* Mason City & Ft. D. R. Co., 75 Iowa 443, 39 N. W. Rep. 700.

In such case the track, being a side track, and having been wrongfully constructed, could not be considered a permanent structure, the damages arising from the maintenance of which would be original, and not continuous; nor, being a nuisance, could the right to continue such maintenance be acquired by prescription. *Cain* v. *Chicago, R. I. & P. R. Co.*, 54 *Iowa* 255, 3 *N. W. Rep.* 736, 6 *N. W. Rep.* 268, 21 *Am. Ry. Rep.* 235, —QUOTING Troy *v.* Cheshire R. Co., 23 N. H. 83.

Where municipal authorities pass an ordinance granting the right to lay tracks on

streets, the privilege must be understood as granted and accepted subject to the implied power of the legislature to modify the ordinance, or to authorize cities to forbid the construction of tracks, switches, or side tracks without compensation to abutting owners; and this is so even if such ordinance be considered as a contract. *Drady* v. *Des Moines & Ft. D. R. Co.*, 14 *Am. & Eng. R. Cas.* 130, 57 *Iowa* 393, 10 *N. W. Rep.* 754.

Where a municipal charter so allows, a railroad may be constructed on a street, by permission of the municipal authorities; and neither the municipality nor the company will be responsible for the inconvenience and damage resulting from such construction. But this rule applies only to a railroad constructed on the grade of the street, where the only obstruction is the passage of the trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the road. *Tate* v. *Missouri, K. & T. R. Co.*, 64 *Mo.* 149, 17 *Am. Ry. Rep.* 191.—DISTINGUISHED IN Kinealy *v.* St. Louis, K. C. & N. R. Co., 69 Mo. 658. FOLLOWED IN Swenson *v.* Lexington, 69 Mo. 157. QUOTED IN Cross *v.* St. Louis, K. C. & N. R. Co., 14 Am. & Eng. R. Cas. 123, 77 Mo. 318.

151. Switches and turnouts.—The owner of a corner lot, for a valuable consideration, released to a company the part of the streets adjoining his property, to the centre line, for a right of way, 'to be occupied by one track, as now located." In constructing a switch the company proposed to lay one rail thereof for a distance of nineteen feet in front of the lot and near the intersection of the streets, on the projecting ends of the ties on which the main track was laid, and fourteen inches from the main rail. Suit for an injunction. *Held*, that in the absence of a showing that such occupation of the ties of the main track will impose any additional burden upon plaintiff's soil, or will present any additional impairment or interference with his use of the street, the injunction will not lie. *Indianapolis & St. L. R. Co.* v. *Calvert*, 32 *Am. & Eng. R. Cas.* 170, 110 *Ind.* 555, 9 *West. Rep.* 238, 11 *N. E. Rep.* 476.

Where a company has constructed a switch, or "Y," in a public street of a city of the second class in Kansas, without authority from the city council, so close to the sidewalk that it practically prevents access from the abutting lots to the street, the owner of the abutting lots so obstructed can recover damages. *Kansas, N. & D. R. Co.* v. *McAfee*, 42 *Kan.* 239, 21 *Pac. Rep.* 1053.

A railroad switch or turnout laid, without municipal authority, on part of a public street, is a nuisance, which the owner of property in front of which the same is used is entitled to have abated, as inflicting injury peculiar to himself. Such owner, however, has no standing to champion the rights of others in front of whose property the switch is laid with municipal authority, and who do not complain. *Bell* v. *Edwards*, 37 *La. Ann.* 475.

The legislature may authorize a company to lay its tracks on a public street; but when it is so authorized by legislative grant, it has no right to appropriate and use a street or public highway for the laying of the tracks of its trunk line, switches, sidings, or branches; and the power must be given in plain words or by necessary implication. *Pennsylvania R. Co.'s Appeal*, 115 *Pa. St.* 514, 5 *Atl. Rep.* 872.—APPLIED IN Philadelphia *v.* Philadelphia & R. R. Co., 19 Phila. (Pa.) 507. DISTINGUISHED IN Pennsylvania R. Co. *v.* Diem, 39 Am. & Eng. R. Cas. 685, 128 Pa. St. 509.

The power to construct a road includes the authority to make switches and turnouts essential to the use of the road. *Stroudsburg* v. *Stroudsburg Pass. R. Co.*, 2 *Pa. Dist.* 35.

It does not follow, however, that it may exclusively occupy a street or arbitrarily interfere with public travel. *Stroudsburg* v. *Stroudsburg Pass. R. Co.*, 2 *Pa. Dist.* 35.—QUOTING Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 356; Ehrisman *v.* East Harrisburg City Pass. R. Co., 150 Pa. St. 180.

A charter provided that the company might construct a railroad along a certain street and make switches to its wharves, which were on the north side of the street. By an ordinance the city provided that the wharf company could exercise all the privileges conferred upon it by its charter, provided it did not obstruct the free passage of the south side of the street. Under such ordinance the wharf company had no right to construct switches south of its main track on said street. *Galveston Wharf Co.* v. *Gulf, C. & S. F. R. Co.*, 81 *Tex.* 404, 17 *S. W. Rep.* 57.

A wharf company does not acquire a vested right by laying switches and turn-

outs not authorized by its charter, but laid without objection. The court may authorize the same to be removed at the request of a railroad company having a right to use the street for the same purpose. *Galveston Wharf Co.* v. *Gulf, C. & S. F. R. Co.*, 81 *Tex.* 494, 17 *S. W. Rep.* 57.

Damages can be recovered for injuries sustained from the existence and operation of railroad switches and coal bins in close proximity to one's lot, although they do not occupy the street upon which the lot abuts or disturb ingress to and egress from it. *Ft. Worth & R. G. R. Co.* v. *Downie*, 82 *Tex.* 383, 17 *S. W. Rep.* 620.

4. *Change of Grade.** *Culverts.*

152. Validity and effect of statutes changing grade. — N. J. Act of 1874 (Rev. p. 944) conferring upon cities the power to change grades, whereby railroads entering said cities may locate, change, or elevate their tracks, is not limited to railroads in existence at the time of the passage of the act. *State* (*Hudson County, Pros.*) v. *Mayor, etc., of Bayonne*, 54 *N. J. L.* 293, 23 *Atl. Rep.* 648.

A change of grade made under the provisions of the above statute must be confined to such limits as are necessary for the accomplishment of its purpose. An ordinance which extends the line of such change clearly beyond what is required by the alteration of grade at the point of railroad crossing is illegal. *State* (*Hudson County, Pros.*) v. *Mayor, etc., of Bayonne*, 54 *N. J. L.* 293, 23 *Atl. Rep.* 648.

In 1890 congress passed an act requiring a railroad bridge across a river in New York city to be elevated. In 1892 the state legislature passed an act (ch. 339) to enable the railroad company to comply with the act of congress, which changed the grade of the street, and gave the company exclusive control of the improvement, but required the city to bear one half the cost. *Held*, that the act of 1892 did not provide for a contribution by the city to the private use of a corporation, in violation of N. Y. Const. art. 8, § 11, but for payment for the benefit received by the city from raising the grade of the railroad, and thus returning a portion of the avenue to public use, and permitting free and unobstructed passage on intersecting streets from one side of the city to the other. *Tocci* v. *Mayor, etc., of N. Y.*, 25 *N. Y. Supp.* 1089, 73 *Hun* 46.

The elevation of the tracks, the construction of the bridge, and the improving of the street for city use are inseparable, and are all parts of the same work, to which the city contributes in consideration of the surrender of the company's rights to public streets and avenues; and whether the legislature required the city to pay a consideration which was too high cannot be considered by the courts. *Tocci* v. *Mayor, etc., of N. Y.*, 25 *N. Y. Supp.* 1089, 73 *Hun* 46.

In such case the company abandoned the use of a street on acquiring the right to elevate its track. *Held*, that the land in the street reverted to the city, for street purposes, without a formal release from the company. *Tocci* v. *Mayor, etc., of N. Y.*, 25 *N. Y. Supp.* 1089, 73 *Hun* 46.

153. Power of court, or county commissioners, to order change of grade. — A taxable inhabitant of a town, owning land abutting upon a highway therein, which crosses a railroad by a bridge, in which and its approaches the county commissioners have ordered certain alterations to be made, is not "a party aggrieved" within Mass. St. 1882, ch. 135, § 1, giving to such party an appeal to the board of railroad commissioners, although he appeared before the county commissioners and was heard. *Chandler* v. *Railroad Com'rs*, 141 *Mass.* 208, 5 *N. E. Rep.* 509.—REVIEWING Brainard *v.* Connecticut River R. Co., 7 Cush. (Mass.) 506.

Where a change in the highway at a grade crossing has been ordered by the county commissioners, private owners of land the approach to which, in a certain direction, will be cut off by the proposed change, cannot maintain a petition for *certiorari* to quash the proceedings of the commissioners, on the general principle that one cannot maintain a private action for loss or damage which he suffers in common with the rest of the community. *Davis* v. *Hampshire County Com'rs*, 55 *Am. & Eng. R. Cas.* 52, 153 *Mass.* 218, 26 *N. E. Rep.* 848.

In enforcing against a company the duty imposed by its charter to construct, when necessary, on a street or highway crossing its tracks, a bridge or viaduct, with the approaches, the court has power to establish the grade therefor, though that involves a

* Changes of grades in city streets, see note, 14 AM. & ENG. R. CAS. 130.

change in the grade previously established for the street or highway. *Parker* v. *Truesdale*, 54 *Minn.* 241, 55 *N. W. Rep.* 901.

154. Power of city or town to change grade. — City authorities have power to regrade a street for any public purpose, without incurring any responsibility to holders of lots adjacent to the street, though the street may be raised several feet above the level of the lot. So the city authorities may authorize the passage of a railroad through a city, as consistent with the purposes of public streets, and it is not a purpresture. *Wolfe* v. *Covington & L. R. Co.*, 15 *B. Mon.* (*Ky.*) 404.—REVIEWED IN Newport & C. Bridge Co. *v.* Foote, 9 Bush (Ky.) 264.

And such authorities may change the grade of a street to suit the grade of a railroad coming into the city, or may authorize the railroad company to do so—not, perhaps, throwing the expense of the grading upon the adjacent lot owners. *Wolfe* v. *Covington & L. R. Co.*, 15 *B. Mon.* (*Ky.*) 404.

Defendant company claimed that under proceedings of the city council of a certain city said city had authorized it to excavate a certain street to a previously established grade, and to use a portion of the same for its roadbed, and to use the materials excavated for the construction thereof, all in consideration of certain undertakings upon defendant's part. The proceedings referred to disclosed no agreement to refrain from changing the grade. *Held:* (1) that it was competent for the council to change said grade so as to deprive defendant of the right to excavate according to the same; (2) that this change was effected by a resolution of the council authorizing the city surveyor to establish stakes for a temporary grade of said street, etc., and by the action of the surveyor in obedience to such resolution. *Karst* v. *St. Paul, S. & T. F. R. Co.*, 22 *Minn.* 118.

It seems that the primary object of power to alter the grade of streets, conferred upon common councils in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage, and to adapt the street more perfectly for the purposes of a public way. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238.

A municipality cannot, under the guise of exercising such power, appropriate a part of a street practically to the exclusive use of a railroad company and cut off abutting owners, without compensation, from using any part of it in the accustomed way. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238. —EXPLAINED IN Rauenstein *v.* New York, L. & W. R. Co., 136 N. Y. 528.

A municipal corporation has no right to make such a change in a street grade as will effect a destruction of the franchise theretofore granted to a company to lay its tracks therein. *Seattle* v. *Columbia & P. S. R. Co.*, 6 *Wash.* 379, 33 *Pac. Rep.* 1048.

It may be granted that town supervisors have a right to enter upon a highway and change the grade in making proper improvements thereon; but they have no right to extend an embankment or deposit earth outside the limits of the highway, or to change the grade merely for the purpose of allowing a railroad to be constructed thereon. *Buchner* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 447, 60 *Wis.* 264, 19 *N. W. Rep.* 56.

155. Change of grade by city at request of abutting owners.—Before a street has been actually worked to grade, the grade may be altered by the common council upon the application, in writing, of the owners of a majority of the property per lineal foot along the line of said proposed change of grade. *State* (*Hudson County, Pros.*) v. *Mayor, etc., of Bayonne*, 54 *N. J. L.* 293, 23 *Atl. Rep.* 648.

156. Ordinance requiring change of grade.—A city granted to a company the right to locate and construct its road upon the streets, on condition that where the grade of the railroad should be higher than the street, the company should "fill up each side to their said road to form a convenient passage over the same." The company elevated its track above the level of the street, and the city filled the remainder of the street to a level with the railroad, and sued the company for the cost thereof. *Held*, that it was no defense that the street at the time of the construction of the railroad was unimproved, and had never been graded; or that after the building of the railroad the street was in as good condition as it was

before. *Indianapolis & C. R. Co.* v. *Lawrenceburg*, 34 *Ind.* 304.

In construing an ordinance requiring certain street grades to be raised so as to allow a company to construct tunnels and lay its tracks therein, the location of the railroad at the time, its consequent inconvenience to the adjoining proprietor, and the topography of the ground thereabouts must be kept in view. *Northern C. R. Co.* v. *Mayor, etc., of Baltimore*, 46 *Md.* 425, 18 *Am. Ry. Rep.* 461.

An ordinance requiring the street grades to be raised for the purpose of allowing a company to construct tunnels and lay tracks therein gives it the right to lay tracks without tunneling upon such streets as have not been opened, and which exist only upon the city plat. *Northern C. R. Co.* v. *Mayor, etc., of Baltimore*, 46 *Md.* 425, 18 *Am. Ry. Rep.* 461.

157. Changing grade—Company liable.*—An action lies in favor of the owner of property abutting on a public street to recover damages for injuries caused by changing the grade of the streets for railroad purposes, although he sold to the company a right of way through his property, unless the terms of the sale or the attendant circumstances authorize the inference that the resulting damage was included in the compensation paid; and the action lies against the company and the construction company who built the road, although the work was done by a subcontractor. *Alabama Midland R. Co.* v. *Williams*, 92 *Ala.* 277, 9 *So. Rep.* 203.

A company has no right, in constructing its road, to change the location or grade of a public way so as to deprive the adjoining owner of his right to enjoy his premises, by preventing ingress or egress, and if it does so, it must answer in damages therefor. *Louisville & N. R. Co.* v. *Finley*, 86 *Ky.* 294, 5 *S. W. Rep.* 753.

A city ordinance authorized the construction of a railroad on either of two streets, through the corporate limits, under suitable restrictions as to grade to be regulated thereafter. *Held*, that the ordinance authorized the company, so far as the city had power to do so, to run the road along the street, but not to obstruct it to the injury of abutting property owners; and that the road was to be constructed on the grade of the street substantially as it then existed, unless an alteration was made by proper municipal regulations. *Tate* v. *Ohio & M. R. Co.*, 7 *Ind.* 479.—FOLLOWED IN Evansville & C. R. Co. *v.* Dick, 9 Ind. 433.

A company, by reason of acting under statutory command in changing the grade of a street, does not become clothed with the rights of the public, as exercising the functions of the municipal officers who control the streets, so as to be relieved from liability to property owners for damages to their land. *Egbert* v. *Lake Shore & M. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 648, 6 *Ind. App.* 350, 33 *N. E. Rep.* 659.

Where an ordinance recites that a right of way is granted to a company, with the right to construct its road over and across certain streets "on the grade of the city or such grade as may be agreed upon," the company is limited to the grade established by the city, unless it be shown that some other grade has been agreed upon. *Slatten* v. *Des Moines Valley R. Co.*, 29 *Iowa* 148.

Where a change of grade in a city street is occasioned by the laying of a track thereon, the right of an abutting property owner to recover damages sustained because of such occupation of the street is not dependent upon improvements which have been made according to the previously authorized grade. *Nicks* v. *Chicago, St. P. & K. C. R. Co.*, 84 *Iowa* 27, 50 *N. W. Rep.* 222.

In order to entitle abutters on a highway which has been raised or lowered by a railroad corporation, under Mass. Rev. St. ch. 39, §§ 67, 68, to recover damages therefor, it is not necessary that the selectmen of the town should have either authorized or directed such alteration to be made. *Parker* v. *Boston & M. R. Co.*, 3 *Cush.* (*Mass.*) 107.

The remedy for an injury occasioned by the alteration of a highway for the purpose of raising or lowering the same, by a railroad corporation, is not by an action against the town under Mass. Rev. St. ch. 25, § 3, but by a proceeding against the corporation for damages, under Rev. St. ch. 39, § 56. *Parker* v. *Boston & M. R. Co.*, 3 *Cush.* (*Mass.*) 107.

Although a company has lawful authority to lay its track along a street, it is bound to locate it in conformity to the grade so as not to interfere with the concurrent use of the street by the public. *Smith* v. *Kansas*

* Right to change grade of street after a railroad track has been laid, see note, 19 L. R. A. 510.

City, St. J. & C. B. R. Co., 98 *Mo.* 20, 11 *S. W. Rep.* 259.

A railroad corporation having authority, when public necessity requires, to change the grade of the streets crossing its tracks will not be permitted to exercise its power in that respect except upon the same terms as those on which the municipality within which the streets are located may exercise like power; that is, on the payment of damages to those injured by the change. *Mayor, etc., of Jersey City* v. *Central R. Co.*, 23 *Am. & Eng. R. Cas.* 138, 40 *N. J. Eq.* 417, 2 *Atl. Rep.* 262.

Though a company be authorized to change the grade of a street so as to conform to a bridge over its track, yet it will be liable to individuals that may be damaged thereby. *Mayor, etc., of Jersey City* v. *Central R. Co.*, 23 *Am. & Eng. R. Cas.* 138, 40 *N. J. Eq.* 417, 2 *Atl. Rep.* 262.—QUOTING Warren R. Co. *v.* State, 29 N. J. L. 353.

Where a city consents to the construction of railroad tracks in the city "so as to conform to the grade of the streets which they cross and run through, as laid down in the grade maps of the city," this applies to all streets which may be used, whether then opened or not, and when a street is opened the company must conform to the established grade. *Long Island R. Co.* v. *Brooklyn*, 29 *N. Y. S. R.* 381, 8 *N. Y. Supp.* 805, 55 *Hun* 610, 5 *Silv. Sup. Ct.* 475.

It is permitted to appropriate so much of the highway as may be necessary or convenient for such purpose, but the use thereof by the public is not thereby restricted. The railway corporation is allowed to build and operate its road upon the highway, but it has no authority to change the grade thereof, or to use it to the exclusion of the public, or in such a manner as will infringe upon the rights to its use of adjoining property owners. *McQuaid* v. *Portland & V. R. Co.*, 40 *Am. & Eng. R. Cas.* 308, 18 *Oreg.* 237, 22 *Pac. Rep.* 899.

As between an abutting lot owner and a company laying its track on the street, the street must be considered private property, and the company has no right to change the grade simply because it is a public street, even by consent of the city, if it has the effect of injuring the property owners. *Buchner* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 447, 60 *Wis.* 264, 19 *N. W. Rep.* 56.

158. —— company not liable.—A statute required the common council of a city, when it should alter the grade of any street, to appoint three persons to assess the damages to which any lot owners might be subjected by reason of such alteration; and provision was made for the payment of such damages. The grade of a street was altered by a railroad company with the consent of the council, the damages were assessed, and the assessment was confirmed. *Held*, that it was a legal presumption that the owners of lots affected by the alteration had been satisfied for all the injuries sustained in consequence of the alteration of the grade; and that an action against the company could not be sustained. *Chapman* v. *Albany & S. R. Co.*, 10 *Barb.* (*N. Y.*) 360.

Where a railroad is constructed on a h way, an adjoining property owner ca.... recover damages against the company for changing the grade if no change was made other than what was necessary to restore the highway to its former usefulness. *Conklin* v. *New York, O. & W. R. Co.*, 26 *Am. & Eng. R. Cas.* 365, 102 *N. Y.* 107, 6 *N. E. Rep.* 663, 1 *N. Y. S. R.* 677; *affirming* 32 *Hun* 466, *mem.*—APPLYING Uline *v.* New York C. & H. R. R. Co., 101 N. Y. 98. OVERRULING Fletcher *v.* Auburn & S. R. Co., 25 Wend. 462.—ADHERED TO IN Rauenstein *v.* New York, L. & W. R. Co., 136 N. Y. 528.

Where a company in changing the grade of a street performs a duty imposed by public law and prescribed by municipal ordinance, it is not liable for damages to abutting owners resulting from the necessary changes, individual interests being subordinate to the requirements of the public the same as though the city authorities had done the work themselves. (O'Brien and Maynard, JJ., dissenting.) *Rauenstein* v. *New York, L. & W. R. Co.*, 56 *Am. & Eng. R. Cas.* 655, 136 *N. Y.* 528, 32 *N. E. Rep.* 1047.

By N. Y. Act of 1880, ch. 147, defendant company was authorized to construct an elevated track through a certain city, the statute providing for a commission with power to discontinue portions of streets, or to make alterations in the width or grade of the same. Such commissioners entered into an agreement whereby the company was to be liable to the city for any damages to which it might be subjected at the suit of individuals by reason of such changes. The city was authorized by its charter to

change the grade of streets, but no provision was made for damages to property owners. *Held*, that an individual property owner could not maintain an action against the company for damages arising from a change in the grade of a street, or for closing it temporarily while the work was being done, where there was no proof of negligence or want of skill in the manner of doing it. *Wilson* v. *New York C. & H. R. R. Co.*, 2 *N. Y. Supp.* 65, 39 *Hun* 651, *mem.*

Where a company is authorized to occupy a street on condition that it grade and otherwise improve it, and a plan is furnished by the city engineer, and the work is done in strict accordance therewith, the company is not liable for injuries resulting to an abutting owner where there is nothing to show that the work was done in a negligent manner. *Iron Mountain R. Co.* v. *Bingham*, 38 *Am. & Eng. R. Cas.* 444, 87 *Tenn.* 522, 4 *L. R. A.* 622, 11 *S. W. Rep.* 705.

And where such work is done under a contract with the city council, it will be presumed that the grade furnished the company by the city engineer had been adopted by the council. *Iron Mountain R. Co.* v. *Bingham*, 38 *Am. & Eng. R. Cas.* 444, 87 *Tenn.* 522, 4 *L. R. A.* 622, 11 *S. W. Rep.* 705.

159. Liability of municipality authorizing change of grade.—The liability of a city to property owners for allowing a railroad track to be laid in a street, and for raising the grade of the street, depends upon whether the city council exceeded its authority in doing so. The city is not liable for damages resulting from the exercise of its lawful authority. *Murphy* v. *Chicago*, 29 *Ill.* 279.—DISTINGUISHED IN St. Louis, V. & T. H. R. Co. *v.* Capps, 67 Ill. 607. FOLLOWED IN Chicago D. & C. Co. *v.* Garrity, 115 Ill. 155. MODIFIED IN Pekin *v.* Brereton, 67 Ill. 477. REVIEWED IN Olney *v.* Wharf, 115 Ill. 519.

Where a city has established no grade of a street upon which plaintiff has a lot, and a company, with the permission of the city, fills up the space between an original embankment and the lot, so as to prevent access thereto, he is entitled to recover damages against the city. *Pekin* v. *Winkel*, 77 *Ill.* 56.

A company being authorized by law to construct and operate its road through an incorporated town which held the fee to its streets, the town authorities granted the privilege of constructing the road along the centre of a street, upon condition that the company grade the street and plank its track, so as to secure, as far as possible, to the public the free and uninterrupted use of the street; but the road was so constructed that an abutting lot owner was damaged by the grade of the street being raised, and by the obstruction of the view from his premises. *Held*, that the town, having lawfully granted the right of way, and being guilty of no negligence or wrongful act, was not liable to the lot owner. *Olney* v. *Wharf*, 115 *Ill.* 519, 5 *N. E. Rep.* 366.

A city authorized the construction of a railway over a street, but by an embankment of the railroad, at a point not upon the street, but upon private property, water was caused to flow upon plaintiff's premises to his damage. *Held*, that the city was not liable. *Callahan* v. *Des Moines*, 63 *Iowa* 705, 17 *N. W. Rep.* 470.

Where a city stands by and permits a company to erect a nuisance on a highway, outside of the license granted to it by the city, by raising its track, whereby the natural flow of water is turned onto adjoining property, the city is liable for the injury caused thereby. *Torpey* v. *Independence*, 24 *Mo. App.* 288.—REVIEWING Indianapolis, B. & W. R. Co. *v.* Smith, 52 Ind. 428; Cox *v.* Louisville, N. A. & C. R. Co., 48 Ind. 178; Stack *v.* East St. Louis, 85 Ill. 377.

A railroad was constructed through a village before it was incorporated. After the village was incorporated, the company applied for permission to lay two additional tracks and to change the grade of an avenue so as to carry it under the tracks, and the village authorities granted their consent but took no part in making or superintending the change. *Held*, that an adjoining property owner was entitled to damages against the village the same as if it had made the change itself. *In re Stack*, 50 *Hun* 385, 21 *N. Y. S. R.* 953, 3 *N. Y. Supp.* 231. —FOLLOWING Uline *v.* New York C. & H. R. R. Co., 101 N. Y. 98.

160. Raising grade—Company liable.* — A railroad corporation which proceeds under Mass. Rev. St. ch. 39, § 67, after notice to the mayor and aldermen of a city,

* Liability of company where track is laid above or at grade, see note, 14 AM. & ENG. R. CAS. 129.

Liability of company for raising grade of street. Injury to abutting owner, see 36 AM. & ENG. R. CAS. 170, *abstr.*

and on terms agreed upon between the corporation and the mayor and aldermen, to raise a street, that its railroad may pass under the same, acts by virtue of its independent corporate power, and not as the agent or servant of the city; and such corporation is primarily liable to third parties for damages thereby caused to their estate. *Gardiner* v. *Boston & W. R. Corp.*, 9 *Cush.* (*Mass.*) 1.

The power of a railroad company "to raise or lower any highway for the purpose of having its railway cross over or under the same" does not extend to raising or lowering the grade of a street of a city so as to make a crossing at the grade of the railroad track; and where the street in front of a lot is raised four feet above the grade, the owner will be entitled to recover damages caused thereby. *Gates* v. *Chicago, St. P. & K. C. R. Co.*, 50 *Am. & Eng. R. Cas.* 164, 82 *Iowa* 518, 48 *N. W. Rep.* 1040.

A company obtained permission from a municipal corporation to run its line along a certain street, agreeing not to raise the grade to more than a certain height. It built the line and raised the grade more than the specified height, the corporation not consenting, but not taking any steps to prevent it. *Held*, that as against plaintiffs, who were owners of property injuriously affected thereby, the company was liable, but as against the corporation plaintiffs were restricted to the remedy by arbitration; and that in any event the cause of action was not of such a nature as to entitle the corporation to bring in the company under Ont. Rev. St. c. 184, § 531 (4). *Baskerville* v. *Ottawa*, 20 *Ont. App.* 108.

161. —— company not liable. — Municipal authorities authorized defendant company to make an approach to a bridge by filling the middle portion of a street. The company erected stone walls on each side of the fill, surmounted by iron railings, and left sufficient space on either side to permit carriages to pass two abreast, and did nothing else to obstruct the passage to or from adjoining lots, and did not interfere with the light or air of abutting owners. *Held*, that such owners could not recover damages. *Newport & C. Bridge Co.* v. *Foote*, 9 *Bush* (*Ky.*) 264. — DISTINGUISHING Louisville & N. R. Co. *v.* Hodge, 6 Bush 141. FOLLOWING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289. REVIEWING Wolfe *v.* Covington & L. R. Co., 15 B. Mon. (Ky.) 404; Louisville & F. R. Co. *v.* Brown, 17 B. Mon. 763.—FOLLOWED BUT DISTINGUISHED IN Fulton *v.* Short R. R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332. QUOTED IN Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush 382.

In the absence of any ordinance fixing the grade, where the evidence shows that the existing condition of a street is temporary, the location of the track therein a little above the natural surface, rendered apparently necessary to conform to other parts of the railroad, should not be regarded as evidencing an intent to establish permanently a nuisance affecting the adjacent property. *Smith* v. *Kansas City, St. J. & C. B. R. Co.*, 98 *Mo.* 20, 11 *S. W. Rep.* 259.

If a railroad is built upon a highway without acquiring the private rights or property existing therein, the company is liable for damages resulting to abutting property owners, and as to them the road is unlawful and a continuing nuisance. But where the railroad is lawfully constructed, with proper care and skill, it is not a nuisance, and the company is not liable for such damages as necessarily arise from the construction and operation of the road. *Uline* v. *New York C. & H. R. R. Co.*, 23 *Am. & Eng. R. Cas.* 3, 101 *N. Y.* 98, 4 *N. E. Rep.* 536; *reversing* 31 *Hun* 85, *mem.*—APPLIED IN Conklin *v.* New York, O. & W. R. Co., 26 Am. & Eng. R. Cas. 365, 102 N. Y. 107, 6 N. E. Rep. 663, 1 N. Y. S. R. 677; Reining *v.* New York, L. & W. R. Co., 27 N. Y. S. R. 69, 7 N. Y. Supp. 516. DISTINGUISHED IN American Primitive Methodist Soc. *v.* Brooklyn El. R. Co., 46 Hun 530, 12 N. Y. S. R. 500. FOLLOWED IN Pond *v.* Metropolitan El. R. Co., 112 N. Y. 186, 19 N. E. Rep. 487, 20 N. Y. S. R. 479; Ottenot *v.* New York, L. & W. R. Co., 43 Am. & Eng. R. Cas. 129, 119 N. Y. 603, 2 Silv. App. 469, 23 N. E. Rep. 169, 28 N. Y. S. R. 483; In re Stack, 50 Hun 385, 21 N. Y. S. R. 953, 3 N. Y. Supp. 231. QUOTED IN Harmon *v.* Louisville, N. O. & T. R. Co., 87 Tenn. 614, 11 S. W. Rep. 703.

N. Y. Gen. Railroad Act of 1850, ch. 140, authorizes the laying of tracks across highways on condition that they be restored to their former usefulness; but the railroad may cross at grade, or above or below it as the necessity of the road may require. So an abutting landowner cannot recover damages for grading a highway up to a

bridge which the company has constructed. *Conklin* v. *New York, O. & W. R. Co.*, 26 *Am. & Eng. R. Cas.* 365, 102 *N. Y.* 107, 6 *N. E. Rep.* 663, 1 *N. Y. S. R.* 677; *affirming* 32 *Hun* 466, *mem.*—DISTINGUISHING Story *v.* New York El. R. Co., 90 N. Y. 122.

A slight filling of gravel on a street, to restore it to its former usefulness and to enable vehicles more conveniently to pass over the track into an alley, does not entitle an abutting landowner to compensation. *First Congregational Church* v. *Milwaukee & L. W. R. Co.*, 43 *Am. & Eng. R. Cas.* 182, 77 *Wis.* 158, 45 *N. W. Rep.* 1086.—DISTINGUISHING Buchner *v.* Chicago, M. & N. W. R. Co., 56 Wis. 403, 60 Wis. 264; Shealy *v.* Chicago, M. & N. R. Co., 72 Wis. 471.

162. Liability of company for lowering grade. — City authorities granted to a company the right to construct its track diagonally across a street or highway the fee of which was in the adjoining landowner, and it was constructed partly on his land, which he owned subject to the public easement. It lowered the street on either side some four feet and thereby made it difficult of ingress to and egress from the owner's residence and more difficult than before for foot passengers. *Held*, that the company was liable, and that a recovery of $1800 was not excessive. *Indianapolis, B. & W. R. Co.* v. *Hartley*, 67 *Ill.* 439, 2 *Am. Ry. Rep.* 59.

The lowering by a company of the grade of a highway, in order to adjust such grade to that of its track, is a taking of the property of the owners of lots abutting on such highway, for which, and for the consequent injury to such lots, the company must make compensation, although the track itself does not encroach upon that part of the highway. *Buchner* v. *Chicago, M. & N. W. R. Co.*, 56 *Wis.* 403, 14 *N. W. Rep.* 273.—DISTINGUISHED IN First Congregational Church *v.* Milwaukee & L. W. R. Co., 77 Wis. 158.—*Buchner* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 447, 60 *Wis.* 264, 19 *N. W. Rep.* 56.

After the grade of a highway has been so changed an injunction will not be granted at the suit of a lot owner whose land, though injured by the change, is not actually encroached upon by the track, to restrain the company either from running its trains or from graveling or repairing the highway, or to compel the restoration of the highway to its original grade. *Buchner* v. *Chicago, M. & N. W. R. Co.*, 56 *Wis.* 403, 14 *N. W. Rep.* 273.

A company was authorized to run its road through and upon streets, wharves, places, or squares. In constructing the road through a street in front of plaintiff's property, a cut of about twelve feet was made. Plaintiff was employed by the contractor and assisted in making the cut. *Held:* (1) that the company exceeded its charter privileges in making the cut, making it liable in damages; (2) that plaintiff was not estopped by having worked on the street, it appearing he had not consented to the cut. *Wood* v. *Carleton Branch R. Co.*, 14 *New Brun.* 244.—QUOTING Lamb *v.* North London R. Co., L. R. 4 Ch. 526; Webb *v.* Manchester & L. R. Co., 4 Myl. & C. 120.

163. Consent of abutter to occupation of street implies consent to regrading.—The consent to the location of a railroad in a street necessarily implies consent to such regrading of it as is necessary, and deprives the property owner thus consenting of the right to claim damages incident to the location. *Wolfe* v. *Covington & L. R. Co.*, 15 *B. Mon.* (*Ky.*) 404.—FOLLOWED IN Louisville & F. R. Co. *v.* Brown, 17 B. Mon. 763; Fulton *v.* Short R. R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332.

As a member of a city council plaintiff advocated and voted for the location of a railroad in a certain street, and advocated the same location in a speech before the directors of the company, and said that the location in the street would be worth a large sum to him, in benefiting his property on the street. *Held*, that this authorized the jury to find that plaintiff had consented to the location of the road. *Wolfe* v. *Covington & L. R. Co.*, 15 *B. Mon.* (*Ky.*) 404.

164. Enjoining change of grade.—A city may enjoin a railroad company from changing the grade of streets over which it has control, if the change would deprive the public of the use of the same. *Mayor, etc., of Jersey City* v. *Central R. Co.*, 23 *Am. & Eng. R. Cas.* 138, 40 *N. J. Eq.* 417, 2 *Atl. Rep.* 262.

165. Liability of company raising embankment in street. — The power given by statute to a company when its road intersects or crosses a highway to carry such highway over or under the railroad, "as may be found most expedient for the public good," includes the power to alter

the grade of the highway, provided it is so done as not substantially to impair its usefulness. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

If there be a cut or embankment, and the level of the highway is graded down or up to the track in such manner and at such an angle as not to work any substantial detriment to either persons or vehicles traveling the highway, the company does not transcend its powers or duties. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

Where the topography of the country is such that the cut or embankment makes a change of the highway either necessary or desirable, "with a view to a more easy ascent or descent," the change may be made. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

A company is liable for injury occasioned by the construction of a raised track along a street, thereby causing the water from rains and freshets to flow upon adjacent real estate; and also for injury occasioned by the construction of an embankment, on a street approaching a street crossing of said track, in front of a lot in a city occupied by a dwelling house, thereby rendering the approach to the lot impassable for carriages and inconvenient for foot passengers. *Indianapolis, B. & W. R. Co.* v. *Smith*, 52 *Ind.* 428.

Where a municipality authorizes a company to lay its track in a street, the authority is to lay it on the existing grade of the street; and if the company lays its track on an embankment it will be liable for any damages that result to abutting property owners. *Cross* v. *St. Louis, K. C. & N. R. Co.*, 14 *Am. & Eng. R. Cas.* 123, 77 *Mo.* 318. —DISTINGUISHING Randle *v.* Pacific R. Co., 65 Mo. 325. QUOTING Tate *v.* Missouri, K. & T. R. Co., 64 Mo. 158. — DISTINGUISHED IN Glaessner *v.* Anheuser-Busch Brew. Assoc., 100 Mo. 508, 13 S. W. Rep. 707. QUOTED IN Gaus & S. Mfg. Co. *v.* St. Louis, K. & N. R. Co., 113 Mo. 308.—*Smith* v. *Kansas City, St. J. & C. B. R. Co.*, 98 *Mo.* 20, 11 *S. W. Rep.* 259.

Prior to 1875 plaintiffs owned certain premises on a city street, their title extending to the centre of the street, subject to the public easement. In that year the city acquired by condemnation the title to a large number of its streets, including said street, a uniform and nominal award of damages being paid to each of the owners, including plaintiffs. The city charter confers upon its common council power to alter the grade of streets and to "permit the track of a railroad to be laid in, along, or across any street or public ground." (Laws 1870, ch. 519, tit. 9, §§ 1, 2, 6; tit. 3, § 19.) In 1882 the common council granted to defendant, a steam-railroad corporation, the right to construct and maintain two tracks along the centre of the street. In pursuance thereof and in accordance with the map and profile approved by said council, and under the direction of the city engineer, defendant built an embankment in the street in front of plaintiffs' premises, supported laterally by perpendicular walls, which practically excluded all abutting owners from that part of the street, and so interfered with the use of the street as to cause the rental value of plaintiffs' premises to depreciate. *Held*, that an action was maintainable to recover damages for such depreciation. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238.—DISTINGUISHING Fobes *v.* Rome, W. & O. R. Co., 121 N. Y. 505; Ottenot *v.* New York, L. & W. R. Co., 119 N. Y. 603.—APPROVED IN Egerer *v.* New York C. & H. R. R. Co., 130 N. Y. 108.

The action of the common council in authorizing the construction of the embankment was not a change of grade within the meaning of the charter, and therefore the provision of the charter that "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may, within one year thereafter, claim damages by reason of such alteration" (tit. 9, § 17) did not apply so as to confine plaintiffs to a remedy against the city. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238.

While the authority conferred by the General Railroad Act (Laws of 1850, ch. 140, § 24) upon railroad corporations to cross highways in the construction of their lines authorizes their construction on, over, or below the highway grade, and so to make such incidental changes of the grade as

may be rendered necessary, without giving a right of action to abutting owners who sustain injury, the change here made did not come within that authority. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238.

Where a railroad is constructed in a street on an embankment so as to interfere with the approach to abutting property, and which prevents surface water from draining off, the company is liable, though the work has been approved by the city engineer. *Parrot* v. *Cincinnati, H. & D. R. Co.*, 10 *Ohio St.* 624.—NOT FOLLOWED IN Columbus, H. V. & T. R. Co. *v.* Gardner, 32 Am. & Eng. R. Cas. 243, 45 Ohio St. 309, 11 West. Rep. 264, 13 N. E. Rep. 69.

166. Liability of city for insufficiency of culverts.—Where a municipal corporation has granted a right of way through a street, and the company, solely for its own use, erects a culvert on the street, the municipal corporation is not liable for an injury resulting to an individual from an overflow of water caused by the defective construction of the culvert. *Stackhouse* v. *Lafayette*, 26 *Ind.* 17.—REVIEWING Ross *v.* Madison, 1 Ind. 281.

If a city permits a company to occupy and cross streets and alleys, and requires it to construct culverts, and the city adopts them for its use, and they prove insufficient, or become out of repair, the city will be liable for injury resulting to adjoining property by reason of such insufficiency. *Indianapolis* v. *Lawyer*, 38 *Ind.* 348.

While the city will not be liable for injury resulting from defective sewers constructed for the exclusive use of the company, still it cannot delegate its general power and adopt the work of the company as part of its general system without responsibility for defects in the work. *Indianapolis* v. *Lawyer*, 38 *Ind.* 348.

In an action against a city for flooding plaintiff's premises by means of an insufficient culvert along an open waterway or course under the street, it appeared that a railroad had included that portion of the street in its location; and that the duty of maintaining both street and culvert had passed from the city to the railroad which built the culvert and ever since maintained it; and that the acts complained of were those of the railroad and not of the city. *Held*, that the action could not be sustained. *Lander* v. *Bath*, 85 *Me.* 141, 26 *Atl. Rep.* 1091.—FOLLOWING Hayden *v.* Skillings, 78 Me. 417; Boston & M. R. Co. *v.* York County Com'rs, 79 Me. 392.

It is competent for a city council, when a charter authorizes a company to build its road "under such conditions and ordinances as the mayor and aldermen of said city may provide and require," to release the company from an obligation "to construct and keep in good repair all cross culverts whenever the same may be required under their rail tracks." *Galveston* v. *Galveston City R. Co.*, 46 *Tex.* 435, 13 *Am. Ry. Rep.* 274.

5. *Unauthorized Use of Streets.*

167. Unlawful occupancy of street.—Where a company unlawfully constructs its road in a public street so as to interfere with the private rights of abutters, it constitutes a continuing trespass, for which successive suits for damages may be brought, so long as the trespass is continued, until the occupation ripens into title by prescription. *Lamm* v. *Chicago, St. P., M. & O. R. Co.*, 46 *Am. & Eng. R. Cas.* 42, 45 *Minn.* 71, 47 *N. W. Rep.* 455.—APPROVING Blesch *v.* Chicago & N. W. R. Co., 43 Wis. 183. DISTINGUISHING Chicago & E. I. R. Co. *v.* Loeb, 118 Ill. 203; Milwaukee & N. R. Co. *v.* Strange, 63 Wis. 178.

The evidence showed that a railroad was constructed and operated on a street before plaintiff acquired title to certain premises abutting thereon; that the company was authorized to operate its road on the street, but that it was not authorized to store cars on the track in front of plaintiff's property. There was no evidence to show when the street was opened, or what rights the property owners had therein, or what right to use the street the company had acquired. *Held*, that the court was not justified in finding, as a conclusion of law, that plaintiff was entitled to damages and an injunction to restrain the further storage of cars on the street. *Mosner* v. *Rome, W. & O. R. Co.*, 5 *N. Y. Supp.* 807, 51 *Hun* 638.

168. Obstructing streets, generally.—Authority from the legislature to a company to occupy a street is not sufficient, where it appears that the street has not been legally laid out; and the company may be enjoined from laying its track, and especially from erecting a trestle and a waiting room

on the ground claimed as a street. *Burns* v. *Multnomah R. Co.*, 10 *Am. & Eng. R. Cas.* 289, 8 *Sawy.* (*U. S.*) 543, 15 *Fed. Rep.* 177.

The owner of property abutting on an alley obstructed by a railroad improperly constructed thereon is not authorized upon his own motion to enter upon the alley for the purpose of changing the track or repairing the alley, thereby lessening the injury and reducing the damages to which he would be entitled. The control of the alley is in the city. *Central Branch U. P. R. Co.* v. *Andrews*, 41 *Kan.* 370, 21 *Pac. Rep.* 276.

No license or consent from a city will exempt a company from liability to an abutting owner for placing an obstruction across an alley which practically excludes access to the lot for the ordinary purposes for which an alley is used by an owner. *Leavenworth, N. & S. R. Co.* v. *Curtan*, 56 *Am. & Eng. R. Cas.* 636, 51 *Kan.* 432, 33 *Pac. Rep.* 297.—QUOTING Ft. Scott, W. & W. R. Co. *v.* Fox, 42 Kan. 494.

Although the obstruction may not wholly prevent access to the property, if it is such as practically to preclude the ordinary and reasonable use of the alley as a means of entering and leaving the rear of the lot, the company is liable for the injury suffered. *Leavenworth, N. & S. R. Co.* v. *Curtan*, 56 *Am. & Eng. R. Cas.* 636, 51 *Kan.* 432, 33 *Pac. Rep.* 297.

Where a company, under a city ordinance or a statute, constructs and operates its road in a street or highway, but leaves sufficient space between the roadbed and abutting land or lots for ordinary vehicles, teams, and travel, there is no such obstruction of access to abutting land or lots as to permit damages for any depreciation in value thereof. *Chicago, K. & W. R. Co.* v. *Union Inv. Co.*, 56 *Am. & Eng. R. Cas.* 679, 51 *Kan.* 600, 33 *Pac. Rep.* 378.

Where a track has been laid in a public street without authority, any adjacent proprietor who has not consented to such use is entitled to damages for such injury as he may have suffered in consequence thereof, and it is for the jury to determine what the damages have been from the malicious and unnecessary operation of the road. *Grand Rapids & I. R. Co.* v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich.* 393, 11 *N. W. Rep.* 212.

169. Obstructing travel with standing cars, making up trains, etc.—Where the use and occupation of streets in a city are legal, no recovery can be had by reason of the inconvenience to citizens caused by such use, provided the use be reasonable. *Glick* v. *Baltimore & O. R. Co.*, 8 *Mackey* (*D. C.*) 412.

But a citizen may recover for any grievances suffered by reason of an unauthorized use of such lawful structures, and their use for the purpose of shifting and coupling cars in making up trains is unauthorized and unlawful. *Glick* v. *Baltimore & O. R. Co.*, 8 *Mackey* (*D. C.*) 412.—REAFFIRMING Neitzey *v.* Baltimore & P. R. Co., 5 Mackey 34; Hopkins *v.* Baltimore & P. R. Co., 6 Mackey 311.

Where an abutting owner complains of the unlawful use of a street by a company in permitting cars to stand upon it, and using it for the purpose of loading and unloading, the offense, being but temporary in its nature, is one which makes the company liable for an action whenever and as often as the wrong is committed. *Lindquest* v. *Union Pac. R. Co.*, 33 *Fed. Rep.* 372.—FOLLOWING Frankle *v.* Jackson, 33 Fed. Rep. 371.

The fact that a company is authorized to use a street will not relieve it from liability for damages resulting to adjoining property owners by the improper use of the street, as by unnecessarily leaving cars thereon. *Frankle* v. *Jackson*, 30 *Fed. Rep.* 398.

170. Using street for loading and unloading.—An abutting property owner may recover damages against a company that uses an avenue for the purpose of a freight yard or freight delivery, and thereby damages the abutting property. *Trook* v. *Baltimore & P. R. Co.*, 3 *MacArth.* (*D. C.*) 392.

In such action witnesses who are acquainted with the value of the property in the same locality may testify as to their opinion regarding the depreciation in the value of plaintiff's property caused by such unlawful obstruction of the avenue. *Trook* v. *Baltimore & P. R. Co.*, 3 *MacArth.* (*D. C.*) 392.

An instruction to the jury that a company has a right to use the public streets "to a reasonable extent for the purpose of loading and unloading its cars," and that "plaintiff cannot recover for any annoyance to him or his family resulting therefrom," is erroneous, if the use of the streets for such purpose be unauthorized. *Neitzey* v. *Baltimore & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 553, 5 *Mackey* (*D. C.*) 34.

A company cannot justify the using of a street for receiving and discharging freight, nor as a place for making up trains or for standing cars, by showing that it has authority to lay its tracks and switches on the street. *Owensborough & N. R. Co.* v. *Sutton, (Ky.)* 13 *S. W. Rep.* 1086.

171. Storage of cotton on street. —Although a street, by reason of its declivity and of the fact that it terminates upon a river, is used only by foot travelers, the city council cannot lease the same to a railroad company for the purpose of storing cotton thereon, such a lease being a perversion of the public use to which the lands are devoted. *Marine Ins. Co.* v. *St. Louis, I. M. & S. R. Co.*, 43 *Am. & Eng. R. Cas.* 79, 41 *Fed. Rep.* 643.

172. Unauthorized excavations.— A city council gave to a company the right to construct its track along a public street, and the company made excavations along such street so that plaintiffs were deprived of convenient access to and egress from their lots, and the lots and tenements thereon were subject to injury by the caving and falling of the street and lots. *Held*, that the city was liable for the injury caused by such excavations. *Pekin* v. *Brereton*, 67 *Ill.* 477. —CRITICISING Prop'rs of Locks, etc., *v.* Nashua & L. R. Corp., 10 Cush. (Mass.) 385. FOLLOWING Nevins *v.* Peoria, 41 Ill. 502. MODIFYING Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Murphy *v.* Chicago, 29 Ill. 279.—FOLLOWED IN Stack *v.* East St. Louis, 85 Ill. 377. REVIEWED AND DISTINGUISHED IN Olney *v.* Wharf, 115 Ill. 519.

Plaintiff sued for injuries occasioned to his premises by an unauthorized excavation by defendant company in the street in front of his property. The company claimed that he was not entitled to damages to the full amount of the diminution of the value of his property suffered in consequence of the excavation, because he could refill it for less than the amount of such diminution. *Held*, that the burden was on the company to establish this claim, and in order to do so it must show that plaintiff had a right to refill the excavation. *Karst* v. *St. Paul, S. & T. F. R. Co.*, 23 *Minn.* 401.

173. Leaving stone and earth outside of right of way. — Where, in constructing its road across a street, a company unnecessarily places stone and dirt outside of its right of way, in the street, in front of a person's lots, to his injury, it is liable to him therefor. *Farrant* v. *First Div. St. P. & P. R. Co.*, 1? *Minn.* 311 (*Gil.* 286).

174. Creating a nuisance on street. —The privileges growing out of the acts of congress authorizing defendant company to lay necessary tracks at or near its depots or stations in the District of Columbia are privileges conferred by competent authority, and any inconvenience which may result to private individuals by their careful exercise is *damnum absque injuria*. *Neitzey* v. *Baltimore & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 553, 5 *Mackey* (*D. C.*) 34.

But the company is not authorized to convert streets and avenues of the city into freight yards by loading and unloading cars thereon and leaving them there when not in use; still, if no private inconvenience to anybody results therefrom, it is simply an indictable nuisance and not a private one. *Neitzey* v. *Baltimore & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 553, 5 *Mackey* (*D. C.*) 34.

When, however, these cars have been used for the conveyance of offensive matter, and so infect the whole atmosphere with noxious odors, and when the freight loaded and unloaded there consists of similar material, and the process of bringing the cars there and taking them away for the purpose of loading and unloading causes annoyance by jarring the neighboring houses, and the smoke from the engines penetrates the dwellings, all this then becomes more than a public nuisance; it becomes a private one. *Neitzey* v. *Baltimore & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 553, 5 *Mackey* (*D. C.*) 34.—REAFFIRMED IN Glick *v.* Baltimore & O. R. Co., 8 Mackey (D. C.) 412. REVIEWED IN Fogg *v.* Nevada C. O. R. Co., 43 Am. & Eng. R. Cas. 105, 20 Nev. 429.

A track laid upon a city street by authority of law, properly constructed and operated in a skilful and careful manner, is not, in law, a nuisance. *Chicago & E. I. R. Co.* v. *Loeb*, 27 *Am. & Eng. R. Cas.* 415, 118 *Ill.* 203, 8 *N. E. Rep.* 460.

A track in a street is not necessarily a public nuisance *per se*, nor can it be said, as a matter of law, that it is an obstruction. Therefore, an indictment against a company which merely charges that a track was maintained in the street, but does not directly charge that it was an obstruction, is not good. *Wabash, St. L. & P. R. Co.* v. *People*, 12 *Ill. App.* 448.

Defendant company was indicted for creating a nuisance by obstructing certain

streets and a public square by its tracks, switches, and buildings, and by the manner of their use. The company filed a special plea that it had acquired the right to use the premises for the purposes of its road, and that in such use it created such temporary obstruction only as resulted from the reasonable and necessary transaction of its business. *Held*, that the plea was good. *State* v. *Louisville, N. A. & C. R. Co.*, 10 *Am. & Eng. R. Cas.* 286, 86 *Ind.* 114.

When the erection of sheds or awnings over public streets, in a particular manner, is prohibited by ordinance, sheds or awnings not constructed in the manner forbidden are not nuisances, and a railroad company cannot, of its own authority, demolish such shed or awning simply because it obstructs the use of its track. *Laviosa* v. *Chicago, St. L. & N. O. R. Co.*, 4 *Am. & Eng. R. Cas.* 128, *McGloin* (*La.*) 299.

Where the company provokes the deed and furnishes the labor necessary for its accomplishment, the fact that the demolition of such a shed or awning was ordered without lawful authority by one municipal officer, and done under the superintendence of another, does not make the company less an actor in the wrong and responsible as such. *Laviosa* v. *Chicago, St. L. & N. O. R. Co.*, 4 *Am. & Eng. R. Cas.* 128, *McGloin* (*La.*) 299.

175. Unreasonable and oppressive use of street.—A company may be prevented from making an unreasonable or oppressive use of a street or banquette, despite municipal legislation expressly authorizing such particular manner of use. *Laviosa* v. *Chicago, St. L. & N. O. R. Co.*, 4 *Am. & Eng. R. Cas.* 128, *McGloin* (*La.*) 299.

6. *Restoration of Highway.*

176. Obligation of company to restore highway.*—Railroad companies in Delaware are required to use every reasonable precaution to prevent obstruction to travel or injuries to travelers during the progress of the work of constructing a track across highways. The latter must be restored to a safe condition as rapidly as possible, subject always to necessary impairment. *Kyne* v. *Wilmington & N. R. Co.*, 8 *Houst.* (*Del.*) 185, 14 *Atl. Rep.* 922.

A highway crossed by railroad tracks must be so far restored to its former condition as not to impair its usefulness more than the additional use of it for railroad purposes requires, unless absolutely necessary. *Evansville & T. H. R. Co.* v. *Carvener*, 32 *Am. & Eng. R. Cas.* 134, 113 *Ind.* 51, 14 *N. E. Rep.* 738, 12 *West. Rep.* 203. *Ohio & M. R. Co.* v. *Bridgeport*, 43 *Ill. App.* 89. *Rembe* v. *New York, O. & W. R. Co.*, 1 *Silv. App.* 154, 102 *N. Y.* 721, *mem.*, 7 *N. E. Rep.* 797, 2 *N. Y. S. R.* 498; *affirming* 32 *Hun* 68, *mem.* *Gulf, C. & S. F. R. Co.* v. *Montgomery*, 85 *Tex.* 64, 19 *S. W. Rep.* 1015. *Gulf, C. & S. F. R. Co.* v. *Holtcamp*, 3 *Tex. App.* (*Civ. Cas.*) 527. *Missouri Pac. R. Co.* v. *Speed*, 3 *Tex. Civ. App.* 454, 22 *S. W. Rep.* 527. *Jamestown* v. *Chicago, B. & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 263, 69 *Wis.* 648, 34 *N. W. Rep.* 728.—REVIEWED IN Moundsville *v.* Ohio River R. Co., 37 W. Va. 92.—*Grand Trunk R. Co.* v. *Sibbald*, 20 *Can. Sup. Ct.* 259; *affirming* 18 *Ont. App.* 184, 19 *Ont.* 164.—APPROVING Bate *v.* Canadian Pac. R. Co., 18 Can. Sup. Ct. 697.

The charter of a company required it to purchase a turnpike road running parallel to the proposed railroad, and to assume the liabilities of the turnpike corporation, before being permitted to run cars upon its own road, and gave to it the right to lay the railroad track across and along the turnpike, but required it to restore the road to its former state, or in sufficient manner not to impair its usefulness. *Held*, that if the taking of a part of the bed of the turnpike for the track of the railroad, or the bringing of the railroad into close proximity to the turnpike, rendered it dangerous to persons traveling with teams on the latter and impaired its public usefulness, the railroad company was bound either to remove the roads further from each other, or to separate them by protecting guards. *Moshier* v. *Utica & S. R. Co.*, 8 *Barb.* (*N. Y.*) 427.

Whether a company acts under a special charter or under the General Railroad Act, it only has a mere franchise to cross streams or highways, subject to its liability to make compensation to private persons who are injured; and the liability of the company will be the same as if an individual had acted. *Robinson* v. *New York & E. R. Co.*, 27 *Barb.* (*N. Y.*) 512.

*Obligation of company to restore highways and maintain crossings, see notes, 10 AM. & ENG. R. CAS. 330; 13 AM. ST. REP. 93. See also 36 AM. & ENG. R. CAS. 149, *abstr.*

The provision in section 16 of Ohio Corporation Act of May 1, 1852, which requires a railway company to place a highway crossed or diverted "in such condition as not to impair its former usefulness," is a condition inseparable from the right or franchise granted to such company to cross the highway with its railroad or to divert it from its location. *State ex rel.* v. *Dayton & S. E. R. Co.*, 5 *Am. & Eng. R. Cas.* 312, 36 *Ohio St.* 434.

A provision in a railroad charter requiring the company to restore highways to their former usefulness, as near as may be, is not a condition precedent to the company's right to cross a highway with the railroad. *Richardson* v. *Vermont C. R. Co.*, 25 *Vt.* 465.

The duty imposed upon railroad companies to restore and keep in repair highways that they may cross is coupled with the privilege of using and occupying the highway for their tracks; and if a company refuses to perform this duty, it should not enjoy the easement granted. *Oshkosh* v. *Milwaukee & L. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 681, 74 *Wis.* 534, 43 *N. W. Rep.* 489.

177. What is a highway within the requirement. — A way generally traveled by the public for more than fifteen years as a public road, but not regularly laid out under any statute, nor of public record as a highway or street by dedication, is not within the terms of Kan. Laws of 1876, ch. 105, § 1. *Missouri, K. & T. R. Co.* v. *Long*, 6 *Am. & Eng. R. Cas.* 254, 27 *Kan.* 684.

A road that has never been regularly laid out or opened by the proper authorities, and which is in fact unused and is unfit for travel and closed against the public, is not a "highway" within the meaning of the provision of the railroad law which makes a company laying tracks across public highways liable for injuries resulting from neglect to restore them to a proper condition, even though the owners of land along the road have moved their fences back so as to open it as a highway, and have been paid for their lands by the township, and a bridge has been built upon it by the public authorities. *Flint & P. M. R. Co.* v. *Willey*, 5 *Am. & Eng. R. Cas.* 305, 47 *Mich.* 88, 10 *N. W. Rep.* 120.

New York General Railroad Act of 1850, ch. 140, § 28, requiring a company which constructs its railroad along or across a highway to restore the same "to its former state, or to such a state as not unnecessarily to have impaired its usefulness," does not apply where the road in question is not a public highway. *Kerr* v. *West Shore R. Co.*, 18 *N. Y. S. R.* 63, 2 *N. Y. Supp.* 686.

Under Pa. Act of Feb. 19, 1849, providing that when any railroad should find it necessary to occupy any part of "any turnpike or public road" it should forthwith reconstruct the same, the character of the road is to be determined by the time when the railroad is located. So the act was held to apply to a case where a railroad was located over a public road, but the road was included in a city as a street before the railroad was actually constructed. *Pittsburgh, V. & C. R. Co.* v. *Com.*, 10 *Am. & Eng R. Cas.* 321, 101 *Pa. St.* 192.

A company which appropriates a portion of a road which has formerly been a turnpike, but which, owing to the forfeiture of the turnpike company's charter, has been abandoned by the turnpike company, though it continues to be used by the public, is bound to cause said road to be reconstructed, under the provisions of the above statute, and in case of refusal it will be compelled by mandamus so to do. *Pittsburgh, McK. & Y. R. Co.* v. *Com.*, 104 *Pa. St.* 583.

178. Authority to use highway presumed.—Where there is nothing in the pleadings or the evidence to show whether a company procured the permission of the supreme court to use or cross a highway, as required by statute, or not, and in the absence of any admission or evidence that such permission was not granted, the court will infer that the company complied with the law and obtained such permission. *Schermerhorn* v. *Mt. McGregor R. Co.*, 23 *N. Y. Supp.* 417, 69 *Hun* 512, 52 *N. Y. S. R.* 892.

179. Powers of highway commissioners.—The commissioner of highways of a town has no power to control the location of a railway within the line of a highway of the town, and while, for any failure of the company in the performance of the duty of restoration, he is authorized to maintain an action for its performance, or for damages sustained by the town (N. Y. Act of 1855, ch. 255), it is for the company in the first instance to determine the method of restoration, it taking the risk of its act being in accordance with its obligation, and the commissioner has no power to dictate how the restoration shall be accomplished. *Post* v. *West Shore R. Co.*, 47 *Am.*

& Eng. R. Cas. 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

The provision of N. Y. General Railroad Act of 1850, § 28, subd. 5, imposing upon a railroad company which constructs its line across a highway the duty to restore the same "to its former state or to such state as not unnecessarily to impair its usefulness," does not relieve commissioners of highways from the care and control of those parts of public highways constituting approaches to railroad crossings, although constructed by the company in discharge of its statutory duty. *Bryant* v. *Randolph*, 133 *N. Y.* 70, 30 *N. E. Rep.* 657, 44 *N. Y. S. R.* 85.

180. Duty to bridge, generally.—The duty of restoration of "the highway as near as may be to its former state, so as not unnecessarily to impair its usefulness," imposed by its charter (section 5, ch. 195, Laws of 1846) upon defendant company, does not absolutely require it, at such a crossing, to construct a bridge of the full width of the highway; the requirement is simply so to construct the bridge as, in view of the circumstances, not unnecessarily to impair the use of the highway. *People* v. *New York, N. H. & H. R. Co.*, 10 *Am. & Eng. R. Cas.* 230, 89 *N. Y.* 266.—DISAPPROVED IN Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11. FOLLOWED IN Hatch *v.* Syracuse, B. & N. Y. R. Co., 50 Hun 64, 24 N. Y. S. R. 36, 4 N. Y. Supp. 509.

A company was bound by its charter to restore any highway intersected by the track "to its former state, or in a sufficient manner not to impair its usefulness." It constructed the road across a street which was sixty-six feet wide, and connected the street again by a bridge across the track, forty feet and two inches in width. *Held*, that the jury might with propriety find this to be a sufficient compliance with the act, and that defendant was not necessarily guilty of a nuisance because the bridge was not of equal width with the street. *Reg.* v. *Great Western R. Co.*, 12 *U. C. Q. B.* 250.

181. Bridging of cuts—Repair of bridge.—The duty to restore highways to their former usefulness, imposed upon railroad companies by N. Y. General Railroad Act, is a continuing one. Thus where a company constructs its road across a highway in a cut, and carries the highway over the railroad by a bridge, it is bound to continue to keep the bridge in repair as long as the highway exists and it continues to operate its road. *Roe* v. *Elmendorf*, 52 *How. Pr.* (*N. Y.*) 232.—APPROVING People ex rel. *v.* Troy & B. R. Co., 37 How. Pr. 427.

Where a company, in passing through a farm, makes a deep cut in a private road leading to the public highway, it cannot be compelled to bridge the cut, under Pa. Act of Feb. 19, 1849, requiring the bridging of cuts in highways. *Traut* v. *New York, C. & St. L. R. Co.*, (*Pa.*) 15 *Atl. Rep.* 678.

Defendant's line crossed a highway between plaintiff's farm and a town, and at the crossing a deep cut was necessarily made. Plaintiff sued defendant, charging that after a reasonable time for restoring the road had elapsed it wrongfully and injuriously continued the cut, and thereby the highway had been rendered impassable, and plaintiff had been prevented from driving along it to town, and carrying the produce of his farm, as he was frequently required to do. The evidence showed that it was impossible to construct a bridge across the cut until the latter was completed and the banks shaped. Plaintiff's own witness swore that defendant had carried on the work with diligence; and before the trial the bridge had been completed, and the use of the highway restored. *Held*, that plaintiff could not recover: (1) Because it was no wrong on defendant's part to let the cut and excavation continue for however long a time, and that was the injury complained of. (2) If the declaration had complained of delay in restoring the road by a bridge, the evidence disproved such a charge. (3) If such delay had been proven, then defendant would have been guilty of obstructing a public highway, for which it might be indicted, but plaintiff as an individual could maintain no action. *Ward* v. *Great Western R. Co.*, 13 *U. C. Q. B.* 315.—FOLLOWED IN Hamilton *v.* Covert, 16 U. C. C. P. 205.

182. What is a breach of the duty to restore.—Power given by a charter of a railroad company to construct its road across a public highway, upon condition that the same be restored to its former state, "or in a sufficient manner not to impair its usefulness," does not authorize the company permanently to appropriate any portion of the public highway by obstructions which materially interfere with the public travel. *Little Miami R. Co.* v. *Greene County Com'rs*, 31 *Ohio St.* 338, 16 *Am. Ry. Rep.* 278.—QUOT-

ING Hamden *v.* New Haven & N. Co., 27 Conn. 165. REVIEWING Roberts *v.* Chicago & N. W. R. Co., 35 Wis. 679.

The evidence showed that defendant company constructed its road where it crossed a highway in a deep cut, and depressed the highway, leaving banks on either side so as to prevent one on the highway from seeing approaching trains until he was on or very near the track. *Held*, that this was sufficient to authorize a jury to find that the company had failed to restore the highway to its former usefulness, as required by the statute. *Duffy* v. *Chicago & N. W. R. Co.*, 32 *Wis.* 269.—APPROVED IN Roberts *v.* Chicago & N. W. R. Co., 35 Wis. 679.

A railway crossed a highway, and in the line of the ditch formerly running at the side of the highway, and several feet within the limits of the highway, the company constructed an open culvert of square timber, about five feet deep and seven feet wide. Plaintiff, walking along the road and crossing the railway, fell into this culvert and was injured. *Held*, that the company was liable. Its duty was to restore the highway to its former state, or in a sufficient manner not to impair its usefulness, and in substituting this open culvert, which it could readily have covered, for the former ditch, it had unnecessarily made it more dangerous. *Fairbanks* v. *Great Western R. Co.*, 35 *U. C. Q. B.* 523.—REVIEWING Whitmarsh *v.* Grand Trunk R. Co., 7 U. C. C. P. 373.

183. Breach of the duty is a nuisance.* — If a company, under authority from a county court giving it license to build its road upon, along, or across public highways, upon the express condition that it shall restore such highways to their former state, or to such state as not unnecessarily to impair their usefulness, takes possession of a part of a public highway and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under W. Va. Code, ch. 43, § 45, notwithstanding it has such authority from the county court. *State* v. *Monongahela River R. Co.*, 37 *W. Va.* 108, 16 *S. E. Rep.* 519.—NOT FOLLOWING State *v.* Chesapeake & O. R. Co., 24 W. Va. 809.

A company has no authority to use a street or highway for its roadbed without restoring the same to its former condition; and a failure so to restore the highway will constitute a nuisance. *Oshkosh* v. *Milwaukee & L. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 681, 74 *Wis.* 534, 43 *N. W. Rep.* 489.

184. Liability for damage done before restoration completed. — Where a railway crosses a highway and thereby occasions damage, an action will lie against the company for not restoring the road within the prescribed period. *Caledonian R. Co.* v. *Colt*, 3 *Macq. H. L. Cas.* 833, 7 *Jur. N. S.* 475.

While engaged in the construction of its railroad it is the duty of the company to prevent any obstruction to persons passing a highway, so far as this can be done; and if chargeable with negligence in this respect it is liable, but the question of negligence is for the jury. *Rembe* v. *New York, O. & W. R. Co.*, 1 *Silv. App.* 154, 102 *N. Y.* 721, *mem.*, 7 *N. E. Rep.* 797, 2 *N. Y. S. R.* 498; *affirming* 32 *Hun* 68, *mem.*

The failure of a company to restore a highway where its track crosses, as required by the statute, will not make it liable, unless such failure contributed to the injury complained of. *So held*, where a company was charged with negligence in constructing the approach to a bridge without guard rails on either side, but where the evidence only showed that plaintiff's intestate was found fatally injured at the base of the approach, but where there was no evidence to show that he fell from the approach, or if he did, that the absence of guard rails caused it. *Gardinier* v. *New York C. & H. R. R. Co.*, 1 *Silv. App.* 195, 103 *N. Y.* 674, *mem.*, 9 *N. E. Rep.* 182, 3 *N. Y. S. R.* 693; *reversing* 36 *Hun* 647, *mem.*

The Texas statute requiring railroad companies to restore highways so as not unnecessarily to impair their usefulness requires them to be restored as soon as that can reasonably be done. So where plaintiff drove along a highway and saw defendant constructing its track near the highway on one side, and on returning some three hours later saw that the track was laid some 300 yards beyond the highway on the other side, but was injured by the crossing not being restored, and there was some evidence tending to show that it might have been made safe in a few minutes, the jury was justified in finding that the company had not restored the crossing within a reasonable time. *Dallas & G. R. Co.* v. *Able*, 37

* See also *post*, **219**.

Am. & Eng. R. Cas. 453, 72 *Tex.* 150, 9 *S. W. Rep.* 871.

The complaint in an action for personal injuries caused by the failure of a company to restore a highway to a safe condition and its negligence in running a train across the same is held to be sufficiently definite and certain. *Cheney* v. *Chicago, M. & N. R. Co.*, 75 *Wis.* 223, 43 *N. W. Rep.* 1152.

185. Duty of company after highway is fully restored.*—Kan. Gen. St. 1868, ch. 23, § 47, devolves upon railroad companies the duty whenever they cross a highway to restore it to its former state, or to such a state as not to have necessarily impaired its usefulness, but no duty is imposed thereby upon the companies to keep the highway in repair. When the highway has been fully restored to its former condition, the company is under no obligation thereafter under said section to maintain a sufficient and safe crossing. *Missouri, K. & T. R. Co.* v. *Long*, 6 *Am. & Eng. R. Cas.* 254, 27 *Kan.* 684.—NOT FOLLOWED IN Memphis, P. P. & B. R. Co. *v.* State, 38 Am. & Eng. R. Cas. 429, 87 Tenn. 746, 11 S. W. Rep. 946.

Under the statute railroad companies are required to restore highways to their former state of usefulness, and to preserve them in such state. The duty is a continuous one. *Hatch* v. *Syracuse, B. & N. Y. R. Co.*, 50 *Hun* 64, 24 *N. Y. S. R.* 36, 4 *N. Y. Supp.* 509.—FOLLOWING People *v.* New York C. & H. R. R. Co., 74 N. Y. 302; People *v.* New York, N. H. & H. R. Co., 89 N. Y. 266.

By Ohio Act of May 1, 1854, § 23, the duty of restoring a highway diverted in the construction of a railroad to "such condition as not to impair its former usefulness" is imposed upon the corporation, and it is liable for injuries resulting from its neglect to do so. But when such highway has been fully restored to such condition, the corporation is under no obligation to keep the same in repair. If, however, after such highway has been fully restored, the railroad company wrongfully encroaches upon the highway, or impairs its usefulness, it will be liable for damages resulting therefrom. *Pittsburgh, Ft. W. & C. R. Co.* v. *Maurer*, 21 *Ohio St.* 421.—REVIEWING Bellefontaine & I. R. Co. *v.* Schruyhart, 10 Ohio St. 116.

Where a charter only requires a company to restore highways "and leave" them in good repair, and well constructed for public use, it is not bound to keep them in such condition. *Chesapeake, O. & S. W. R. Co.* v. *State*, 16 *Lea* (*Tenn.*) 300.—OVERRULED IN Memphis, P. P. & B. R. Co. *v.* State, 38 Am. & Eng. R. Cas. 429, 87 Tenn. 746, 11 S. W. Rep. 946.

Under Wis. Rev. St. of 1878, § 1836, requiring railroad companies which construct their tracks across or along any highway to restore it to its former state, and thereafter to maintain the same in such condition, the company is not only required to restore the highway, but must thereafter maintain the same in such restored condition. *Buchner* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 447, 60 *Wis.* 264, 19 *N. W. Rep.* 56.

186. Who may proceed against company for failure to restore highway.—Highways in Illinois originally constructed as national roads now belong to the state, and the towns only have the care and superintendence of them in keeping them in repair. *Held*, that this is not such possession as will allow a town to maintain an action of trespass *quare clausum fregit* against a railroad company for failing to restore such road, as required by its charter. Such action cannot be maintained unless the plaintiff is in possession of the premises, except where the land is unoccupied, and there is no adverse possession. *St. Louis, V. & T. H. R. Co.* v. *Summit*, 3 *Ill. App.* 155.—QUOTING Conner *v.* New Albany, 1 Blackf. (Ind.) 88. REVIEWING Troy *v.* Cheshire R. Co., 23 N. H. 83.

Where a company in constructing its road changes the surface of a public highway so as to interfere with public travel, it is the duty of the company so far to restore the highway to its former condition as not to interfere materially with its usefulness to the public, and if it fails to do so the county may have an action against it for damages. *Greenup County* v. *Maysville & B. S. R. Co.*, 88 *Ky.* 659, 11 *S. W. Rep.* 774.

Where the duty of the company in this regard, and the measure of it, are declared by statute, the county may maintain an action in equity to compel the performance of the duty, and in the same suit may have an issue out of chancery as to the damages that have already accrued. *Greenup County* v. *Maysville & B. S. R. Co.*, 88 *Ky.* 659, 11

* Obligation to pave, grade, and repair streets, see notes, 38 AM. & ENG. R. CAS. 410; 26 *Id.* 552.

S. W. Rep. 774. — FOLLOWING Lawrence County *v.* Chattarol R. Co., 81 Ky. 225.

It seems that under N. Y. Act of 1855, ch. 255, enlarging the powers and duties of highway commissioners, a highway commissioner may institute proceedings to compel a company fully to perform this duty, or when it is in default he may proceed and do the necessary work and maintain an action against the company for the expense. *Bryant* v. *Randolph*, 133 *N. Y.* 70, 30 *N. E. Rep.* 657, 44 *N. Y. S. R.* 85.

A commissioner of highways of a town sued a railroad company for failing to restore a highway, as required by the statute, asking for damages against the company for money which the town had expended in partially restoring the highway, and that the company be compelled to restore it to its original condition. The company defended on the ground that this was not the proper form of action; that mandamus was the proper remedy. *Held*, that the action as brought was fully authorized by N. Y. Act of 1855, ch. 255, expressly authorizing highway commissioners to bring such actions. *Barse* v. *Herkimer, N. & P. N. G. R. Co.*, 13 *N. Y. S. R.* 215, 47 *Hun* 632.

187. Notice of defect to company. —The statutory duty of railroads to restore highways, where their tracks interfere with the same, is a continuing one, and devolves upon any company which may succeed to the ownership of the road. So where a second company succeeds to a road after it is built, it is not necessary to show that it had notice of a defect in order to make it liable. *Vaughan* v. *Buffalo, R. & P. R. Co.*, 54 *N. Y. S. R.* 782, 72 *Hun* 471, 25 *N. Y. Supp.* 246.—DISTINGUISHING Conhocton Stone Road *v.* Buffalo, N. Y. & E. R. Co., 51 N. Y. 573; Ahern *v.* Steele, 115 N. Y. 203, 26 N. Y. S. R. 295.

188. Defenses, generally. — The question of the grade of a railroad is not a proper element of inquiry upon the question whether a highway has been restored to its former usefulness. *People* v. *New York C. & H. R. R. Co.*, 74 *N. Y.* 302; *modifying* 12 *Hun* 195.

A railroad corporation is not relieved from the duty imposed upon it by N. Y. General Railroad Act of 1850 to restore a highway intersected by its road "to such state as not unnecessarily to have impaired its usefulness" by the fact that a street railway company whose road runs along the highway is obligated to keep the highway between the rails of its track in repair. The duty of maintaining the crossing in proper condition is not limited or restricted by privileges granted to or duties imposed upon others. *Masterson* v. *New York C. & H. R. R. Co.*, 3 *Am. & Eng. R. Cas.* 408, 84 *N. Y.* 247, 38 *Am. Rep.* 510.

189. Non-establishment of permanent grade by city no defense.— Where a company is sued for failing to restore a street, as required by statute, it is no defense that the city has not established a permanent grade for the street. *Oshkosh* v. *Milwaukee & L. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 681, 74 *Wis.* 534, 43 *N. W. Rep.* 489.

190. Statute of limitations no defense.* — The obligation imposed upon a company by How. Mich. St., § 3323, to restore a highway to its former state, as near as may be, and to construct suitable crossings for the passage of teams, continues until properly discharged. *Thayer* v. *Flint & P. M. R. Co.*, 93 *Mich.* 150, 53 *N. W. Rep.* 216.

The duty imposed upon railroad companies by the statute, to restore streets or highways to their former state of usefulness, is a continuing one, and therefore an action for failing to do so cannot be barred by the statute of limitations. *Hatch* v. *Syracuse, B. & N. Y. R. Co.*, 50 *Hun* 64, 24 *N. Y. S. R.* 36, 4 *N. Y. Supp.* 509.

191. Compelling restoration by injunction. — A company may be compelled by a mandatory injunction to restore a highway which is obstructed by its track, as required by the statute. *Jamestown* v. *Chicago, B. & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 263, 69 *Wis.* 648, 34 *N. W. Rep.* 728.— DISTINGUISHING Milwaukee *v.* Milwaukee & B. R. Co., 7 Wis. 85; Sheboygan *v.* Sheboygan & F. du L. R. Co., 21 Wis. 667.— FOLLOWED IN Oshkosh *v.* Milwaukee & L. W. R. Co., 39 Am. & Eng. R. Cas. 681, 74 Wis. 534, 43 N. W. Rep. 489.

Where an action is begun in January, 1886, and plaintiff alleges that the construction began in 1884 and that plaintiff has requested the company to restore such highway to its former state, and that the request has not been complied with, plaintiff shows *prima facie* that ample time to restore the highway has elapsed. *Jamestown* v. *Chi-*

* See also *post*, 193, 241.

cago, B. & N. R. Co., 32 *Am. & Eng. R. Cas.* 263, 69 *Wis.* 648, 34 *N. W. Rep.* 728.

And such action cannot be defeated by the fact that the city itself has the power to do the work and recover the cost thereof from the company. *Oshkosh* v. *Milwaukee & L. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 681, 74 *Wis.* 534, 43 *N. W. Rep.* 489.—REVIEWED IN Moundsville *v.* Ohio River R. Co., 37 W. Va. 92.

192. Compelling restoration by mandamus. — Under Ind. Rev. St. of 1881, § 3903, railroad companies are authorized to construct their tracks over and across public highways, but they are required to restore them to their former state, and the performance of such duty may be compelled by mandamus. *Cummins* v. *Evansville & T. H. R. Co.*, 36 *Am. & Eng. R. Cas.* 147, 115 *Ind.* 417, 15 *West. Rep.* 456, 18 *N. E. Rep.* 6.

While a railroad corporation has a discretion as to the manner of performing the duty imposed upon it by N. Y. General Railroad Act of 1850, ch. 140, § 28, subd. 5, of restoring a highway across or along which its road has been constructed, the discretion is a ministerial one. The act of restoration must be done; as to this there is no discretion. If it elects a manner which proves ineffectual and yet it claims to have performed its duty, and the aid of the court is invoked by the commissioners of highways to compel, by mandamus, the performance, the court has power to and should point out in the writ in what the corporation has failed, and to direct particularly what must be done so that it may not fail again. *People ex rel.* v. *Dutchess & C. R. Co.*, 58 *N. Y.* 152, 7 *Am. Ry. Rep.* 10.—FOLLOWED IN New York C. & H. R. R. Co. *v.* People, 12 Hun (N. Y.) 195. RECONCILED IN State ex rel. *v.* Dayton & S. E. R. Co., 36 Ohio St. 434. REVIEWED IN People *v.* New York C. & H. R. R. Co., 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 3 Civ. Pro. 11, 2 McCar. 345; Bell *v.* New York C. & H. R. R. Co., 29 Hun 560.

In proceedings by mandamus to compel a railroad corporation to restore a highway, the court adjudged and commanded that the track of the highway for travel, at a certain specified place, for a short distance, should be changed from one side of the railroad track to the other, so as to avoid the necessity and the danger of two crossings. *Held*, that this was not a discontinuance of the highway, but that for all practical uses and purposes it remained the same, and that it was within the power of the court to direct the change to be made. *People ex rel.* v. *Dutchess & C. R. Co.*, 58 *N. Y.* 152, 7 *Am. Ry. Rep.* 10.

Proceedings by mandamus to compel a company to reconstruct a public highway injuriously occupied by it may be instituted on the relation of the road commissioners of the proper township, acting officially, and the consent thereto of the attorney-general of the commonwealth is unnecessary. *Com. ex rel.* v. *New York, P. & O. R. Co.*, 138 *Pa. St.* 58, 20 *Atl. Rep.* 951.

193. Liability over to town mulcted in damages—Limitations.* —Where a company is authorized, in building its road, to alter a highway, upon condition that it restore the same to its former state of usefulness, if it fails to do so, whereby the town is compelled to pay damages to one who is injured by reason of the defects in such highway, the company is bound to indemnify the town for the judgment recovered against it, and for the costs and expenses incurred in defending the action. *Hamden* v. *New Haven & N. Co.*, 27 *Conn.* 158.—DISTINGUISHED IN O'Connor *v.* Fond du Lac & P. R. Co., 5 Am. & Eng. R. Cas. 82, 52 Wis. 526, 38 Am. Rep. 753. QUOTED IN Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338.

The obligation resting upon the company to restore the highway is a continuing one, and it cannot avoid liability to the town for damages which the latter has paid by showing that the statute of limitations would bar an action for the original alteration of the highway which constituted a nuisance. (Elsworth, J., dissenting.) *Hamden* v. *New Haven & N. Co.*, 27 *Conn.* 158.—QUOTED IN Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338.

Where a company obstructs a highway in the construction of its track, whereby a traveler is injured and he recovers damages against the town, the latter may recover over against the company. *Lowell* v. *Boston & L. R. Co.*, 23 *Pick.* (*Mass.*) 24.

Where a company, against which mandamus proceedings are instituted to compel the restoration of a road, has succeeded by purchase to the franchises, etc., of another company which originally occupied the highway, it becomes subject to the duties

* See also *post*, **206, 241, 396-402.**

and liabilities relating thereto which rested upon the original company; nor is it relieved therefrom by the statute of limitations. *Com. ex rel.* v. *New York, P. & O. R. Co.*, 138 *Pa. St.* 58, 20 *Atl. Rep.* 951.

194. Consequential damages to abutters. — The legislature has full and paramount authority over all public highways. And where it authorizes and requires a company, by its charter, in constructing its railway across streets and highways to put the same in proper condition and repair so as not to interfere with public travel, it is not a trespasser in entering thereon for the purpose of restoring and improving the same, as commanded by its charter, and, if the work is done with reasonable prudence and skill, is not liable for consequential damages to owners of abutting land. *Robinson* v. *Great Northern R. Co.*, 48 *Minn.* 445, 51 *N. W. Rep.* 384.

The work is subject to the supervision and direction of the regularly constituted authorities having control of such streets or highways. But no such question is involved where the court defines the nature and extent of the improvement in a judgment obtained on the application of such authorities. *Robinson* v. *Great Northern R. Co.*, 48 *Minn.* 445, 51 *N. W. Rep.* 384.

7. Substitution of New Road.

195. Statutory provisions as to construction of substituted road. — The provisions of the statute, including those as to carrying a highway which may be touched, intersected, or crossed by a railroad under or over the railroad track, "as may be found most expedient for the public good," and as to making a change in the line of the highway where an embankment or cut calls for it, or it is desirable with a view to a more easy ascent or descent, and the grant of authority to the railroad company to acquire additional land for the construction of the road or highway on the new line, were intended to preserve to the public the old highway on the original surface, or on a new surface, or a new highway on the new line. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

The meaning of these provisions, in so far as they relate to the manner of the construction of the railroad (independent of any questions which may arise as to the use or operation of it), is nothing more than that, when the conditions of locality or topography are such that the railroad and highway cannot cross or intersect on the same surface, the railroad company may pass the highway over the railroad, or under, according as the former or latter shall be more for the public good; and, furthermore, if it be that the conditions are such as not to permit, consistently with its practical use, the grading of the highway to the level of the railroad cut or embankment, to authorize a detour or change in the route of the highway. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

This new route or detour in the highway, after being established upon land to be acquired by the company, is to be maintained as other public highways, and to be open as a public highway, and not as a private road of the company. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

An act gave to a company power to construct its railroad on any public road, and provided that if in its construction it should be necessary to change a public road, it should cause the same to be reconstructed "in the most favorable location and in as perfect a manner as the original road." *Held*, that this did not require that the making of the new road should precede the occupying of the old one. *Danville, H. & W. R. Co.* v. *Com.*, 73 *Pa. St.* 29. — DISTINGUISHING Queen *v.* Scott, 3 Q. B. 543; Queen *v.* Great North of England R. Co., 9 Q. B. 315.

Where a railroad is laid on a public road the company thereby becomes liable, under Pa. Act of Feb. 19, 1849, to construct a new road in its place. The township in which the road is cannot release the company from its liability to make the road. The township cannot exercise the special powers of the company in laying out the new road, paying damages, and constructing the road. *Snow* v. *Deerfield Tp.*, 78 *Pa. St.* 181.

A company incorporated subject to Pa. Gen. Railroad Act of Feb. 19, 1849, which takes a turnpike or public road for its corporate purposes incurs the obligation, under section 13 of that act, to construct a substitute road within a reasonable time; and a failure to do so is a denial to every citizen of the state of the use of a public highway,

and is a public nuisance for which the company is liable to an indictment. *Pittsburgh, V. & C. R. Co.* v. *Com.*, 10 *Am. & Eng. R. Cas.* 321, 101 *Pa. St.* 192.—FOLLOWED IN Com. *v.* Pennsylvania R. Co., 117 Pa. St. 637.

A Pennsylvania statute provides that if appellant company finds it necessary to change the site of any turnpike or public road, it shall cause the same to be reconstructed forthwith at its own expense on the most favorable location and in as perfect a manner as the original road. *Held*, that the question whether a change of the public road is necessary is to be determined by the company, subject to the control of the courts; and after it has supplied a new and safe crossing in place of an old one which it has removed, and such new crossing has been used by the public for several years, the supervisors of the township have no authority to restore the old crossing. *Pennsylvania R. Co.'s Appeal*, 39 *Am. & Eng. R. Cas.* 685, 128 *Pa. St.* 509, 18 *Atl. Rep.* 522.—DISTINGUISHING Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514.

196. Authority to make the change.—The right to change the site of a public highway is not confined to cases in which the highway is occupied longitudinally by a track, but exists as well in cases where the construction or reconstruction of its roadbed across a highway renders such a change of site necessary. *Pennsylvania R. Co.'s Appeal*, 39 *Am. & Eng. R. Cas.* 685, 128 *Pa. St.* 509, 18 *Atl. Rep.* 522.

A company may change the site of a public road to avoid grade crossings, and the necessity is to be determined, in the first instance, by the company, in the exercise of a sound discretion. *Abington Tp.* v. *North Pa. R. Co.*, 2 *Pa. Dist.* 68.

It appeared that in the construction of a railroad an old highway was occupied and a new one constructed and used as a substitute, for which the company purchased the required lands, and that the selectmen filed at that time in the town clerk's office a certificate of the survey of the new highway and a vacation of the old one. *Held*, that it should be presumed that an agreement was entered into between the selectmen and the company for a change in location of the highway agreeably to Vt. Rev. Laws, §§ 3379–80, for the filing of the certificate could only be proper after the making of such an agreement. *Wead* v. *St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 52, 24 *Atl. Rep.* 361.

197. Time within which to build substituted road.—A company must, if possible, construct its road without any inconvenience to the public; but, if this cannot be done, it must be constructed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent the obstruction, the company must build it in a reasonable time, and cannot delay it until its road is completed. *Louisville & N. R. Co.* v. *State*, 3 *Head* (*Tenn.*) 523.

198. Acceptance of new road by county and its effect.—Where a company takes part of a highway under a statute allowing it to do so, but which requires the company to restore the highway to its former state, so as not to impair its usefulness, in an action by the county to recover damages for a failure to restore the road it is proper to allow the company to prove in mitigation of damages that it caused a new road to be built, intending the same to be used in lieu of the old road, which new road was accepted by the county. *Greenup County* v. *Maysville & B. S. R. Co.*, (*Ky.*) 21 *S. W. Rep.* 351.

199. Effect of long user and acquiescence.—In order to make a crossing safer a railroad company opened a new road some four rods distant from the old one, on land belonging to the commissioner of highways, who assisted in the work. The new road continued to be used for six years, the old one being abandoned. *Held*, that the old road had ceased to be a highway, and after such long acquiescence the court would not order a change of the location. *Schermerhorn* v. *Mt. McGregor R. Co.*, 52 *N. Y. S. R.* 892, 69 *Hun* 512, 23 *N. Y. Supp.* 417.

200. Acquisition of land for new road--Compensation to owner.—A railroad company petitioned the selectmen of a town to lay out a highway, stating that in laying the railroad a highway had been obstructed, and requesting the selectmen to lay out a new highway as a substitute for the one taken for the railroad. The selectmen laid out the road prayed for, and awarded that the damages for the land taken for the highway should be paid by the company. *Held*: (1) that the town was not liable to the landowner for the damages awarded; (2) that if the laying of the road was valid at all, it must be regarded as

having been done for the accommodation of the company. *Ellis* v. *Swansey*, 26 *N. H.* 266.

Whether the selectmen of a town have any power whatever to lay out a highway as a substitute for one taken by a railroad in the course of its construction, *quære*. *Ellis* v. *Swansey*, 26 *N. H.* 266.

The right conferred upon railroad companies by N. Y. General Railroad Act of 1850, as amended by chapter 133 of 1880, to use highways for the purposes of their roads on obtaining consent of the supreme court, is subject only to the duty to restore them to their former state, "or to such state as not unnecessarily to have impaired" their usefulness, and when it becomes necessary for the performance of the duty of restoration to remove a highway in whole or in part outside of its original limits, the corporation may acquire by purchase the lands required for the purpose, and the reconstructed highway in the new location becomes part of the legal highway. *Post* v. *West Shore R. Co.*, 47 *Am. & Eng. R. Cas.* 322, 123 *N. Y.* 580, 26 *N. E. Rep.* 7, 34 *N. Y. S. R.* 484; *affirming* 50 *Hun* 301, 20 *N. Y. S. R.* 180, 3 *N. Y. Supp.* 172.

The duty of restoration so imposed carries with it the necessary powers for that purpose, and among them the power to take lands compulsorily where a removal or a change of the highway is necessary; and to accomplish this such lands must be acquired. *People ex rel.* v. *Dutchess & C. R. Co.*, 58 *N. Y.* 152, 7 *Am. Ry. Rep.* 10.—QUOTED IN Valley R. Co. *v.* Bohm, 34 Ohio St. 114. REVIEWED IN State ex rel. *v.* Minneapolis & St. L. R. Co., 39 Minn. 219, 39 N. W. Rep. 153; Moundsville *v.* Ohio River R. Co., 37 W. Va. 92.

201. Power of highway commissioners and supervisors to consent to substitution of new road.—Highways can only be vacated in the manner prescribed by statute; and commissioners of highways have no authority to surrender the entire use of a highway to a company on condition that it provide a new road. *Rice* v. *Chicago, B. & N. R. Co.*, 30 *Ill. App.* 481.

The court will not interfere with a judgment in favor of an individual against a railroad for damages caused by occupying a highway for the purposes of a track, thereby causing a new road to be opened further away, though such occupancy be by consent of the commissioners, and the damages for opening the new road are paid by the company. *Louisville, E. & St. L. R. Co.* v. *Lanter*, 47 *Ill. App.* 339.

Neither one nor both of the supervisors of a township have power to make a verbal contract binding on the township, having for its object the substitution of a road for a way already open and in public use, nor to consent to an impediment or obstruction of a highway. *Appeal of North Manheim Tp.*, (*Pa.*) 36 *Am. & Eng. R. Cas.* 194, 14 *Atl. Rep.* 137.

An agreement by the supervisors of a township that no objection will be made to the crossing of a turnpike by a railroad, provided the company will construct a new road so as to connect with a highway intersecting the turnpike further on, is an act requiring deliberation and judgment, and such agreement made by a single supervisor without the concurrence of the other is void as against the township. *Appeal of North Manheim Tp.*, (*Pa.*) 36 *Am. & Eng. R. Cas.* 194, 14 *Atl. Rep.* 137.

202. Rights of abutters on discontinuance of old road.—Where a company moves a street only 150 feet, so as to make a safer crossing by carrying it over the railroad by a bridge, and the village authorities accept the new street and discontinue the old one, and plaintiff, who owns the land, is not deprived of light, air, or access thereby, he is not entitled to a mandatory injunction to compel the restoration of the old crossing, or to damages. *Buchholz* v. *New York, L. E. & W. R. Co.*, 50 *N. Y. S. R.* 670, 66 *Hun* 377, 21 *N. Y. Supp.* 503. —DISTINGUISHING Story *v.* New York El. R. Co., 90 N. Y. 122.

203. Additional compensation to county for use of newly constructed street.—Where any part of a public street or highway is washed out or otherwise destroyed, and the damage is repaired by a new structure upon the portion thus destroyed or rendered unfit for use, this does not give to the county a right to exact additional compensation from a railroad company, which, previous to the injury, used the street or public highway with the assent of the municipality, where the railroad company proposes to make the same use of the street or highway after it has been repaired. *Floyd County* v. *Rome St. R. Co.*, 77 *Ga.* 614, 3 *S. E. Rep.* 3.

204. Action for defects—Notice to company.—The duty imposed by statute

upon railroad companies to restore highways which have been taken or obstructed by their tracks is a continuing one, not affected by a change in the ownership of the road. So where a company is sued for failing to restore a highway, it is no defense that it is the successor of the original company, and had no notice of the defect. *Vaughan* v. *Buffalo, R. & P. R. Co.*, 72 *Hun* 471, 54 *N. Y. S. R.* 782, 25 *N. Y. Supp.* 246. —DISTINGUISHING Conhocton Stone Road *v.* Buffalo, N. Y. & E. R. Co., 51 N. Y. 573; Ahern *v.* Steele, 115 N. Y. 203.

205. Liability of town for unsafe condition of substituted road.— When a public highway has been taken by a company for the construction of its railroad and so obstructed as to be rendered impassable, without a substitute therefor being provided in the manner required by law, it is not the duty of the highway surveyor to contest the company's right so to take or obstruct the highway, and hence he is not responsible for any injury which may occur by reason of its so doing. *Batty* v. *Duxbury*, 23 *Vt.* 714.—REVIEWED IN Mann *v.* Central Vt. R. Co., 14 Am. & Eng. R. Cas. 620, 55 Vt. 484, 45 Am. Rep. 628.

Where a company obstructs a highway the town must provide a suitable byway for the public to pass around the obstruction, and use reasonable care to divert the travel from such highway while it remains unsafe. *Batty* v. *Duxbury*, 24 *Vt.* 155.

As the town is primarily liable to travelers for the condition of public highways, the town must make such byway reasonably safe, though it is the duty of the railroad company to make the byway. If it fails to do so the town must discharge the duty, and failing, will be liable. *Batty* v. *Duxbury*, 24 *Vt.* 155.

206. Liability over to town mulcted in damages.*—Where a company fails to restore a highway, as required by statute, whereby individuals using the highway are injured, and the town is required to pay damages, it may recover the same back from the company, and one recovery will not prevent a second. Thus where a husband and wife are both injured at the same time while driving on the highway, a recovery by the town for damages that it was compelled to pay to the husband will not prevent a further recovery for damages paid to the wife. *Newbury* v. *Connecticut & P. R. R. Co.*, 25 *Vt.* 377.

In such case each successive recovery against the town constitutes a new cause of action against the company; and the fact that the injury to the different persons was at the same time, in the same carriage, and under the same circumstances, is immaterial. *Newbury* v. *Connecticut & P. R. R. Co.*, 25 *Vt.* 377.

Where a company fails to restore a highway, and the town is compelled to pay damages for injuries received by reason of the defective highway, it may recover from the company not only the amount of the damages paid, but the costs and expenses incurred in defending the suit, the company having been notified, but failing to appear and defend. *Duxbury* v. *Vermont C. R. Co.*, 26 *Vt.* 751.—CRITICISING Lowell *v.* Boston & L. R. Co., 23 Pick. (Mass.) 24. QUOTING Hayden *v.* Cabot, 17 Mass. 169; Wynn *v.* Brooke, 5 Rawle (Pa.) 106.

207. English cases. — A company which lays its track over one side of a highway, and thereby renders the road dangerous and extraordinarily inconvenient, will be restrained by perpetual injunction from using the highway until it has made a substituted road. *Attorney-General* v. *Widnes R. Co.*, 30 *L. T.* 449, 22 *W. R.* 607.

The Turnpike Act (3 Geo. III., c. 126), or the Railways Clauses Act, 1845, § 16, does not place a railway company in the position of trustees of a substituted road made by it, so as to transfer to it the soil of the old road which had ceased by the diversion to form part of the turnpike road. *Salisbury* v. *Great Northern R. Co.*, 5 *C. B. N. S.* 174, 5 *Jur. N. S.* 70, 28 *L. J. C. P.* 40.

IV. REMEDIES OF ABUTTING OWNERS

1. *In General. Election of Remedies.*

208. When confined to the statutory remedy.—Where a street is taken by a company, a party entitled to use and enjoy such street cannot pursue the statutory remedy, but must sue for damages for a consequential injury. *Protzman* v. *Indianapolis & C. R. Co.*, 9 *Ind.* 467.—CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493. DISTINGUISHED IN Portland & W. V. R. Co. *v.* Portland, 27 Am. & Eng. R. Cas. 353, 14

* See also *ante*, **193**; *post*, **396-402.**

Oreg. 188; Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148. QUOTED IN Cox *v.* Louisville, N. A. & C. R. Co., 48 Ind. 178.

Parties who own the fee in land on which is a highway cannot enjoin a railroad company from condemning it for its road, though they may be specially injured by obstructing the highway. Their remedy is to make themselves parties to the eminent domain proceeding, and therein prove their damages. *Conner* v. *Covington Transfer R. Co.*, (*Ky.*) 19 *S. W. Rep.* 597.

Under N. Mex. Comp. Laws, § 2665, subsection 5, an abutting owner is not deprived of his right to damages for the construction of a railroad in a street, whereby the street is diverted from the use for which it was originally intended. *New Mexican R. Co.* v. *Hendricks*, (*N. Mex.*) 30 *Pac. Rep.* 901.

Where a company does not enter upon a street under statutory authority, but under the license of a city, an abutter is not confined to the statutory remedy, but may maintain an action at law for damages. *White* v. *Northwestern N. C. R. Co.*, 56 *Am. & Eng. R. Cas.* 706, 113 *N. Car.* 610, 18 *S. E. Rep.* 330.

209. Election of remedies. — An abutting owner may maintain an action against a company which wrongfully builds its track upon the street, and where there is no waiver or estoppel he may maintain ejectment or an injunction. *Porter* v. *Midland R. Co.*, 46 *Am. & Eng. R. Cas.* 70, 125 *Ind.* 476, 25 *N. E. Rep.* 556.

But where such owner stands by, without objecting, until the rights of the public and third parties have intervened, he may maintain neither ejectment nor an injunction, but may resort to an action for damages, which must be brought within six years from the completion of the grade, or it will be barred by the statute of limitations, which limits to six years actions for injuries to real property. *Porter* v. *Midland R. Co.*, 46 *Am. & Eng. R. Cas.* 70, 125 *Ind.* 476, 25 *N. E. Rep.* 556.

Where a company enters upon and constructs its road upon a street, thereby reducing its width, and it does not appear that it entered under any statutory authority, but only by the license of the city, an abutting property owner who is damaged thereby may maintain a common-law action for damages, to be assessed up to the time of the trial, or may sue for permanent damages inflicted by the location and construction of the road, and by so doing confer upon defendant an easement to occupy the street, as far as such abutter is concerned. *White* v. *Northwestern N. C. R. Co.*, 56 *Am. & Eng. R. Cas.* 706, 113 *N. Car.* 610, 18 *S. E. Rep.* 330.—APPROVING Story *v.* New York El. R. Co., 90 N. Y. 122; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268. QUOTING Adams *v.* Chicago, B. & N. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493.

210. Payment of damages assessed compels discontinuance of action.— Payment by the company, and acceptance by the landowner, of damages assessed and awarded to the latter for the obstruction of a public road, compel the discontinuance by him of an action to restrain the obstruction as a public nuisance. The damages are supposed to cover his private inconvenience; for the public inconvenience, public officers must sue. *Appeal of Campbell*, (*Pa.*) 12 *Atl. Rep.* 843.

211. Liability of city or town to abutting owner.* —Whether a municipal corporation would be liable to a citizen for a nuisance committed by an authorized railroad company, *quære*. *Colorado C. R. Co.* v. *Mollandin*, 4 *Colo.* 154.

A city does not become liable to abutting owners by passing an ordinance giving to a railroad company permission to use the streets for the purposes of its road. *Denver* v. *Bayer*, 7 *Colo.* 113, 2 *Pac. Rep.* 6.

If it was intended by the ordinance to confer upon the company a right to use the street without compensation to adjoining owners, where permanent injury results from such use the ordinance is, in this respect, *ultra vires* and void. The relation of principal and agent does not exist in such case. *Denver* v. *Bayer*, 7 *Colo.* 113, 2 *Pac. Rep.* 6.—DISTINGUISHING Stack *v.* East St. Louis, 85 Ill. 377.

The liability in such case is against the company. *Sorensen* v. *Greeley*, 10 *Colo.* 369, 15 *Pac. Rep.* 803. *Burkam* v. *Ohio & M. R. Co.*, 43 *Am. & Eng. R. Cas.* 153, 122 *Ind.* 344, 23 *N. E. Rep.* 799.

Where a company is authorized by ordinance to build its road within a part of a street which is thereby legally vacated, the city cannot be held liable to a lot owner whose property is not adjacent to the vacated street for any act of the company not authorized by such ordinance. *East*

* See also *post*, **236.**

St. Louis v. *O'Flynn*, 119 *Ill.* 200, 10 *N. E. Rep.* 395.

A city of the second class, having power by its charter "to provide for the passage of railways through the streets," gave permission to a company to occupy one of the streets to its entire width. *Held*, that in the absence of an express statute making the city responsible, it was not liable to an adjacent lot owner for the damages to his lots caused by such occupation. *Hedrick* v. *Olathe*, 30 *Kan.* 348, 1 *Pac. Rep.* 118.

Unless they are such as would not have resulted if the road had been properly constructed and operated. *Swenson* v. *Lexington*, 69 *Mo.* 157.

A section in a charter provided that "private property may be taken for public use, or for the purpose of giving the right of way, or other privilege, to any railroad company; but in every case the city shall make the person or persons whose property shall be taken or injured thereby adequate compensation." *Held*, that this did not make the city liable, where its only action was giving permission to occupy the street. *Hedrick* v. *Olathe*, 30 *Kan.* 348, 1 *Pac. Rep.* 118.

If a city has authority to grant a right of way over its streets to railroads, it incurs no liability by reason of the fact that a company authorized by it to build and operate its road upon a street has so constructed an embankment in the street as to cause a pond of water to be formed upon adjacent land, provided the embankment conforms to the established grade of the street and is otherwise so constructed as to cause no damage or inconvenience beyond that necessarily occasioned by the appropriation of a portion of the street for the purpose. *Swenson* v. *Lexington*, 69 *Mo.* 157.

Though a city is primarily liable to a property owner for injury to his property caused by the improper construction of a railroad in the streets, the company is also liable to him. *Swenson* v. *Lexington*, 69 *Mo.* 157.

2. *Action at Law.*

212. When an action will lie, generally.* — When injury is caused to adjacent property by excavations in the streets made for railroad purposes, an action for damages lies against the railroad company and the construction company which undertook to build the road, although the work was in fact done by a subcontractor; and it is not necessary to show that, in the performance of the work, he conformed to the grade fixed by the railroad engineers. *Alabama Midland R. Co.* v. *Coskry*, 92 *Ala.* 254, 9 *So. Rep.* 202.

Defendant company was authorized by Act of Congress of May 21, 1872, to lay its track along a certain street in the city of Washington, upon paying any damages sustained by property owners. If the company could not agree with the owner, the damages were to be assessed by a jury; but it proceeded to lay its track without complying with the statute. *Held*, that an abutting owner might maintain an action on the case against the company, and recover all the damages actually resulting to his property; but whether the action should be at common law without the statute, not decided. *Dickson* v. *Baltimore & P. R. Co.*, 3 *MacArth.* (*D. C.*) 362.

The act of municipal authorities, sanctioned by the legislature, gives to a company the right to use a street. *Held*, that the failure by the legislature to provide for the assessment of damages by way of compensation to the property owners on said street did not take away the right of the party to his suit at law for damages, under Ga. Code, § 2692. *South Carolina R. Co.* v. *Steiner*, 44 *Ga.* 546, 3 *Am. Ry. Rep.* 86.

Where a company lays its track across a highway leading to plaintiff's place of business and near thereto, and constructs it in such a manner as to cause a diversion of travel and consequent diminution in plaintiff's business, he may recover therefor. *Park* v. *Chicago & S. W. R. Co.*, 43 *Iowa* 636, 14 *Am. Ry. Rep.* 489.

In plaintiff's petition it was alleged that a company built its tracks over a street of a city of the second class in such a way as to render the street wholly useless to him as a means of access to and from his lots, which abutted on the street; that shortly afterwards the railroad and franchises of that company were sold, under a decree of foreclosure, to another company, which company had since operated the road, and had continued the obstruction and nuisance, and thereby permanently deprived him of all access to the street from his property;

* Damages to adjoining owners for establishing railroad on highway, see note, 4 AM. ST. REP. 402.

that he had never received any compensation on account of the injury sustained by reason of the appropriation of the street, and there had been no consent to the appropriation or waiver of the claim for damages. *Held:* (1) that a cause of action was stated in favor of plaintiff against the purchasing company, and this although it was conceded that the road was properly and skilfully constructed; (2) that plaintiff was entitled to recover his damages for the permanent appropriation of the street in front of his property, although it was accessible from another street. *Ft. Scott, W. & W. R. Co.* v. *Fox*, 40 *Am. & Eng. R. Cas.* 331, 42 *Kan.* 490, 22 *Pac. Rep.* 583.—DISTINGUISHING Central Branch U. P. R. Co. *v.* Twine, 23 Kan. 585.

Where a railroad track has been laid in a public street without authority, any adjacent proprietor who has not consented to such use is entitled to damages for such injury as he may have suffered in consequence thereof. It is for a jury to determine the damages to an adjacent proprietor from the malicious and unnecessary operation of a railroad in the public street. *Grand Rapids & I. R. Co.* v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich.* 393, 11 *N. W. Rep.* 212.

The unauthorized occupancy of a highway by a company for its track is actionable if any actual damage ensues to adjacent owners, whether indictable or not. *Grand Rapids & I. R. Co.* v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich.* 393, 11 *N. W. Rep.* 212. *New Orleans, J. & G. N. R. Co.* v. *Moye*, 39 *Miss.* 374. — DISTINGUISHING Tegarden *v.* McBean, 33 Miss. 283.

Where an abutting owner sues a company for raising an embankment in the street in front of his premises, it is proper to charge the jury that if the company restored the street to its former state, or to such state as not unnecessarily to impair its usefulness, then plaintiff cannot recover, but that otherwise he may. *Corey* v. *Buffalo, C. & N. Y. R. Co.*, 23 *Barb.* (*N. Y.*) 482.

Under N. Y. Act of 1880, ch. 147, which permitted defendant to agree with commissioners, appointed by the act on behalf of the city of Rochester, upon a plan to elevate its tracks along and across the city streets and to close up streets, etc., a portion of a street upon which plaintiff's premises abutted was discontinued, and defendant, having previously obtained title to the fee of the street, erected thereon an embankment about fourteen feet high, upon which it laid its tracks, leaving a space between it and said premises so narrow as not to admit of the approach of a team and carriage to them. Plaintiff's premises were used and occupied as a hotel and boarding house. In an action to recover damages, upon these facts appearing, the court directed a verdict for defendant. *Held*, error; that plaintiff established a right to recover, and the question of damages should have been submitted to the jury. *Egerer* v. *New York C. & H. R. R. Co.*, 50 *Am. & Eng. R. Cas.* 228, 130 *N. Y.* 108, 29 *N. E. Rep.* 95, 41 *N. Y. S. R.* 488; *reversing* 49 *Hun* 605, 17 *N. Y. S. R.* 225, 2 *N. Y. Supp.* 69. — APPROVING Reining *v.* New York, L. & W. R. Co., 128 N. Y. 157. DISTINGUISHING Fobes *v.* Rome, W. & O. R. Co., 121 N. Y. 505; Kane *v.* New York El. R. Co., 125 N. Y. 165; Radcliff *v.* Mayor, etc., of Brooklyn, 4 N. Y. 195; Coster *v.* Mayor, etc., of Albany, 43 N. Y. 399; Fearing *v.* Irwin, 55 N. Y. 490; Stetson *v.* Faxon, 19 Pick. (Mass.) 147.

A company, whose charter, granted before the adoption of the Pa. Constitution of 1874, allowed it to exercise the right of eminent domain, is liable in damages to the owner of property whose use of the adjoining street is impaired by the shifting or relaying of its tracks. *Philadelphia & R. R. Co.* v. *Patent*, (*Pa.*) 5 *Atl. Rep.* 747.—QUOTING Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 382.

Under the Texas Bill of Rights, which provides that "no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made," an abutting owner may recover damages where his property has been injured by reason of a railroad being constructed and operated in the street, though no part of the property is taken. *Belt Line St. R. Co.* v. *Crabtree*, 2 *Tex. App.* (*Civ. Cas.*) 579.—QUOTING Gottschalk *v.* Chicago, B. & Q. R. Co., 14 Neb. 550; Burlington & M. R. R. Co. *v.* Reinhackle, 15 Neb. 279.—*Gulf, C. & S. F. R. Co.* v. *Graves*, 10 *Am. & Eng. R. Cas.* 199, 1 *Tex. App.* (*Civ. Cas.*) 301.

213. When remedy, if any, is at law.*— Where a company under authority from a city has located its road upon a public street, and is constructing the same, a court of equity will not entertain a bill to restrain the operation of the road until the

* See also *post*, **221.**

damages to an abutting lot owner are ascertained and paid, but will leave him to his remedy at law. *Stetson* v. *Chicago & E. R. Co.*, 75 *Ill.* 74.

A court of equity will not enjoin the use of a railroad track upon a public street until the adjoining lot owners' damages are paid, and this is so even where the railroad company is insolvent. *Peoria & R. I. R. Co.* v. *Scherts*, 84 *Ill.* 135.

A court of equity will not undertake to control by injunction the use of a street by a railroad company, or the manner of laying its track, or the manner of operating its road, for the reason that the power of controlling streets is vested in municipal authorities, and the courts cannot supervise the exercise of such power at the suit of the people. *Cairo & V. R. Co.* v. *People*, 92 *Ill.* 170.

Any expected damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the license of the city holding the fee of the street must be sought in an action at law. Equity will not interfere. *Truesdale* v. *Peoria Grape Sugar Co.*, 5 *Am. & Eng. R. Cas.* 248, 101 *Ill.* 561.

Where a railroad track is laid down in a street, by authority of the city council, to connect a private manufacturing establishment with other railroad tracks running through such street, although such connecting track may be constructed entirely with the means provided by the owners of the establishment, it becomes "a public highway," within the meaning of Ill. Const. art. 11, § 12, giving to the city council the right to devote the portion of the street to that use; and the remedy of a person injured thereby is at law, and not in equity. *Parlin* v. *Mills*, 11 *Ill. App.* 396.—FOLLOWING Truesdale *v.* Peoria Grape Sugar Co., 101 Ill. 561.

214. Plaintiff may sue if specially injured.—A private individual may maintain an action because of an obstruction of a public street, where such obstruction peculiarly affects him, although it does not affect the general public. *Chicago, St. L. & P. R. Co.* v. *Eisert*, 127 *Ind.* 156, 26 *N. E. Rep.* 759. *Harvey* v. *Georgia Southern & F. R. Co.*, 56 *Am. & Eng. R. Cas.* 630, 90 *Ga.* 66, 15 *S. E. Rep.* 783. *Patterson* v. *Detroit, L. & N. R. Co.*, 19 *Am. & Eng. R. Cas.* 415, 56 *Mich.* 172, 22 *N. W. Rep.* 260. *Attorney-General ex rel.* v. *Morris & E. R. Co.*, 19 *N. J. Eq.* 386; *reversed in* 19 *N. J. Eq.* 575. *Gulf, C. & S. F. R. Co.* v. *Eddins*, 60 *Tex.* 656.—APPROVING Pumpelly *v.* Green Bay & M. Canal Co., 13 Wall. (U. S.) 166.—DISTINGUISHED IN Texas & S. R. Co. *v.* Meadows, 39 Am. & Eng. R. Cas. 29, 73 Tex. 32, 3 L. R. A. 565, 11 S. W. Rep. 145. FOLLOWED IN Gulf, C. & S. F. R. Co. *v.* Bock, 63 Tex. 245. QUOTED IN Columbus, H. V. & T. R. Co. *v.* Gardner, 32 Am. & Eng. R. Cas. 243, 45 Ohio St. 309, 11 West. Rep. 264, 13 N. E. Rep. 69.—*Gulf, C. & S. F. R. Co.* v. *Bock*, 63 *Tex.* 245.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.—*Wood* v. *Stourbridge R. Co.*, 16 *C. B. N. S.* 222. *Brown* v. *Toronto & N. R. Co.*, 26 *U. C. C. P.* 206.—REVIEWED IN Murphy *v.* Grand Trunk R. Co., 1 Ont. 619.

And the company cannot defend on the ground that it had authority from the city to lay the track or make the obstruction. *Ford* v. *Santa Cruz R. Co.*, 59 *Cal.* 290. *Frith* v. *Dubuque*, 45 *Iowa* 406. *Central Branch U. P. R. Co.* v. *Twine*, 23 *Kan.* 585.—FOLLOWING Atchison & N. R. Co. *v.* Garside, 10 Kan. 552; Venard *v.* Cross, 8 Kan. 248.—QUOTED IN Ottawa, O. C. & C. G. R. Co. *v.* Larson, 40 Kan. 301.—*Gottschalk* v. *Chicago, B. & Q. R. Co.*, 14 *Am. & Eng. R. Cas.* 157, 14 *Neb.* 550, 16 *N. W. Rep.* 475.—QUOTING Rigney *v.* Chicago, 102 Ill. 64. REVIEWING Beckett *v.* Midland R. Co., L. R. 3 C. P. 82; Mollandin *v.* Union Pac. R. Co., 14 Fed. Rep. 394.—APPLIED IN Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240. FOLLOWED IN Republican Valley R. Co. *v.* Fellers, 20 Am. & Eng R. Cas. 256, 16 Neb. 169. QUOTED IN Omaha Belt R. Co. *v.* McDermott, 25 Neb. 714, 41 N. W. Rep. 648.

Nor because it has legislative permission. *Gulf, C. & S. F. R. Co.* v. *Fuller*, 22 *Am. & Eng. R. Cas.* 154, 63 *Tex.* 467.

Provided the railroad be constructed in a careless, improper, negligent, or unlawful manner. *Cain* v. *Chicago, R. I. & P. R. Co.*, 54 *Iowa* 255, 3 *N. W. Rep.* 736, 6 *N. W. Rep.* 268. *McLauchlin* v. *Charlotte & S. C. R. Co.*, 5 *Rich.* (*So. Car.*) 583.

It is no answer for unlawfully obstructing an alley that new and increased custom will result to plaintiff's business by reason of the obstruction itself (the same being a depot to be placed across the alley), and other improvements which will be erected by the company at and near the point where the depot is to be located and maintained; nor

can any increase in the value of plaintiff's property, anticipated as a probable effect of the company's new improvements and works, be taken into the account as a set-off against injury to business. *Harvey* v. *Georgia Southern & F. R. Co.*, 56 *Am. & Eng. R. Cas.* 630, 90 *Ga.* 66, 15 *S. E. Rep.* 783.

The court erred in charging the jury in conflict with the principles above announced, the company having admitted at the trial that it claimed no authority of law for closing the alley, and that closing the same was a nuisance. *Harvey* v. *Georgia Southern & F. R. Co.*, 56 *Am. & Eng. R. Cas.* 630, 90 *Ga.* 66, 15 *S. E. Rep.* 783.

It is not necessary that a portion of a lot should actually have been taken by a company in order to entitle the owner to damages for the obstruction; but if access to and egress from the property have been cut off by the construction of a railroad, the owner suffers a peculiar and special injury, for which he is entitled to compensation. *Leavenworth, N. & S. R. Co.* v. *Curtan*, 56 *Am. & Eng. R. Cas.* 636, 51 *Kan.* 432, 33 *Pac. Rep.* 297. *Gulf, C. & S. F. R. Co.* v. *Graves*, 10 *Am. & Eng. R. Cas.* 199, 1 *Tex. App. (Civ. Cas.)* 301.—QUOTING Houston & T. C. R. Co. *v.* Odum, 53 Tex. 343.

It is immaterial to inquire in whom the fee to the street is vested when it is shown that it was dedicated to the use of the public, and that complainant, as the owner of adjacent property, has an easement and a substantial and valuable right in the street. In every such case, he who sustains special damage by the construction of a railway along the street has a right of action, no matter where the fee is vested. *Gulf, C. & S. F. R. Co.* v. *Eddins*, 60 *Tex.* 656.—FOLLOWED IN Gulf, C. & S. F. R. Co. *v.* Bock, 63 Tex. 245.—*Gulf, C. & S. F. R. Co.* v. *Bock*, 63 *Tex.* 245.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

215. Where no action will lie.*—(1) *In general.*—Where a railroad is constructed according to law, and on the established grade of a street, an abutting lot owner cannot recover damages because his lot is rendered inaccessible and surface water is prevented from running off. *Nottingham* v. *Baltimore & P. R. Co.*, 3 *MacArth. (D. C.)* 517.

It is incumbent upon a property owner who seeks to recover damages for the construction of a railroad in a street to show that the additional burden caused injury to his property. Where there are no damages there can be no recovery. *Burkam* v. *Ohio & M. R. Co.*, 43 *Am. & Eng. R. Cas.* 153, 122 *Ind.* 344, 23 *N. E. Rep.* 799.

A railroad was built on ground owned by the company along one side of a street, but the roadbed encroached a little upon the street, though the ties did not overlap it. *Held*, that such encroachment would give no right to damages to a property owner on the other side of the street. *Rinard* v. *Burlington & W. R. Co.*, 66 *Iowa* 440, 23 *N. W. Rep.* 914.

If land of plaintiff over which there is an established highway is taken by a company under its charter, no action at law is maintainable for such taking. *Whittier* v. *Portland & K. R. Co.*, 38 *Me.* 26.

The lawful occupation of a street by a company, by laying a track upon its surface and running engines and trains thereon in the usual manner, will not entitle abutting property owners to damages for incidental injuries thereby occasioned. *Botto* v. *Missouri Pac. R. Co.*, 11 *Mo. App.* 589.

For injuries resulting from the violation or destruction of public rights, in cases where no private, individual right is injuriously affected, no private action can be maintained. *Dodge* v. *Pennsylvania R. Co.*, 36 *Am. & Eng. R. Cas.* 180, 43 *N. J. Eq.* 351, 10 *Cent. Rep.* 655, 11 *Atl. Rep.* 751; *affirmed in* 45 *N. J. Eq.* 366, 19 *Atl. Rep.* 622.

Except in the instances where statutory provision to the contrary exists, the law gives no compensation for losses resulting from the surrender of public rights. *Dodge* v. *Pennsylvania R. Co.*, 36 *Am. & Eng. R. Cas.* 180, 43 *N. J. Eq.* 351, 10 *Cent. Rep.* 655, 11 *Atl. Rep.* 751; *affirmed in* 45 *N. J. Eq.* 366, 19 *Atl. Rep.* 622.

(2) *Where the road is authorized.* — A company authorized by municipal law to operate its road through or across a street is not liable in a common-law action, except for injuries done wantonly or without reasonable care. *So held*, in an action by an abutting hotel keeper to recover for damage from engine smoke, jar, and noise. *Colorado C. R. Co.* v. *Mollandin*, 4 *Colo.* 154. —APPROVING Radcliff *v.* Mayor, etc., of Brooklyn, 4 N. Y. 195; Bellinger *v.* New York C. R. Co., 23 N. Y. 42; People *v.* Kerr,

* When injury to abutting owners for use of street for railway purposes is *damnum absque injuria*, see notes, 2 L. R. A. 59; 5 *Id.* 372.

27 N. Y. 188. CRITICISING South Carolina R. Co. *v.* Steiner, 44 Ga. 547. DISTINGUISHING Southern Pac. R. Co. *v.* Reed, 41 Cal. 256. NOT FOLLOWING Fletcher *v.* Auburn & S. R. Co., 25 Wend. 462. — DISTINGUISHED IN Denver *v.* Bayer, 7 Colo. 113.

In proof of such authority, the company may adduce a city ordinance and evidence of compliance therewith in every respect. *Colorado C. R. Co.* v. *Mollandin*, 4 *Colo.* 154.

Complaint by the owner of a lot having buildings thereon, used for worship and a school, alleging the use of the adjoining street by a railroad company for its track, on which cars were run, whereby worship was interrupted, children attending the school imperiled, and the street obstructed, etc. Answer, that the railroad was operated in the usual way necessary for such business; that the railroad is nine feet wide, and none of it upon plaintiff's premises, being beyond the centre of the street, and was constructed by leave of the city and in manner as required by an ordinance; that the street is sixty-six feet wide and is not obstructed save as the running of cars carefully and as is usual may temporarily have that effect as to its general use. *Held*, that the answer was good. *Dwenger* v. *Chicago & G. T. R. Co.*, 20 *Am. & Eng. R. Cas.* 26, 98 *Ind.* 153.

An abutting lot owner cannot recover damages by reason of the location of a railroad, duly authorized by the city council, along one of the regularly laid-out streets of a city, unless there has been a practical obstruction of the street in front of his premises and he is virtually deprived of access to his property. *Wichita & C. R. Co.* v. *Smith*, 46 *Am. & Eng. R. Cas.* 53, 45 *Kan.* 264, 25 *Pac. Rep.* 623.—FOLLOWED IN Kansas, N. & D. R. Co. *v.* Mahler, 45 Kan. 565. —*Herndon* v. *Kansas, N. & D. R. Co.*, 46 *Kan.* 560, 26 *Pac. Rep.* 959.

The use by a railroad, under authority of its charter, of a street, in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes. Any damage to the property abutting on the street, resulting from such obstruction, is *damnum absque injuria*. *Porter* v. *North Mo. R. Co.*, 33 *Mo.* 128.—DISTINGUISHING Lackland *v.* North Mo. R. Co., 31 Mo. 181.—CRITICISED IN Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366. DISTINGUISHED IN Glaessner *v.* Anheuser-Busch Brew. Assoc., 100 Mo. 508, 13 S. W. Rep. 707. FOLLOWED IN Lackland *v.* North Mo. R. Co., 34 Mo. 259. QUOTED IN Gaus & S. Mfg. Co. *v.* St. Louis, K. & N. R. Co., 113 Mo. 308. RECONCILED IN Virginia & T. R. Co. *v.* Lynch, 13 Nev. 92.

Plaintiff brought an action to recover damages for the obstruction of a street in front of his premises by a railroad, or in default thereof for an injunction to restrain such use. The evidence showed that the obstruction was authorized by law, and, by reference to a map, that plaintiff's lot abutted on and was bounded by the street. *Held*, that plaintiff had no interest beyond that possessed by the public generally beyond the streets bounding his property, and the remedy should be refused. *Hier* v. *New York, W. S. & B. R. Co.*, 40 *Hun* (*N. Y.*) 310; *affirmed in* 109 *N. Y.* 659, *mem.*, 17 *N. E. Rep.* 867.—QUOTED IN Rummel *v.* New York, L. & W. R. Co., 30 N. Y. S. R. 235, 9 N. Y. Supp. 404.

A common-law action does not lie against a railroad for consequential injuries occasioned by the construction and operation of its road; and a public street in front of property may be used for the purposes of a railroad when the charter authorizes such use. *Struthers* v. *Dunkirk, W. & P. R. Co.*, 87 *Pa. St.* 282.

Authority from the legislature for the construction of a track on a street, whereby the owners of adjacent lots suffer inconvenience and injury, is not a taking of property within the meaning of Texas Constitution. Such an addition to the use of the street, if authorized by the legislature, gives to the lot owner no right to compensation, although his easement in the street be thereby impaired, and his lot rendered less valuable. *Houston & T. C. R. Co.* v. *Odum*, 2 *Am. & Eng. R. Cas.* 503, 53 *Tex.* 343.—REVIEWED IN Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

216. Recovery for injuries sustained in common with others.* — (1) *Rule generally.*—An adjoining property owner cannot maintain an action to abate a railroad in a street as a nuisance, or recover damages therefor, unless he shows that he has suffered some special damage by reason thereof. *Hogan* v. *Central Pac. R. Co.*, 71 *Cal.* 83, 11 *Pac. Rep.* 876.

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*See also *post*, **285**.

Lot owner can only recover for special injuries, see note, 20 AM. & ENG. R. CAS. 81; 14 *Id.* 172.

No right of action accrues to an abutting lot owner against a company for operating its railroad in the street in the usual way, by leave of the city, where the injury is only such as the general public sustains. *Dwenger* v. *Chicago & G. T. R. Co.*, 20 *Am. & Eng. R. Cas.* 26, 98 *Ind.* 153. *Terre Haute & L. R. Co.* v. *Bissell*, 108 *Ind.* 113, 9 *N. E. Rep.* 144. *Rochette* v. *Chicago, M. & St. P. R. Co.*, 17 *Am. & Eng. R. Cas.* 192, 32 *Minn.* 201, 20 *N. W. Rep.* 140.—FOLLOWING Shaubut *v.* St. Paul & S. C. R. Co., 21 Minn. 502; Prop'rs of Locks, etc., *v.* Nashua & L. R. Corp., 10 Cush. (Mass.) 385; Rigney *v.* Chicago, 102 Ill. 64; Caledonian R. Co. *v.* Ogilvy, 2 Macq. H. L. Cas. 229; Beckett *v.* Midland R. Co., L. R. 3 C. P. 82; McCarthy *v.* Metropolitan Board of Works, L. R. 7 C. P. 508.—FOLLOWED IN Carroll *v.* Wisconsin C. R. Co., 36 Am. & Eng. R. Cas. 648, 40 Minn. 168, 41 N. W. Rep. 661.—*Rude* v. *St. Louis*, 93 *Mo.* 408, 12 *West. Rep.* 238, 6 *S. W. Rep.* 257.—FOLLOWED IN Canman *v.* St. Louis, 97 Mo. 92; Gaus & S. Mfg. Co. *v.* St. Louis, K. & N. R. Co., 113 Mo. 308.—*Fairchild* v. *St. Louis*, 97 *Mo.* 85, 11 *S. W. Rep.* 60. *Hamilton* v. *Covert*, 16 *U. C. C. P.* 205.—FOLLOWING Ward *v.* Great Western R. Co., 13 U. C. Q. B. 315.—*Jarvis* v. *Great Western R. Co.*, 8 *U. C. C. P.* 115.

And the same rule obtains under Missouri Constitution, providing that "private property shall not be taken or damaged for public use without just compensation." *Jackson* v. *Chicago, S. F. & C. R. Co.*, 43 *Am. & Eng. R. Cas.* 145, 41 *Fed. Rep.* 656.

The obstruction of a street by the construction of a railroad therein and the consequent loss of trade by the diversion of travel to another street is damage which is common to the public and is not peculiar to the owner of property abutting upon the street, and he cannot recover compensation therefor. *Jackson* v. *Chicago, S. F. & C. R. Co.*, 43 *Am. & Eng. R. Cas.* 145, 41 *Fed. Rep.* 656.

Plaintiff was owner and occupant of an unplatted tract of land, adjoining a platted tract, and abutting, in part, upon the head of a street laid out on such platted tract. *Held:* (1) that plaintiff, simply as owner and occupant, had no estate or interest in a part of such street upon which his tract did not abut, and that, therefore, he could not complain of obstructions placed and maintained in such part by a railroad company, upon the ground of an appropriation of the same without compensation to him; (2) that the injury suffered by plaintiff, in consequence of the obstructions, being an injury in common with the public, the only difference between the two being a difference in degree, not in kind, the obstructions (if a nuisance at all) were a public nuisance only, and therefore to be removed and enjoined through a proceeding by the public or its proper representative, and that as they had occasioned plaintiff no injury which the law regards as peculiar or special, he had no action for private damages. *Shaubut* v. *St. Paul & S. C. R. Co.*, 21 *Minn.* 502, 19 *Am. Ry. Rep.* 223.

(2) *Exceptions.*— Injuries resulting from the obstruction of highways leading to the premises of the party complaining, and interfering with access to them, are proper grounds of recovery by the injured party, even though many others sustain like injuries from the same cause. *Park* v. *Chicago & S. W. R. Co.*, 43 *Iowa* 636, 14 *Am. Ry. Rep.* 489.—FOLLOWED IN Platt *v.* Chicago, B. & Q. R. Co., 74 Iowa 127, 37 N. W. Rep. 107.

In an action by an abutting property owner to recover special damages for the construction of a railway along the street in front of his property, impairing the use of the street, plaintiff is not barred from recovering by the fact that other property owners in the same locality have also been injured in the same manner. *Texas & N. O. R. Co.* v. *Goldberg*, 32 *Am. & Eng. R. Cas.* 240, 68 *Tex.* 685, 5 *S. W. Rep.* 824.

Under Tex. Const. art. 1, § 17, providing that no person's property shall be damaged for public use without compensation, the "damage" is not alone the direct physical damage to the *corpus* of the property, but it is any direct physical injury to the right of user or enjoyment of it by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally; but a landowner who claims damages for the construction of a railroad in a street is not precluded from recovering because the damage is common to property owners in his part of the city, who cannot be said to constitute the "community generally." *Haney* v. *Gulf, C. & S. F. R. Co.*, 3 *Tex. App. (Civ. Cas.)* 336.—APPROVING Rigney *v.* Chicago, 102 Ill. 64. DISTINGUISHING Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656; Gulf, C. & S. F. R.

Co. *v.* Fuller, 63 Tex. 467; Williams *v.* Gulf, C. & S. F. R. Co., 1 Tex. App. (Civ. Cas.) 131; Gulf, C. & S. F. R. Co. *v.* Graves, 1 Tex. App. (Civ. Cas.) 301.

217. Effect of suing for damages.—By instituting an action for damages the lot owner in effect consents that the company may continue for all future time to use the street as it is now using it, and in consideration therefor to accept such judgment as may be rendered. *Jeffersonville, M. & I. R. Co.* v. *Esterle*, 13 *Bush* (*Ky*) 667, 17 *Am. Ry. Rep.* 111.—REVIEWED IN Central Branch U. P. R. Co. *v.* Twine, 23 Kan. 585.

218. Ejectment.*—If a company appropriates a highway to its permanent use without any authority for so doing, the abutting landowner who owns the fee of the highway may recover possession thereof in an action of ejectment. *Louisville St. L. & T. R. Co.* v. *Hess*, 50 *Am. & Eng. R. Cas.* 202, 92 *Ky.* 407, 17 *S. W. Rep.* 870.

219. Nuisance.†—If the noise, confusion, and disturbance caused by the engines and cars of a company to private property are such as would, in the absence of legislative authority, have constituted an actionable nuisance, the existence of such authority in no way relieves them of their damaging effect, so as to take away from the property owners their right to redress, or so as to convert what was before actionable into a case of *damnum absque injuria*. *Chicago, M. & St. P. R. Co.* v. *Darke*, 148 *Ill.* 226, 35 *N. E. Rep.* 750.

Where a company, prior to the enactment of Iowa Code of 1873, § 464, commenced the use of a city street for its tracks, it did so free from any claim for damages by abutting lot owners, and cannot afterwards be made liable; but where, since the enactment of said section, the same company built another track on the same street, under authority from the city, without compensating the abutting lot owners, the occupation of the street with such second track constitutes a continuing trespass and nuisance, for which any abutting lot owner may recover. And if no recovery is had which will compensate for the future and continuous occupancy of the street, the grantee of the owner may maintain an action for the injury which he sustains thereby. *Merchants' Union Barb Wire Co.* v. *Chicago, B. & Q. R. Co.*, 70 *Iowa* 105, 28 *N. W. Rep.* 494.—DISTINGUISHED IN Pratt *v.* Des Moines N. W R. Co., 32 Am. & Eng. R. Cas. 236, 72 Iowa 249, 33 N. W. Rep. 666.

The controlling principle which gives to private individuals a right of action to abate a public nuisance, such as a railroad in the street, is an invasion, impairment, or destruction of a common right which they possess, independent, separate, and distinct from the rights of the general public. *Fogg* v. *Nevada C. O. R. Co.*, 43 *Am. & Eng. R. Cas.* 105, 20 *Nev.* 429, 23 *Pac. Rep.* 840.

To enable separate lot owners to maintain an action to abate a railroad in the street, as a nuisance, they must show that they have sustained, or will sustain, a special and peculiar injury, irreparable in its nature, and different in kind from that sustained by the public generally. *Fogg* v. *Nevada C. O. R. Co.*, 43 *Am. & Eng. R. Cas.* 105, 20 *Nev.* 429, 23 *Pac. Rep.* 840.

Where a railroad is lawfully constructed on a street, but the use of the road is unlawful, so as substantially to destroy the easement in the street, and all ingress and egress of an abutting lot owner, the latter may maintain successive actions for the nuisance, recovering the damages that have accrued up to the time each action is brought, and a recovery in one action will not bar a subsequent action for a continuance of the nuisance. *Harmon* v. *Louisville, N. O. & T. R. Co.*, 87 *Tenn.* 614, 11 *S. W. Rep.* 703.

The measure of damages in such case is the impairment of the value of the use of such property by such nuisance during its continuance, and not the difference in the market value of the property. *Harmon* v. *Louisville, N. O. & T. R. Co.*, 87 *Tenn.* 614, 11 *S. W. Rep.* 703.

But if suit be brought for such nuisance, and the entire destruction of the easement be alleged, and a charge be submitted to fixing the permanent impairment of the value of the property as the measure of damages, one recovery will bar a subsequent suit for the continuance of the nuisance. *Harmon* v. *Louisville, N. O. & T. R. Co.*, 87 *Tenn.* 614, 11 *S. W. Rep.* 703.

220. Trespass.*—Under Iowa Code, § 464, a company, before constructing and

* Right of abutting owner to maintain ejectment against company constructing road in street, see 40 AM. & ENG. R. CAS. 295, *abstr.*

† See also *ante*, **183**; *post*, **232**.

* See also *post*, **233**.

operating a road along the streets of a town, must have the damages to the owners of lots abutting on such streets assessed; and if it fails to do so, such lot owners can bring an action against it as a trespasser to recover the damages sustained by reason of the construction and operation of the road. *Mulholland* v. *Des Moines, A. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 99, 60 *Iowa* 740, 13 *N. W. Rep.* 726.—FOLLOWED IN Hanson *v.* Chicago, M. & St. P. R. Co., 61 Iowa 588; Stough *v.* Chicago & N. W. R. Co., 30 Am. & Eng. R. Cas. 396, 71 Iowa 641.

The above section applies to partly constructed roads, as well as to those completed; and a road begun, but not completed, before the adoption of the Code, will be within its provisions, although when such road was incorporated the law in force did not provide for compensation or assessment of damages in behalf of lot owners. *Mulholland* v. *Des Moines, A. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 99, 60 *Iowa* 740, 13 *N. W. Rep.* 726.

The owner of land is not divested of his title thereto by laying out a highway over it. So where a railroad company is only authorized to construct its track across private lands by agreement with the owner, or upon payment of damages, it is liable as a trespasser where it constructs its road on a highway without permission or payment of damages. *Presbyterian Soc.* v. *Auburn & R. R. Co.*, 3 *Hill* (*N. Y.*) 567.

A company occupying a public street by authority from the municipal government is not a trespasser as to abutting property owners. *Iron Mountain R. Co.* v. *Bingham*, 38 *Am. & Eng. R. Cas.* 444, 87 *Tenn.* 522, 4 *L. R. A.* 622, 11 *S. W. Rep.* 705.—DISTINGUISHED IN East End St. R. Co. *v.* Doyle, 88 Tenn. 747, 9 L. R. A. 100, 13 S. W. Rep. 936.

Where a company, without the consent of the owner, and without having acquired a right to the land in the manner provided by the statute, takes possession of land for which it is liable to make compensation (such as land forming part of a public street, but the fee of which is in plaintiff), it is liable in an action of trespass; and the neglect of the owner to proceed by injunction to restrain the company from constructing its road on such land is not a waiver of his right of action for the trespass. *Blesch* v. *Chicago & N. W. R. Co.*, 43 *Wis.* 183.—FOLLOWING Sherman *v.* Milwaukee, L. S. & W. R. Co., 40 Wis. 645.—APPROVED IN Lamm *v.* Chicago, St. P., M. & O. R. Co., 45 Minn. 71. DISTINGUISHED IN Milwaukee & N. R. Co. *v.* Strange, 20 Am. & Eng. R. Cas. 413, 63 Wis. 178.

3. *Injunction.**

221. Rule that equity will not interfere with lawful occupation of street.† — Where a company is authorized by law to lay a track and operate a railroad in a street, a court of equity cannot, on a bill filed by an individual to enjoin the road, restrict the number of trains to be run thereon, as a condition precedent to the right to operate the road. *Kentucky & I. Bridge Co.* v. *Krieger*, 93 *Ky.* 243, 19 *S. W. Rep.* 738.—REVIEWING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289.

The damages resulting to complainants from laying and using a track in front of their property should be included in the compensation awarded in condemnation proceedings, and therefore an injunction cannot be awarded against the operation of the road. *Phipps* v. *Western Md. R. Co.*, 66 *Md.* 319, 7 *Atl. Rep.* 556.

222. —— under legislative authority. — The mayor and aldermen of a city have not the right to an injunction restraining the construction of a railway upon the streets, under legislative authority, for the benefit of the residents along such streets. *Savannah & T. R. Co.* v. *Mayor, etc., of Savannah*, 45 *Ga.* 602, 3 *Am. Ry. Rep.* 36.

Where a company has obtained an order from the supreme court, as required by N. Y. Act of 1864, ch. 582, authorizing it to construct its road "upon or along any highway," notice having been given to the highway commissioners, such commissioners cannot restrain the construction of the road along or upon a highway. *Baxter* v. *Spuyten Duyvil & P. M. R. Co.*, 61 *Barb.* (*N. Y.*) 428.

223. —— or municipal consent.— A court of equity will not restrain the laying of a side track by a company in a

* Right of abutting owner to enjoin use of street or highway for railroad purposes, see note, 5 L. R. A. 373. See also 46 AM. & ENG. R. CAS. 74, *abstr.*

Construction of electric railways in streets. Right of abutting owner to injunction, see 46 AM. & ENG. R. CAS. 89, *abstr.*

† See also *ante*, **213.**

public street in front of its own property to connect with the main track of a railway, under license by ordinance of the city council, on a bill by private individuals owning property in the vicinity but not abutting on the part of the street to be used. *Truesdale* v. *Peoria Grape Sugar Co.*, 5 *Am. & Eng. R. Cas.* 248, 101 *Ill.* 561.

An injunction will not lie at the suit of an abutting property owner, when the entry upon and occupation of the street by a railroad are by the authority of the municipal agency invested with the control of such street. The want of power of a court of equity to interfere by injunction is predicated upon the impracticability of ascertaining the damage that will be done. But when the landowner has settled his right to damages, and their measure, in an action at law, if any reason exists why he cannot have execution of the same, equity will assist him, but not before. *Penn Mut. L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

Where a railroad is authorized by an act of the legislature, and constructed over streets by consent of the municipal authorities, it cannot be restrained as a nuisance. *Milburn* v. *Cedar Rapids*, 12 *Iowa* 246.—EXPLAINING Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506; Williams *v.* New York C. R. Co., 16 N. Y. 97.—DISTINGUISHED IN Cook *v.* Burlington, 30 Iowa 94; Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366. FOLLOWED IN Hughes *v.* Mississippi & M. R. Co., 12 Iowa 261; Gear *v.* Chicago, C. & D. R. Co., 39 Iowa 23; Cook *v.* Chicago, M. & St. P. R. Co., 83 Iowa 278. QUOTED IN Cook *v.* Burlington, 30 Iowa 94.

Where a railroad has been constructed in a street by authority of law and the sanction of the city authorities, an injunction should not issue, at the suit of an abutting owner, to restrain the operation of the road, unless it clearly appears that he has been deprived of the use of the street. It is not enough to show that he has suffered inconvenience and annoyance which might be grounds for an action at law for damages. *Hyland* v. *Short R. R. Transfer Co.*, (*Ky.*) 11 *S. W. Rep.* 79.—QUOTING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289.

In the absence of any allegation or proof that a railroad is improperly constructed or conducted, or uses defective machinery, or in any way occasions injury not incident to the prudent and lawful exercise of its right to operate a road under permission from the city, plaintiff is not entitled to an injunction or damages. *Hill* v. *Chicago, St. L. & N. O. R. Co.*, 38 *La. Ann.* 599.—FOLLOWED IN New Orleans, Ft. J. & G. I. R. Co. *v.* Barton, 43 La. Ann. 171.

Preliminary injunction to stop a company, on an allegation of nuisance by an owner of adjoining property on the same line, from completing through a city a tunnel authorized by the civil authorities of the place, was refused. *Hodgkinson* v. *Long Island R. Co.*, 4 *Edw. Ch.* (*N. Y.*) 411.

Where a company is authorized by the legislature to build its road into a city, upon obtaining the consent of the mayor and council of the city, which consent has been obtained, a court of equity will not interfere by injunction to prevent the construction and operation of the road on the streets, upon an application by abutting property owners alleging that the construction of the road through the streets is unauthorized and a nuisance, that their property will be injured and depreciated in value, their business seriously affected, and that real estate and property vested in them by law have been taken without compensation. *Drake* v. *Hudson River R. Co.*, 7 *Barb.* (*N. Y.*) 508.—DISTINGUISHED IN Savannah, A. & G. R. Co. *v.* Shiels, 33 Ga. 601; Williams *v.* New York C. R. Co., 16 N. Y. 97. FOLLOWED IN Plant *v.* Long Island R. Co., 10 Barb. (N. Y.) 26.

If the city is the owner of the legal title to the soil of the streets, it is the only party whose rights of property are violated, or whose ownership can be said to be usurped, by the construction of a railroad through such streets. And it is the only party who can claim the right to have the rails removed, or the use of the street vindicated, or freed from the alleged incumbrance, or the proceedings of the railroad company arrested until compensation shall be made. *Drake* v. *Hudson River R. Co.*, 7 *Barb.* (*N. Y.*) 508.

A railway corporation authorized to locate, construct, and operate its road upon a street in an incorporated city, by authority of the common council thereof, granted in accordance with the charter of the city, or upon a county road in the country, under an agreement with the county court of the county in which the road is situated, in accordance with section 3242, Ann. Laws Oreg., cannot be enjoined from proceeding with its enterprise

at the suit of an owner of lands abutting upon the street and county road, whether the fee to the lands to the centre of the street and county road adjacent thereto is in such owner or not, without establishing, by allegations and proofs, that the construction and use of the railway will specially interfere with the owner's ingress and egress to and from his premises. (Lord, J., dissenting.) *Paquet* v. *Mt. Tabor St. R. Co.*, 40 *Am. & Eng. R. Cas.* 321, 18 *Oreg.* 233, 22 *Pac. Rep.* 906.

Where a right of way over the portion of a street on one side of the centre line, at grade, is granted to a company by the municipal authorities, a property owner on the other side of the street is not entitled to damages, where convenient access to his property is not interfered with; and the court will not issue an injunction, at the suit of such owner, to restrain the construction of the road. *Beck* v. *Erie Terminal R. Co.*, 1 *Pa. Dist.* 449.

224. Equity will not enjoin merely to compel payment of damages assessed.—An abutting owner will be refused an injunction to restrain a railroad from operating its trains in the street, where the road is authorized by the legislature, and no part of plaintiff's property is taken, and he made no claim for damages until after the track is laid, but the court will leave him to his remedy at law to recover the damages guaranteed by the state Constitution. *Osborne* v. *Missouri Pac. R. Co.*, 35 *Fed. Rep.* 84. —FOLLOWING Stetson *v.* Chicago & E. R. Co., 75 Ill. 74; Rigney *v.* Chicago, 102 Ill. 79; Hutton *v.* London & S. W. R. Co., 7 Hare 259; Lister *v.* Lobley, 7 Ad. & El. 124. —*Stetson* v. *Chicago & E. R. Co.*, 75 *Ill.* 74. —FOLLOWED IN Osborne *v.* Missouri Pac. R. Co., 35 Fed. Rep. 84; Peoria & R. I. R. Co. *v.* Schertz, 84 Ill. 135.—*Peoria & R. I. R. Co.* v. *Schertz*, 84 *Ill.* 135, 16 *Am. Ry. Rep.* 434.—FOLLOWING Stetson *v.* Chicago & E. R. Co., 75 Ill. 74.—QUOTED IN Spencer *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 406.

Where private property is injured in value by the use of a street bounding the same, it may be that the owner is without remedy until the damage has actually occurred and the amount of such damage is ascertained in an action at law. But when the damages are ascertained in the mode provided by law, the right of the lot owner to the payment of the same as compensation is guaranteed to him by the Constitution, as a condition of the continued appropriation of the street to the public use, whereby the injury to his private property is inflicted. *Penn Mut. L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

Where a company has secured from the municipal officers the right to lay its track in a street, the public easement in which has been acquired by more than twenty years' adverse user, and the fee of which is not in the adjoining lot owners, a person who has leased a lot on said street and erected a business house thereon has no right to enjoin the company from laying its track, when such company has not assessed or tendered to plaintiff the damages he will sustain, unless he can show that he will suffer damages different from the community in general; and the term "community in general" means those who reside in the immediate vicinity of the railroad, and are subject to the inconveniences incident to its structure. *Decker* v. *Evansville S. & N. R. Co.*, 133 *Ind.* 493, 33 *N. E. Rep.* 349.

225. Limits and exceptions to the rule of non-interference.* — A statutory license to occupy the streets of a city with a steam railway, which license is conditional upon paying (before proceeding with the construction) damages to the owners of property injured thereby, contemplates such payment as a condition precedent, and the company may be enjoined from violating the condition. That the statute provides that either party may proceed to have the damages assessed will not make it incumbent upon the property owner to take steps for that purpose rather than resort to the remedy of injunction; certainly not where the facts of the case render it more appropriate for the company to take the initiative. *Georgia Southern & F. R. Co.* v. *Ray*, 43 *Am. & Eng. R. Cas.* 95, 84 *Ga.* 376, 11 *S. E. Rep.* 352.

Where a city has no authority to grant the privilege of laying railroad tracks in streets, unless upon the petition of more than one half of the abutting property owners, any one or more of such owners may enjoin a railroad that is proceeding under an ordinance that was passed without such petition. *Bee* v. *Chicago, R. I. & P. R. Co.*, 23 *Ill. App.* 137.

* Injury to abutting property caused by operation of railway. When company liable and may be enjoined, see note, 56 AM. REP. 6.

Where it appears that a municipal corporation has no power to grant the privilege of establishing a railroad through its streets, or that such a railroad would be an injurious monopoly, or a public nuisance, or if there are reasons for believing that such grant is about to be made corruptly, a court of equity has power to issue an injunction to restrain such grant. *Davis* v. *Mayor, etc., of N. Y.*, 1 *Duer* (*N. Y.*) 451; *affirmed in* 9 *N. Y.* 263.

A railroad in the streets of a city, not legally authorized by the common council, is a public nuisance of which taxpayers and owners of abutting property have a legal right to complain, and it may be restrained upon the application of the parties specially aggrieved. *Wetmore* v. *Story*, 22 *Barb.* (*N. Y.*) 414.—QUOTING Milhau *v.* Sharp, 15 Barb. 230. REVIEWING Gould *v.* Hudson River R. Co., 6 N. Y. 522.

But such parties are not entitled to damages, nor to an injunction, on the ground that no compensation has been awarded to them for the land in the streets claimed by them. If they have any title to those lands, their property will not be used for any purpose other than to pursue previously acquired privileges. *Wetmore* v. *Story*, 22 *Barb.* (*N. Y.*) 414.—QUOTING Drake *v.* Hudson River R. Co., 7 Barb. 508.

Where the construction of a steam railroad in a street of a city will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired under proceedings instituted against such owners, as required by law for the appropriation of private property. It is immaterial whether the fee is vested in the city or in the abutting owners, so long as it is held upon the same defined uses. *Scioto Valley R. Co.* v. *Lawrence*, 7 *Am. & Eng. R. Cas.* 93, 38 *Ohio St.* 41, 43 *Am. Rep.* 419.—FOLLOWING Cincinnati & S. G. A. St. R. Co. *v.* Cumminsville, 14 Ohio St. 524.—APPLIED IN Grafton *v.* Baltimore & O. R. Co., 17 Am. & Eng. R. Cas. 200, 21 Fed. Rep. 309. CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 38 Alb. L. J. 388.

A statute located a street, and directed the county commissioners "forthwith to open the street," and also empowered a company to lay railroad tracks on the street "immediately after the passage of this act." *Held*, that the commissioners must first open the street, and that an injunction would lie to restrain the company from entering the land to build its road before the street was opened. *Jarden* v. *Philadelphia, W. & B. R. Co.*, 3 *Whart.* (*Pa.*) 502.

226. —— irreparable damage — Danger to life or health.—If the damages are irreparable, such as affecting the free use of a residence, or an abutting lot, cutting off ingress or egress thereto, and endangering the property, life, and health of persons residing thereon, an injunction will be granted to prevent the obstruction. *Chicago, St. L. & P. R. Co.* v. *Eisert*, 127 *Ind.* 156, 26 *N. E. Rep.* 759.

227. —— public use of street destroyed.—Where it appears that a company has no authority to use a street so as to destroy its public use as such, a court of equity will award an injunction on the application of one whose business will be injured and the value of whose property will be depreciated by reason thereof. *Riedinger* v. *Marquette & W. R. Co.*, 29 *Am. & Eng. R. Cas.* 611, 62 *Mich.* 29, 28 *N. W. Rep.* 775.

Although the authorities hold that a company may lay its track on the streets of a borough, yet the occupancy of a street by a company to the exclusion of the public, or so that the safety of travelers will be endangered by requiring them to pass on or along the track for a distance of 200 or 300 feet, will not be allowed. *Stroudsburg* v. *Wilkes-Barre & E. R. Co.*, 2 *Pa. Dist.* 507.—QUOTING Jones *v.* Erie & W. V. R. Co., 151 Pa. St. 30.

Where such a crossing is proposed by a company, the court, on application for an injunction, will restrain the construction of the railroad until satisfied that the character of the crossing proposed is proper and safe. *Stroudsburg* v. *Wilkes-Barre & E. R. Co.*, 2 *Pa. Dist.* 507.

228. —— serious, special, and unequal injury to abutting owners.*—A legislative charter may confer upon a company the right of way upon any street, highway, or turnpike in the state, and the right to construct thereon its road. *Hepting* v. *New Orleans Pac. R. Co.*, 36 *La. Ann.* 898.

Under such grant the company is authorized to lay its track upon and through the

* Special injury by construction of railroad in street which will entitle lot owner to injunction, see note, 20 AM. & ENG. R. CAS. 30.

street of an unincorporated town without further permission or authority. The company cannot, however, so construct the road through a street as unnecessarily to impair the right of the public to the free use of such street, and to inflict serious and unequal damage upon private property contiguous to said street; and property owners so injured may demand by suit the reconstruction of the track, and under conditions its ultimate removal. *Hepting* v. *New Orleans Pac. R. Co.*, 36 *La. Ann.* 898.

If a street is so unlawfully obstructed as to subject an abutting owner to special injury, not common to, but distinct and different from that suffered by the public, and for which he cannot obtain adequate compensation at law, he is entitled to the summary interference by injunction of a court of equity. *Baltimore & O. R. Co.* v. *Strauss*, 37 *Md.* 237.

Where a company wrongfully obstructs a street, whereby all access to one's lot is cut off, it is a case of special or particular injury to the owner of the lot, so that he may maintain an action; and it does not affect the right of action, though it may the amount of damages, that the obstruction is not continuous, but only occasional, for several hours at a time. *Hayes* v. *Chicago, St. P., M. & O. R. Co.*, 46 *Minn.* 349, 49 *N. W. Rep.* 61. — FOLLOWING Brakken *v.* Minneapolis & St. L. R. Co., 29 Minn. 41.— *Dubach* v. *Hannibal & St. J. R. Co.*, 29 *Am. & Eng. R. Cas.* 609, 89 *Mo.* 483, 1 *S. W. Rep.* 86.

220. Effect of delay by complainant.—Where a party acquiesces for more than twenty years in the use of a strip of land for railroad purposes, after it has been vacated as a public highway, and where he has a clear and unobstructed roadway of twenty-nine feet in width for access to his premises, and the only special injury is the inconvenience of not being permitted to have wagons stand in front of his place of business to load and unload, an injunction will be refused. *Morris & E. R. Co.* v. *Prudden*, 20 *N. J. Eq.* 530.—FOLLOWED IN Higbee *v.* Camden & A. R. & T. Co., 20 N. J. Eq. 435.

Delay on the part of an adjoining owner in remonstrating against or trying to prevent the occupation of a street by a railroad company with its tracks and chutes, etc., until the work has been done, involving an immense outlay of money, will be fatal to his application for relief. *Meredith* v. *Sayre*, 32 *N. J. Eq.* 557.

230. Enjoining unauthorized use of street.—An injunction will be granted to restrain a railroad from the unauthorized construction of a track on an embankment along the public street of an incorporated town, whereby the property of an adjoining owner is injured. *Columbus & W. R. Co.* v. *Witherow*, 82 *Ala.* 190, 3 *So. Rep.* 23.

It is no objection to the granting of an injunction against laying a street railroad in a street that the borough authorities would have the right to remove it forcibly after it was laid. Such relief involving force is not that "adequate remedy" to which litigants are entitled. *Stamford* v. *Stamford Horse R. Co.*, 36 *Am. & Eng. R. Cas.* 140, 56 *Conn.* 381, 15 *Atl. Rep.* 749, 1 *L. R. A.* 375.

Where a company has dedicated land for the purpose of a street which has been accepted by the municipality, and maintained as a street for a number of years until it has become a prominent thoroughfare, there is no abuse of judicial discretion in granting, on the application of the city, an injunction to prevent the company from constructing a side track through the street. *Brunswick & W. R. Co.* v. *Mayor, etc., of Waycross*, 88 *Ga.* 68, 13 *S. E. Rep.* 835.

Where a company uses steam in a public street without authority therefor, an injunction cannot issue to prevent the company from using the tracks, but only to prohibit the use of steam. *Tilton* v. *New Orleans City R. Co.*, 35 *La. Ann.* 1062.

The location of a railroad through a public street in a line not warranted by law will not be enjoined at the instance of the owner of an unimproved building lot suffering no present detriment. *Zabriskie* v. *Jersey City & B. R. Co.*, 13 *N. J. Eq.* 314.

The construction of a railroad operated by steam upon a public highway, without authority of law, is a nuisance which will be restrained by injunction. *Attorney-General ex rel.* v. *Morris & E. R. Co.*, 19 *N. J. Eq.* 386; *reversed in* 19 *N. J. Eq.* 575.

An injunction restraining the unlawful construction of a railway in a street should operate to restrain only such unlawful acts as are specifically found to exist. *Loomis* v. *Thirty-fourth St. R. Co.*, 38 *Hun* (*N. Y.*) 517.

Va. Code of 1873, ch. 56, § 4, provided that a railroad company could only enter the streets of a city or town upon the consent of the corporate authorities, but could not

invade any dwelling house, or any space within sixty feet thereof, without the consent of the owner. By the act of Jan. 15, 1875, this section was amended by providing that in case any lot or lots along the street or alley should be impaired in value by a railroad, the company should make compensation "before crossing or occupying such streets or alleys." A company was enjoined by an abutting owner whose title extended to the middle of the street, and the company moved to dissolve the injunction on the ground that the amendment repealed the provision that railroads could not be constructed within sixty feet of a dwelling without consent. *Held*, that even if such provision had been repealed, this was not ground for dissolving the injunction where the company was attempting to occupy the street without first making compensation. *Hodges* v. *Seaboard & R. R. Co.*, 88 *Va.* 653, 14 *S. E. Rep.* 380.

Where a company locates its track in a public street without payment of damages to the abutting lot owners, the latter are entitled to an injunction to restrain the construction and operation of the road. *Ford* v. *Chicago & N. W. R. Co.*, 14 *Wis.* 609.—QUOTED IN Drady *v.* Des Moines & Ft. D. R. Co., 14 Am. & Eng. R. Cas. 130, 57 Iowa 393.

231. Enjoining occupation of dedicated squares and commons.—The owner of land abutting upon a common cannot enjoin the construction, under authority from the state officers, of a railroad across it, even though such railroad may obstruct travel between the city and the complainants' property. *Sheffield & T. St. R. Co.* v. *Rand*, 83 *Ala.* 294, 3 *So. Rep.* 686.

A company authorized to construct and operate a railway "in, over, and across and along any and all the avenues, streets, public grounds, squares, and alleys" of a city claimed the right to construct and operate its road across a public square which had been dedicated by plat to the city. It appeared that lots had been sold with reference to such square, and around it, which had been improved, and the value of which was enhanced on account of the square, and that the city had inclosed, beautified, and adorned the same. *Held*, that the company should be perpetually enjoined from all attempts to lay a track through or across the inclosed public square. *Jacksonville* v. *Jacksonville R. Co.*, 67 *Ill.* 540.

Persons who owned property facing a public square applied for an injunction to restrain a company from laying its track along the border of the square, on the ground that it affected their rights therein, and obstructed their light, air, prospect, and privilege of a public promenade. It appeared that the company had contracted with the city not to erect any buildings on the square, nor to suffer cars to stand thereon, and that a street some sixty-five feet wide ran between the track and plaintiffs' houses. *Held*, that the road would not be such an annoyance as to amount to a private nuisance, and an injunction should be refused. *Anderson* v. *Rochester, L. & N. F. R. Co.*, 9 *How. Pr.* (*N. Y.*) 553.

An owner of a city lot near a common laid out by the state and "reserved forever to the use of the inhabitants" has a property in the common that cannot be taken for public use without compensation, and may enjoin a railroad from appropriating a part of it before compensation is made. *Bell* v. *Ohio & P. R. Co.*, 1 *Grant's Cas.* (*Pa.*) 105.

232. Enjoining road as a nuisance.*—The construction of a railroad along streets to be used for private purposes, and on a route not authorized by the charter of the company, and authorized only by the municipality by a resolution clearly beyond its powers, may be a public nuisance, but must be abated by a suit in behalf of the state, and cannot be enjoined by an abutting property owner. *Garnett* v. *Jacksonville, St. A. & H. R. R. Co.*, 20 *Fla.* 889.

A railroad in a city is not necessarily a nuisance, and an injunction cannot be sustained on that ground. *New Albany & S. R. Co.* v. *O'Daily*, 12 *Ind.* 551.

A railroad upon a public street is an additional servitude, and where constructed and operated without the consent of the owner, or compensation to him, it is a trespass; and if it obstruct the use and comfortable enjoyment of his premises, rendering access to them unsafe, and work an injury to him distinct and different from that sustained by the public generally, it is a private nuisance, and an injunction will lie at the suit of the owner. *Harrington* v. *St. Paul &*

* See also *ante*, **183, 219.**

Abutting owner cannot enjoin the construction of a private railroad in the street though it be a nuisance, see 25 AM. & ENG. R. CAS. 257, *abstr.*

S. C. R. Co., 17 *Minn.* 215 (*Gil.* 188), 4 *Am. Ry. Rep.* 216, 8 *Am. Ry. Rep.* 247.

An individual cannot maintain a suit to restrain a nuisance which injures him only in rights enjoyed by him as one of the public. But where the injury complained of is the building of a railroad station in the street, in front of complainant's property, and he owns the soil in the street upon which it is built, the injury is to his individual rights, and not to him as part of the public, and the suit must be brought in his own name. *Higbee* v. *Camden & A. R. Co.*, 19 *N. J. Eq.* 276.

A railroad running through the streets of a city, which does not materially interfere with the use of the streets for ordinary purposes or injure the value of adjacent property, cannot be restrained as a nuisance. *Hamilton* v. *New York & H. R. Co.*, 9 *Paige* (*N. Y.*) 171.—APPROVED IN Anderson *v.* Rochester, L. & N. F. R. Co., 9 How. Pr. (N. Y.) 553. QUOTED IN Sargent *v.* Ohio & M. R. Co., 1 Handy (Ohio) 52.

The possibility that a railway through city streets may be abused to the public inconvenience forms no ground for intercepting the progress of its construction. The right to an injunction in such a case accrues only after the completion of the road, and when it is found from actual experience that the running of trains amounts to a nuisance. *Sargent* v. *Ohio & M. R. Co.*, 1 *Handy* (*Ohio*) 52.—QUOTING Hamilton *v.* New York & H. R. Co., 9 Paige (N. Y.) 171; Milhau *v.* Sharp, 15 Barb. 193; Hudson & D. Canal Co. *v.* New York & E. R. Co., 9 Paige 323; Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289.

The law presumes that railroads are beneficial, unless it otherwise appears from the circumstances of the case. *Sargent* v. *Ohio & M. R. Co.*, 1 *Handy* (*Ohio*) 52.

An abutting owner is not entitled to an injunction to restrain a railroad in the street unless the injury to him amounts to a private nuisance, and the damage is irreparable. *Magee* v. *London & P. S. R. Co.*, 6 *Grant's Ch.* (*U. C.*) 170.

233. Enjoining continuing nuisance or trespass.*—A railway constructed in a public street of a city, without authority of law, is a continuous obstruction which amounts to a public nuisance. *Denver & S. R. Co.* v. *Denver City R. Co.*, 2 *Colo.* 673.

*See also *ante*, **220.**

The fact that subsequently to the rendition of a judgment against it the railroad has been sold under foreclosure proceedings does not preclude the property owner from enjoining the continued occupation of the street by the purchaser of the railroad, the purchaser being only entitled to such rights as were acquired by the company constructing it. *Harbach* v. *Des Moines & K. C. R. Co.*, 43 *Am. & Eng. R. Cas.* 115, 80 *Iowa* 593, 44 *N. W. Rep.* 348.

A judgment for damages obtained against a company constructing a railroad in the street merges any defenses which it might have had, and the purchaser, having no greater rights, cannot plead in defense that the original occupation of the street was by the consent of the property owners. *Harbach* v. *Des Moines & K. C. R. Co.*, 43 *Am. & Eng. R. Cas.* 115, 80 *Iowa* 593, 44 *N. W. Rep.* 348.

The trespass by the purchaser of the railroad only commences from the date when it entered upon the possession of the road, and the statute of limitation only commences to run from that date against a suit to enjoin it from continuing the same. *Harbach* v. *Des Moines & K. C. R. Co.*, 43 *Am. & Eng. R. Cas.* 115, 80 *Iowa* 593, 44 *N. W. Rep.* 348.—DISTINGUISHING Pratt *v.* Des Moines N. W. R. Co., 72 Iowa 249.

Equity will enjoin a trespass which is continuous and invades proprietary rights. So where a company enters and excavates a public street against the protest of abutting lot owners, it may be enjoined, where it is only acting under a claim of permission from the municipality. *Morris & E. R. Co.* v. *Hudson Tunnel R. Co.*, 25 *N. J. Eq.* 384.—QUOTING Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75.—FOLLOWED IN Pratt *v.* Roseland R. Co., 50 N. J. Eq. 150.

4. *Procedure.*

a. In Actions at Law.

234. Jurisdiction.—In Texas a county court has jurisdiction of a suit for damages for the interruption and destruction of an easement appurtenant to abutting property, when the impairment is caused by the construction of a railroad track in a street. *Gulf, C. & S. F. R. Co.* v. *Graves*, 10 *Am. & Eng. R. Cas.* 199, 1 *Tex. App.* (*Civ. Cas.*) 301.

235. Who may sue.—Under the provision of Ohio Rev. St. § 3283, that every

railroad company occupying a street or other public ground under an agreement with the municipal or other authorities "shall be responsible for injuries done thereby to private or public property lying upon or near to such ground," the right to recover damages for such injuries is not limited to the owners of property immediately upon the street occupied by the track, or other structures of the company, but extends to the owners of property which is "near to" any public street thus occupied. *Shepherd* v. *Baltimore & O. R. Co.*, 38 *Am. & Eng. R. Cas.* 437, 130 *U. S.* 426, 9 *Sup. Ct. Rep.* 598.

Temporary injury sustained by a property owner on account of the obstruction of a street during the construction of a railroad is not injury done to the property itself within the meaning of the Ohio statute, but special damages arising therefrom constitute a cause of action apart from any claim under the statute. *Shepherd* v. *Baltimore & O. R. Co.*, 38 *Am. & Eng. R. Cas.* 437, 130 *U. S.* 426, 9 *Sup. Ct. Rep.* 598.

A party is not entitled to recover damages for the depreciation of his property in consequence of the laying of a railroad track if the property was not owned by him at the time the track was laid. *Dixon* v. *Baltimore & P. R. Co.*, 3 *Am. & Eng. R. Cas.* 201, 1 *Mackey* (*D. C.*) 78.

One who has a right of way across a street, not a public way, by grant from the owner of the fee, cannot recover damages under Mass. Rev. St. ch. 39, § 56, from a railroad company duly locating its road over and along said street, and over said right of way. *Boston & W. R. Corp.* v. *Old Colony R. Corp.*, 12 *Cush.* (*Mass.*) 605.

Plaintiff sued defendant for damages for constructing or operating its road through a street upon which were plaintiff's premises, but alienated after the joinder of issue in the action, but before trial. *Held*, that any right of action that existed in plaintiff for damages was not lost by the conveyance, nor conveyed to the grantee. *Clark* v. *Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 903, 50 *Hun* 600, *mem.*, 2 *N. Y. Supp.* 563.

236. Liability of city.*—A city which has granted to a company the right to use a street does not thereby become liable to abutting owners for obstructions placed in the street by the company. *Frith* v. *Dubuque*, 45 *Iowa* 406.

Where a city, under Ohio Rev. St. § 3283, grants to a company the right to construct and use its track in a street, the city is not liable to an abutting lot owner for damages to his property resulting from the use of the street by the railroad in the manner authorized. *Dillenbach* v. *Xenia*, 41 *Ohio St.* 207.

237. Declaration. — A declaration claiming damages for the diminution of the rental or market value of the real estate of an adjacent owner, which alleges that such real estate abuts on a street of a town or city, and that such adjacent owner is also the owner of the soil to the centre of said street, and that a railroad company has laid its track along said street, not averring that the track is located either wholly or in part on his side of said street, is demurrable. *Florida Southern R. Co.* v. *Brown*, 23 *Fla.* 104, 1 *So. Rep.* 512.

238. Complaint.—The allegation, in a complaint for damages, of ownership with reference to the time of construction of the railroad is essential, since it is a traversable fact and bears largely on the measure of recovery. So are the special damages which a lot owner sustains beyond other citizens of the town, and which constitute the limit of his recovery when the statute authorizes the construction of the road and an ordinance permits the use and occupation of the street. Failure to aver such damages in a traversable manner renders the complaint subject to demurrer. *Colorado Midland R. Co.* v. *Trevarthen*, 1 *Colo. App.* 152, 27 *Pac. Rep.* 1012.

In an action by the owner for using a public street for a railway, he need not, in his complaint, negative that defendant has taken proceedings to ascertain and pay the compensation. *Gray* v. *First Div. St. P. & P. R. Co.*, 13 *Minn.* 315 (*Gil.* 289).

In a complaint against a company for trespass in laying its tracks in a public street, between the centre thereof and plaintiff's lots, it is sufficient for plaintiff to allege his ownership of the lots and the commission of the trespass thereon, and plaintiff's ownership of the fee of the street—the *locus in quo*—will be implied from the averment of his ownership of the adjacent lots. *Spencer* v. *St. Paul & S. C. R. Co.*, 21 *Minn.* 362.—FOLLOWED IN Wampach v. St. Paul & S. C. R. Co., 21 Minn. 364.

* See also *ante*, **211.**

239. Petition.—A count in a petition, based on a claim that the company violates a city ordinance regulating the speed of trains by running its trains at such a speed as to shake plaintiff's house, is demurrable when the petition contains no averments that plaintiff's house abuts on the street through which the railway runs. *Hitchcock* v. *Chicago, St. P. & K. C. R. Co.*, 88 *Iowa* 242, 55 *N. W. Rep.* 337.

A petition by an abutting owner is not vulnerable to a demurrer because it claims more than plaintiff is entitled to. *Hitchcock* v. *Chicago, St. P. & K. C. R. Co.*, 88 *Iowa* 242, 55 *N. W. Rep.* 337.

In an action by an abutting owner his petition should contain averments to the effect that the acts of defendant were not merely negligent, but that the obstruction in front of plaintiff's lot was wrongful and without right unless damages were paid. *Hitchcock* v. *Chicago, St. P. & K. C. R. Co.*, 88 *Iowa* 242, 55 *N. W. Rep.* 337.

Under the Texas Constitution, a city cannot damage property for public purposes without just compensation; hence it cannot grant permission to a company to do so by building its road on the street in such a way as to damage an abutting owner; therefore where suit is brought to recover such damages it is not necessary to aver carelessness, or negligence in the operation of the road, or in its construction, nor is it necessary to aver that the city charter and ordinances did not authorize the building of the road. *Gulf, C. & S. F. R. Co.* v. *Thompson*, 2 *Tex. App.* (*Civ. Cas.*) 500.—APPROVING Gulf, C. & S. F. R. Co. *v.* Graves, 1 Tex. App. (Civ. Cas.) 301; Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656. DISTINGUISHING Houston & T. C. R. Co. *v.* Odum, 53 Tex. 351.

240. Answer.—In an action for damages caused by raising the grade of a street five feet, thereby shutting off access thereto from abutting property, an answer alleging that the right to enter upon the street and change the grade thereof was authorized by an ordinance of the city is demurrable for want of sufficient facts, when the charter of the city, while authorizing the grant of franchises to lay railway tracks, provides that "no railway track can thus be laid down until the injury to property abutting upon the street * * * has been ascertained and compensated." *Hatch* v. *Tacoma, O. & G. H. R. Co.*, 6 *Wash.* 1, 32 *Pac. Rep.* 1063.

241. Statute of limitations as a bar.*—A company, in 1880, built its track and side tracks across a street and on a lot owned by it, lying next to plaintiff's property, and more than four years thereafter plaintiff brought suit for the depreciation in value of his lot, caused by the building and operation of the road, and for subsequently building and operating additional tracks across the street and lot. *Held:* (1) that in no event could plaintiff recover for any depreciation in the value of his property by reason of any acts of the company, either in matters of construction or operation, the habitual doing or the commencement of the doing of which acts was at a date more than four years prior to the date of suit brought; (2) that plaintiff could, within four years after the date of building of the original railroad, bring suit for damages for the depreciation in value of his premises caused by such railroad construction and operation; and whether he did or did not bring such suit, every element of damages, past and future, that was or would have been properly admissible in that suit, either in matters of construction or operation, must be excluded from consideration. *Omaha & R. V. R. Co.* v. *Moschel*, 56 *Am. & Eng. R. Cas.* 674, 38 *Neb.* 281, 56 *N. W. Rep.* 875.

Ohio Rev. St. § 3283, after providing how railroad companies may agree for the use of public streets, provides that every company laying a track upon any street, alley, road, or ground shall be liable for injuries done to any property lying upon or near such ground, "which may be recovered by civil action brought by the owner * * * at any time within two years from the completion of such track." *Held*, that the statute contemplates full recovery for all injuries done within the two years, and not a succession of actions from time to time as the injuries may occur. *Grafton* v. *Baltimore & O. R. Co.*, 17 *Am. & Eng. R. Cas.* 200, 21 *Fed. Rep.* 309.

Ohio Rev. St. § 6448 is limited to cases where the company takes possession of and is occupying or using the land of another, and it does not displace the remedy expressly given by the above section 3283, nor modify its extent and application. The two sections are consistent and furnish an election of remedies, but a plaintiff cannot have both, either concurrently or in succession.

See also *ante*, **190, 193.**

Grafton v. *Baltimore & O. R. Co.*, 17 *Am. & Eng. R. Cas.* 200, 21 *Fed. Rep.* 309.—APPLYING Hatch *v.* Cincinnati & I. R. Co., 18 Ohio St. 92; Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94; Lawrence R. Co. *v.* Williams, 35 Ohio St. 168; Columbus, S. & C. R. Co. *v.* Mowatt, 35 Ohio St. 284; Scioto Valley R. Co. *v.* Lawrence, 38 Ohio St. 41; Little Miami R. Co. *v.* Hambleton, 40 Ohio St. 496. RECONCILING Atlantic & G. W. R. Co. *v.* Robbins, 35 Ohio St. 531.

242. Evidence — Admissibility.*— In an action by an adjacent owner against a railway company for damages for the occupation of a street, whereby access to his property is obstructed and its value depreciated, the deed of right of way by the owner is admissible in evidence. *Frith* v. *Dubuque*, 45 *Iowa* 406.

In an action for damages caused to abutting lots by laying a track through an alley, the statements as to the value of the lots made by the party whose administrator brings the action, and made at the time of the appropriation, are admissible. *Central Branch U. P. R. Co.* v. *Andrews*, 33 *Am. & Eng. R. Cas.* 205, 37 *Kan.* 641, 16 *Pac. Rep.* 338; *former appeals* 26 *Kan.* 702, 30 *Kan.* 590, 2 *Pac. Rep.* 677, 34 *Kan.* 563, 9 *Pac. Rep.* 213, 37 *Kan.* 162, 14 *Pac. Rep.* 509.

A company was authorized by a borough ordinance to construct its roadbed upon a street, provided it should conform to a certain grade shown by a drawing attached to the ordinance, no grade for the street having been previously established by the borough. In an action against the company to recover damages for injuries to lots abutting upon the street, caused by an embankment made by the company in the construction of its roadbed in accordance with the ordinance, the ordinance is inadmissible as a defense relieving the company from damages. *Duke* v. *Baltimore & C. V. R. Extension Co.*, 129 *Pa. St.* 422, 18 *Atl. Rep.* 566.

243. Sufficiency of evidence. — In an action against a company for injury to property by reason of the widening of an embankment in the street in front of the property and the construction and operation of an additional track thereon, the surface of the embankment being at the established grade of the street, and no evidence being introduced by plaintiff showing how much the market value of the property was diminished by the increased servitude, nor any legitimate evidence of actual damages sustained, a nonsuit should have been ordered. *Denver & R. G. R. Co.* v. *Costes*, 1 *Colo. App.* 336, 28 *Pac. Rep.* 1129.

Where an individual sues for damages for taking a highway over his land for railroad purposes, and the evidence does not show what interest the public had in the soil of the highway, the presumption is that it had but an easement. *Louisville, E. & St. L. R. Co.* v. *Lanter*, 47 *Ill. App.* 339.

Evidence that defendant company dug a cut from four to six feet deep in a street in front of plaintiff's building, leaving no room between the cut and the sidewalk for vehicles to pass each other, and that plaintiff's building was endangered by the sparks emitted from passing engines of defendant, is sufficient to sustain a verdict and judgment for damages against the company. *Texas & N. O. R. Co.* v. *Goldberg*, 32 *Am. & Eng. R. Cas.* 240, 68 *Tex.* 685, 5 *S. W. Rep.* 824.

A company was permitted by a city to run its track along a street only thirty feet wide. Plaintiff complained that the passing trains caused two houses owned by him to vibrate and the plaster to fall off the walls, and alleged loss of tenants thereby, but the evidence as to any structural injury was contradictory, and the court held that it was not sufficiently made out. *Held*, that plaintiff was not entitled to compensation under the Railway Act. *In re Devlin*, 40 *U. C. Q. B.* 160. — FOLLOWING Hammersmith & C. R. Co. *v.* Brand, L. R. 4 H. L. 171.

244. Instructions to the jury. — A party claimed damages by the location of a side track in the street close to his lots. The court instructed the jury that the damages could only be such, in kind, as lots not lying or abutting on the same street, but in the vicinity, did not sustain in any degree. *Held*, that the instruction was erroneous, as it virtually cut off all claim for damages. *Mix* v. *Lafayette, B. & M. R. Co.*, 67 *Ill.* 319.

The court further instructed the jury, at the instance of the company, that "the law of this state does not grant indemnity for all loss or damage occasioned by the building of a railroad, such as inconvenience arising from the crossing of railroad tracks by the public or individuals, or from noise

*Evidence on the question of damages, see *post*, **264-271.**

and confusion of passing trains, smoke from same, or frightening horses." The evidence showed that the track was in the street, within ten to eighteen feet of the front of lots abutting on the street. *Held*, that the instruction was improper, as calculated to mislead the jury. *Mix* v. *Lafayette, B. & M. R. Co.*, 67 *Ill.* 319.

In an action to recover damages to abutting property there is no error in an instruction that if the property is rendered less valuable by the construction and operation of the road the jury shall find for plaintiff, when they have been instructed that he cannot recover for injury suffered in common with the public at large. *Ft. Worth & R. G. R. Co.* v. *Downie*, 82 *Tex.* 383, 17 *S. W. Rep.* 620.

In an action against a company by an adjoining owner, for damages for building a track on the street in front of his property, several witnesses testified as to the damage caused by cutting away part of the street, while witnesses for the company testified that the street was improved thereby. The court instructed the jury that the question for them to determine was whether plaintiff's property had been permanently damaged by putting in the track and taking up a part of the street. *Held*, not erroneous, as expressive of the weight of evidence. *McFadden* v. *Schill*, 84 *Tex.* 77, 19 *S. W. Rep.* 368.

A charge which limits or restricts plaintiff's right of recovery to the entire destruction of his easement in the street upon which his lot abuts is erroneous. *Williams* v. *Gulf, C. & S. F. R. Co.*, 1 *Tex. App.* (*Civ. Cas.*) 131.

b. In Injunction Suits.

245. Parties. — Where occupiers of a street file a bill to restrain lessees of a railway company from building upon the street, which the company had closed up under the authority of its special act, the company and the attorney-general should be made parties. *Temple* v. *Flower*, 41 *L. J. Ch.* 604, 20 *W. R.* 587, 26 *L. T.* 657.

Where a bill charges that municipal authorities, a street-railroad company, and a manufacturing company have combined to procure permission unlawfully for, and to construct a track through, the streets for a manufacturing company, it is proper to make them all defendants. *Mayor, etc., of Macon* v. *Harris*, 73 *Ga.* 428.

The owners of several and distinct lots of land, having no common interest, cannot join in a bill to enjoin a nuisance common to all where the grounds of relief are a special injury to each one's property. An information filed in the name of the attorney-general on the relation of such owners will not, therefore, be considered as a bill filed in their behalf, where the case disclosed is not such that relief can be afforded at the instance of the attorney-general. *Morris & E. R. Co.* v. *Prudden*, 20 *N. J. Eq.* 530.

Each of two supervisors by whom a township is divided into two districts, for convenience in repairing roads, etc., has power of his own motion to maintain a bill in the name of the township to enjoin an obstruction to a public road in the district under his immediate control. *Appeal of North Manheim Tp.*, (*Pa.*) 36 *Am. & Eng. R. Cas.* 194, 14 *Atl. Rep.* 137.

The complaint of a private individual is not ground for a court of equity to grant an injunction to restrain a company from laying rails in the streets of a city. *Peterson* v. *Navy Yard, B. S. & F. R. Co.*, 5 *Phila.* (*Pa.*) 199. — DISTINGUISHED IN Philadelphia *v.* Thirteenth & F. St. Pass. R. Co., 8 Phila. 648.

246. Bill.—An action to enjoin the laying of a track in a street cannot be joined with one asking damages for a track already laid there, under Iowa Code, § 2630, providing for the joiner in one petition of different causes of action, except where it may be prosecuted by the same kind of proceedings. *Bowman* v. *Chicago, St. P. & K. C. R. Co.*, 86 *Iowa* 490, 53 *N. W. Rep.* 327.

A bill alleging that an alley over which complainants are entitled to a right of way is the only reasonably convenient mode of reaching their property and place of business, the streets binding thereon being already rendered nearly impassable by railroad tracks, and that defendants are about to obstruct this alley by laying a railroad track across it, by which complainants will be subjected to daily irremediable damage, is sufficient to warrant the granting of an injunction to prevent such obstruction. *Roman* v. *Strauss*, 10 *Md.* 89.

Abutting owners upon a city street, on the public plan but unopened, entered into an agreement with a company, granting to the latter the use of twenty feet of the middle of the street for its roadbed, free of charge, the company to curb and pave fif-

teen feet on each side thereof, "to remain open for public use as a public highway forever." *Held*, that a bill filed by a successor to the title of one of the abutting owners, to compel the company to remove its tracks laid on the street outside the twenty feet granted, was demurrable for want of an averment that the tracks complained of had been laid without authority of law. *Kemble* v. *Philadelphia, G. & N. R. Co.*, 140 *Pa. St.* 14, 21 *Atl. Rep.* 225.

247. Complaint. — A complaint alleging that plaintiffs are owners of lots abutting on a certain street in a city, that defendant has taken possession of said street in front of said lots, and has laid down its track thereon and used the same, but not alleging that defendant intends or threatens to continue such use, to the injury of plaintiffs, or at all, does not show a good ground for an injunction to prevent defendant from continuing to maintain and use such railway. *Roelker* v. *St. Louis & S. E. R. Co.*, 50 *Ind.* 127.

A complaint alleging the obstruction of public streets by the construction of a railroad therein must show that plaintiff's access to his premises (not adjacent to such obstructions) was thereby so impaired as to entitle him to maintain a private action therefor. *Lakkie* v. *Chicago, St. P., M. & O. R. Co.*, 44 *Minn.* 438, 46 *N. W. Rep.* 912.

A complaint by an abutting owner owning to the centre of the street, alleging that defendant company unlawfully entered upon and has ever since operated its trains on the adjoining half of the street, upon the track of another company, sufficiently shows that defendant's occupancy is unlawful, and does not imply that defendant is entitled to occupy the street by authority from such other company, or otherwise. *Morrell* v. *Chicago, M. & St. P. R. Co.*, 49 *Minn.* 526, 52 *N. W. Rep.* 140.

Where the object of a suit is to restrain the extension of a railroad in a city, an injunction should not be awarded against the city where it only appears that it granted its permission to extend the road, but where there is no allegation or proof that the city is to do anything to obstruct the streets, or perform any other act connected with the extension. *People* v. *New York & H. R. Co.*, 45 *Barb.* (*N. Y.*) 73.

Where an injunction is sought to restrain a railway in a street, on the ground of a special injury to plaintiff, an abutting owner, by preventing access to his lot, he should specify this grievance in his complaint. A general charge that the road will be specially injurious to him is not sufficient. But if no motion is made to require the complaint to be reformed, and no objection is made to the introduction of evidence tending to show such injury, the objection will be considered waived. *Wetmore* v. *Story*, 3 *Abb. Pr.* (*N. Y.*) 262.

The mere inconvenience of access to abutting property occasioned by the lawful use of the street by a company is not actionable. So a complaint does not state a cause of action which merely alleges that defendant made its track so near the sidewalk in front of plaintiff's premises as not to leave sufficient space for a vehicle to stand, whereby he and his family were incommoded. *Kellinger* v. *Forty-second St. & G. S. F. R. Co.*, 50 *N. Y.* 206, 3 *Am. Ry. Rep.* 77.—DISTINGUISHED IN Story *v.* New York El. R. Co., 90 N. Y. 122, 11 Abb. N. Cas. 236. REVIEWED IN Reining *v.* New York, L. & W. R. Co., 40 N. Y. S. R. 392.

A city granted to an electrical street-railway company the right to lay a double track in a street in which it had already granted the right to lay a double track to another company. Before the electrical company commenced work, the company having the prior grant sued to enjoin them from laying their tracks, and to have the ordinance granting the franchise declared void, alleging that it had constructed a single track, and that if it were to lay down its other track, and the electrical company its two tracks, other modes of public travel would be obstructed and the poles and wires of the electrical company would interfere with plaintiff's right as the owner of property abutting on the street. *Held*, that the allegations were not sufficient to warrant an injunction. *Ogden City R. Co.* v. *Ogden City*, 46 *Am. & Eng. R. Cas.* 101, 7 *Utah* 207, 26 *Pac. Rep.* 288.—FOLLOWING Henderson *v.* Ogden City R. Co., 7 Utah 199.

248. Relief granted.—In enjoining a company from using a highway, where it has been diverted by the company from its location, but left in such close proximity to the railway as to make it dangerous for public travel, it is proper for the court to prescribe what change in the location shall operate to supersede the injunction. *State ex rel.* v. *Dayton & S. E. R. Co.*, 5 *Am. & Eng. R. Cas.* 312, 36 *Ohio St.* 434.

5. *Damages.**

a. Necessity of Compensation, and Who Entitled.

249. Necessity of compensation, generally.—If a party dedicates a public street through his land, and a railroad company afterwards procures a condemnation of land along the street for its track, and damages are awarded to him therefor, this is no reason why he should not be awarded further damages, to be paid by another railroad company which seeks to build another track on the same street. *Southern Pac. R. Co.* v. *Reed*, 41 *Cal.* 256, 3 *Am. Ry. Rep.* 46.—DISTINGUISHED IN Colorado C. R. Co. *v.* Mollandin, 4 Colo. 154.

It is not necessary, in order to recover damages, that property should lie along or front upon the line of a railroad. If it is adjacent, or so near that a direct physical injury is done, it is sufficient. *East St. Louis* v. *Lockhead*, 7 *Ill. App.* 83.

The right to damages secured by the Constitution to an abutting owner, where his property is injured, extends as well to cases where the damage is caused by legal acts as to those in which it is the result of an illegal trespass. *Maltman* v. *Chicago, M. & St. P. R. Co.*, 41 *Ill. App.* 229.

The right which the owner of a lot has to the enjoyment of an adjoining street is part of his property, and can only be taken for public use on just compensation being made, pursuant to the Constitution. *Tate* v. *Ohio & M. R. Co.*, 7 *Ind.* 479.—APPLIED IN Conlon *v.* City R. Co., 8 Nov. Sc. 209. CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493. FOLLOWED IN Hutton *v.* Indiana C. R. Co., 7 Ind. 522. REVIEWED IN Cox *v.* Louisville, N. A. & C. R. Co., 48 Ind. 178; Virginia & T. R. Co. *v.* Lynch, 13 Nev. 92.—*Martin* v. *Chicago, S. F. & C. R. Co.*, 47 *Mo. App.* 452. *Starr* v. *Camden & A. R. Co.*, 24 *N. J. L.* 592.—DISTINGUISHING Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill (N. Y.) 567; Case of Philadelphia & T. R. Co., 6 Whart. (Pa.) 25; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 71. REVIEWING Clarence R. Co. *v.* Great North of Eng. R. Co., 4 Q. B. 46.—*Gulf, C. & S. F. R. Co.* v. *Eddins*, 60 *Tex.* 656.—FOLLOWED IN Gulf, C. & S. F. R. Co. *v.* Bock, 63 Tex. 245.—*Gulf, C. & S. F. R. Co.* v. *Bock*, 63 *Tex.* 245.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

Where a railroad crosses a street at such an angle that plaintiff's lot lies opposite to a portion of an embankment rendered necessary for the construction of the roadbed, though not opposite to any portion of rails and ties, plaintiff is entitled to recover damages therefor, under Iowa Code, § 464, providing that no "railway track" can be located in the streets or public places of a city until after the injury to the property abutting thereon has been ascertained and compensated for. *Gates* v. *Chicago, St. P. & K. C. R. Co.*, 50 *Am. & Eng. R. Cas.* 164, 82 *Iowa* 518, 48 *N. W. Rep.* 1040.

Where a company is authorized to build into a city which owns the title to its streets, such streets cannot be subjected to the use of the railroad without the consent of the city, and without an assessment and payment of damages according to law. *Donnaher* v. *State*, 16 *Miss.* 649.—DISTINGUISHING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289. QUOTING Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill (N. Y.) 570; Tuckahoe Canal Co. *v.* Tuckahoe R. Co., 11 Leigh (Va.) 76.

Where the owners of land dedicate a street adjacent thereto, and "covenant and agree that said street shall forever hereafter be kept open for the use of" such grantors, their heirs and assigns, their grantees have an appurtenant right of way in such street which cannot be impaired by legislation allowing a company to occupy it, except on the condition of making compensation. *Methodist Episcopal Church* v. *Pennsylvania R. Co.*, 50 *Am. & Eng. R. Cas.* 217, 48 *N. J. Eq.* 452, 22 *Atl. Rep.* 183.

Even the legislature cannot authorize the taking for ordinary railroad purposes, without compensation, of land used as a public street. *Jersey City & B. R. Co.* v. *Jersey City & H. Horse R. Co.*, 20 *N. J. Eq.* 61; *reversed in* 21 *N. J. Eq.* 550. *Presbyterian Soc.* v. *Auburn & R. R. Co.*, 3 *Hill (N. Y.)* 567.—FOLLOWING Bloodgood *v.* Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 9; Fletcher *v.* Auburn & S. R. Co., 25 Wend. 462.—APPROVED IN Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75. DISTINGUISHED IN Starr *v.*

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*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **361-366.**

Damages for the construction of railroads in highways or across streets, see notes, 2 AM. & ENG. R. CAS. 464; 32 *Id.* 251; 36 *Id.* 16; 50 *Id.* 215; 38 *Id.* 443, *abstr.*; 8 L. R. A. 173.

Camden & A. R. Co., 24 N. J. L. 592; Plant *v.* Long Island R. Co., 10 Barb. (N. Y.) 26. FOLLOWED IN Hastings & G. I. R. Co. *v.* Ingalls, 20 Am. & Eng. R. Cas. 60, 15 Neb. 123; Williams *v.* New York C. R. Co., 16 N. Y. 97. QUOTED IN Donnaher *v.* State, 16 Miss. 649. REVIEWED IN Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506; Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404; Corey *v.* Buffalo, C. & N. Y. R. Co., 23 Barb. 482.—*Burt* v. *Lima & H. F. R. Co.*, 48 *N. Y. S. R.* 553, 21 *N. Y. Supp.* 482.

The dedication of land for the use of a public highway only contemplates its use for ordinary highway purposes, and does not prevent the owner of the fee from recovering damages against a railroad company that occupies the highway for its track, without his consent and without making compensation. *Williams* v. *New York C. R. Co.*, 16 *N. Y.* 97; *reversing* 18 *Barb.* 222.—CRITICISING Case of Philadelphia & T. R. Co., 6 Whart. (Pa.) 25. DISTINGUISHING Drake *v.* Hudson River R. Co., 7 Barb. 508; Plant *v.* Long Island R. Co., 10 Barb. 26; Hentz *v.* Long Island R. Co., 13 Barb. 646; Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289; Fletcher *v.* Auburn & S. R. Co., 25 Wend. 464; Chapman *v.* Albany & S. R. Co., 10 Barb. 360; Milhau *v.* Sharp, 15 Barb. 193. FOLLOWING Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill 567. RECONCILING Adams *v.* Saratoga & W. R. Co., 11 Barb. 414.—QUOTED IN Gray *v.* First Div. St. P. & P. R. Co., 13 Minn. 315 (Gil. 289). REVIEWED IN Fanning *v.* Osborne, 25 Am. & Eng. R. Cas. 252, 102 N. Y. 441.

250. Where street is occupied by consent of city or town.—(1) *Compensation awarded.*—A company which constructs its road in a public street, under a sufficient grant from the legislature or municipality, is nevertheless liable to abutting owners for consequential injuries to their property from such construction, under a constitutional provision of Arkansas that "private property shall not be taken, appropriated, or damaged for public use without just compensation." *Hot Springs R. Co.* v. *Williamson*, 46 *Am. & Eng. R. Cas.* 59, 136 *U. S.* 121, 10 *Sup. Ct. Rep.* 955. *Southern Pac. R. Co.* v. *Reed*, 41 *Cal.* 256, 3 *Am. Ry. Rep.* 46. *Denver & R. G. R. Co.* v. *Bourne*, 32 *Am. & Eng. R. Cas.* 227, 11 *Colo.* 59, 16 *Pac. Rep.* 839.—FOLLOWED IN Denver & R. G. R. Co. *v.* Schmitt, 11 Colo. 56, 16 Pac. Rep. 842.—*Burlington & M. R. R. Co.* v. *Reinhackle*, 14 *Am. & Eng. R. Cas.* 169, 15 *Neb.* 279, 18 *N. W. Rep.* 69, 48 *Am. Rep.* 342.—QUOTING Crawford *v.* Delaware, 7 Ohio St. 459.—APPLIED IN Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240. FOLLOWED IN Omaha & R. V. R. Co. *v.* Rogers, 20 Am. & Eng. R. Cas. 79, 16 Neb. 117.—*Reming* v *New York, L. & W. R. Co.*, 1 *N. Y. S. R.* 733. *Rosenthal* v. *Taylor, B. & H. R. Co.*, 79 *Tex.* 325, 15 *S. W. Rep.* 268. *Ford* v. *Chicago & N. W. R. Co.*, 14 *Wis.* 609.—APPROVING Williams *v.* New York C. R. Co., 16 N. Y. 97. QUOTING Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 71.—*Pomeroy* v. *Milwaukee & C. R. Co.*, 16 *Wis.* 640.

A dummy railroad constructed by authority upon a public road or street, and operated, by means of a steam engine and coaches, for the transportation of passengers only, constitutes an additional burden upon the ultimate fee in the road or street, for which the owner of that fee is entitled to compensation as for a taking of his property for public use. *East End St. R. Co.* v. *Doyle*, 88 *Tenn.* 747, 9 *L. R. A.* 100, 13 *S. W. Rep.* 936.

The right to damages for injury done to property adjacent to a street along which a railway track is constructed, when the city, having authority, has granted the right of way, is not restricted to cases where the street has been exclusively appropriated by the road, or where the road has been unskilfully constructed. *Gulf, C. & S. F. R. Co.* v. *Eddins*, 60 *Tex.* 656.—REVIEWING Houston & T. C. R. Co. *v.* Odum, 53 Tex. 353.—FOLLOWED IN Gulf, C. & S. F. R. Co. *v.* Bock, 63 Tex. 245. REVIEWED IN Gainesville, H. & W. R. Co. *v.* Hall, 44 Am. & Eng. R. Cas. 51, 78 Tex. 169.—*Gulf, C. & S. F. R. Co.* v. *Bock*, 63 *Tex.* 245.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

(2) *Kansas rule.*—A company may, under the provisions of the statute and under the authority of the city ordinance, construct and operate its railroad in a public street in a legal and proper manner, making such alterations in the surface of the street as are necessary to the construction and operation of its road, and which do not necessarily impair the usefulness of the street, without being liable to abutting lot owners or others for damages; but such a company cannot, any more than can an individual, wrongfully and unnecessarily block up or obstruct a street without being liable therefor. *Ottawa*,

O. C. & C. G. R. Co. v. *Larson*, 36 *Am. & Eng. R. Cas.* 163, 40 *Kan.* 301, 2 *L. R. A.* 59, 19 *Pac. Rep.* 661.—QUOTING Atchison & N. R. Co. *v.* Garside, 10 Kan. 552; Heller *v.* Atchison, T. & S. F. R. Co., 28 Kan. 625.—APPROVED IN Central Branch U. P. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. Rep. 276. FOLLOWED IN Ottawa, O. C. & C. G. R. Co. *v.* Peterson, 40 Kan. 310.

To entitle an abutting lot owner to recover damages for locating a railroad, under the authority of the city council, in a street, there must be a practical obstruction of the street in front of his premises, so as virtually to deprive him of ingress and egress. *Kansas, N. & D. R. Co.* v. *Mahler*, 45 *Kan.* 565, 26 *Pac. Rep.* 22.—FOLLOWING Kansas, N. & D. R. Co. *v.* Cuykendall, 42 Kan. 234; Wichita & C. R. Co. *v.* Smith, 45 Kan. 264.

No license or consent from a city will exempt a company from liability to a lot owner for placing an obstruction across an alley which practically excludes access to the lot by precluding the use of the alley for the ordinary purposes for which an alley is used. *Leavenworth, N. & S. R. Co.* v. *Curtan*, 56 *Am. & Eng. R. Cas.* 636, 51 *Kan.* 432, 33 *Pac. Rep.* 297.

251. Where ordinance requires payment of damages.—A company constructed its track along a public street in front of plaintiff's lots occupied for mercantile business, under an ordinance of the town granting the right so to do, but which required the company to pay all damages to the property owners. *Held*, that the company, by accepting the ordinance and acting under it, became bound to pay plaintiff for all damage to his property or business. *St. Louis, V. & T. H. R. Co.* v. *Capps*, 67 *Ill.* 607.—DISTINGUISHING Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Murphy *v.* Chicago, 29 Ill. 279.—FOLLOWED IN St. Louis, V. & T. H. R. Co. *v.* Haller, 82 Ill. 208.

And the liability extends to all damages done to property owners during the time of the construction of the road, as well as for such as were caused by the construction when completed. *St. Louis, V. & T. H. R. Co.* v. *Capps*, 72 *Ill.* 188.

252. Where railway tunnels under street.—A railway company may tunnel under a public street without paying compensation to the abutting owner. *Souck* v. *East London R. Co.*, 42 *L. J. Ch.* 477, *L. R.* 16 *Eq.* 108, 21 *W. R.* 590.

253. Exclusive use of street not necessary to give right to compensation.*—It is not necessary that a railway along a street should exclusively appropriate it, in order to entitle an adjacent proprietor to damages for its construction. *Gulf, C. & S. F. R. Co.* v. *Eddins*, 60 *Tex.* 656.—FOLLOWED IN Gulf, C. & S. F. R. Co. *v.* Bock, 63 Tex. 245.—*Gulf, C. & S. F. R. Co.* v. *Bock*, 63 *Tex.* 245.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

254. Who entitled to damages, generally.†—The right to use and enjoy the street is an appurtenance to a lot abutting thereon, and an injury to the appurtenance is an injury to the whole property. *Protzman* v. *Indianapolis & C. R. Co.*, 9 *Ind.* 467.

Where the bed of defendant's railway is partly on plaintiff's land, and partly on the street adjacent to the land, plaintiff is entitled to be compensated, not only for the appropriation of the portion of his land taken for the right of way, but also for the injury he will sustain on account of the laying down of the track in the street on which his property abuts, under Iowa Code, § 464. *McClean* v. *Chicago, I. & D. R. Co.*, 67 *Iowa* 568, 25 *N. W. Rep.* 782.—DISTINGUISHED IN Cook *v.* Chicago, M. & St. P. R. Co., 83 Iowa 278.

Under Iowa Code, § 464, city streets cannot be occupied longitudinally by railroads without the consent of the city and compensation to the abutting lot owners; and where a railroad is laid diagonally across two streets at their intersection, so that the street in front of plaintiff's corner lot is occupied thereby, he is entitled to compensation. *Enos* v. *Chicago, St. P. & K. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 72, 78 *Iowa* 28, 42 *N. W. Rep.* 575.

An abutting lot owner who has an easement in an alley, which is destroyed by the appropriation of the alley for railroad purposes, is entitled to recover damages only for the loss of his special right to pass and repass over the alley; and he is not entitled

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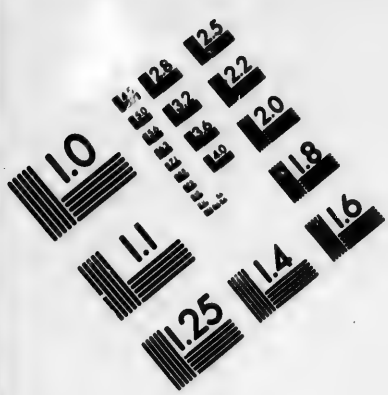
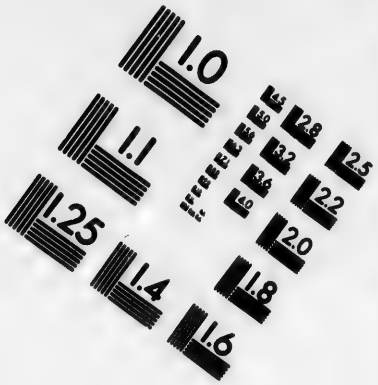
* As to when injury to land is to be estimated in condemnation proceedings where a road is to be built on street or alley, see 57 AM. & ENG. R. CAS. 720, *abstr.*

† Conveyance of strip of land for construction of railroad in street. Abutter's right to damages, see 50 AM. & ENG. R. CAS. 216, *abstr.*

Lot running from street to street, see 50 AM. & ENG. R. CAS. 226, *abstr.*





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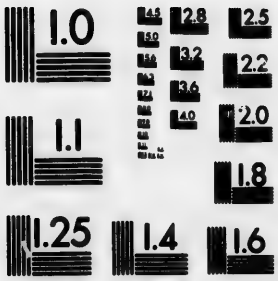

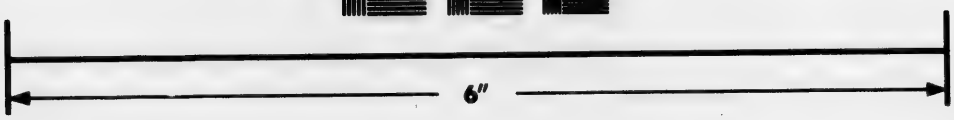

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to recover for the loss of any general benefits which he is entitled to receive in common with the public generally. *Central Branch U. P. R. Co.* v. *Andrews*, 14 *Am. & Eng. R. Cas.* 248, 30 *Kan.* 590, 2 *Pac. Rep.* 677. —APPROVED IN Central Branch U. P. R. Co. *v.* Andrews, 41 Kan. 370.

One whose land in a street in front of his lot is appropriated by a company and occupied by its track is presumptively entitled to damages in addition to what he would suffer if the railway stopped at the line of his lot, and no part of the same was so appropriated. *Papooshek* v. *Winona & S. P. R. Co.*, 44 *Minn.* 195, 46 *N. W. Rep.* [illegible].

Property entitled to damages by reason of the exercise of the right of eminent domain must be either that which is actually invaded, or that which abuts upon a highway that is invaded. A person who is not the owner of land abutting upon a street which has been appropriated by a railroad has no right to recover damages upon the ground that the street has been made inconvenient and dangerous to travelers over it. *Pennsylvania Co.* v. *Pennsylvania S. V. R. Co.*, 151 *Pa. St.* 334, 25 *Atl. Rep.* 107.

255. —— for noise, dust, smoke, and cinders.* — A party residing near a track may recover for damage caused by throwing smoke and cinders from passing trains on his property. *Stone* v. *Fairbury, P. & N. W. R. Co.*, 68 *Ill.* 394.

Whenever without his consent, and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot so as to cause, upon that part of the street, smoke, dust, cinders, etc., which darken and pollute the air coming upon the lot from that part of the street, the lot owner may recover whatever damages to his lot are thus caused by so laying and operating the railroad. *Adams* v. *Chicago, B. & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 7, 39 *Minn.* 286, 39 *N. W. Rep.* 629, 1 *L. R. A.* 493, 38 *Alb. L. J.* 388.

A lot owner whose lot does not approach nearer to the line of a railroad than from one to two hundred feet, but who is within reach of the noise and dust produced by the ordinary operations of the road, may not recover damages for the consequential injury sustained by reason of such noise and dust. *Pennsylvania Co.* v. *Pennsylvania S. V. R. Co.*, 151 *Pa. St.* 334, 25 *Atl. Rep.* 107.

* See also *post*, 270.

—DISTINGUISHING Monongahela Nav. Co. *v.* Coons, 6 Watts & S. (Pa.) 101.

256. Right of lessor to damages.— Trespass on the case will lie to recover damages under W. Va. Const. art. 3, § 9, as compensation for permanent injury to real estate by the construction of a railroad upon a street adjacent to such property, and the owner may count for permanent damages and recover the same according to the evidence, although, when the injury occurred, he was not in the actual occupancy of the property, but was in constructive possession of the same through his tenant under a lease. *Fox* v. *Baltimore & O. R. Co.*, 34 *W. Va.* 466, 12 *S. E. Rep.* 757.—EXPLAINING Gillison *v.* Charleston, 16 W. Va. 282.

257. Who not entitled to damages.* — The clause of the Constitution which provides that "private property shall not be taken or damaged for public use without just compensation" must receive a reasonable and practicable interpretation. Where the property is not taken, the damages must be real, and not speculative. If the property is not worth less in consequence of the construction of a railroad in its vicinity, or upon a street upon which the lots abut, than if no road were constructed, the owner will not be entitled to damages, and cannot enjoin the construction of the road in the street in pursuance of the company's charter and the license of the city authorities. *Chicago & P. R. Co.* v. *Francis*, 70 *Ill.* 238.—FOLLOWED IN Eberhart *v.* Chicago, M. & St. P. R. Co., 70 Ill. 347.

Under Iowa Code, § 464, not all the owners of lots abutting upon a street on which a railroad is laid may recover damages, but only those owning lots abutting upon that portion of the street which is so used; and owners of lots abutting upon a street crossed only by a railroad are, consequently, not entitled to damages under the statute. *Morgan* v. *Des Moines & St. L. R. Co.*, 20 *Am. & Eng. R. Cas.* 67, 64 *Iowa* 589, 52 *Am. Rep.* 462, 21 *N. W. Rep.* 96.

If persons who own property abutting upon a street join, either in writing or by parol, with the owners of the other lots abutting thereon in an agreement that a railroad track may be laid therein and operated, and pursuant to that agreement the track is constructed, the owners of the lots and

* Abutting owner's right to compensation where no damages are proved, see 50 AM. & ENG. R. CAS. 227, *abstr.*

their subsequent assignees or grantees are estopped from claiming damages for the construction of the railroad under a statute requiring the payment of compensation to them. *Merchants' Union Barb-Wire Co.* v. *Chicago, R. I. & P. R. Co.*, 43 *Am. & Eng. R. Cas.* 121, 79 *Iowa* 613, 44 *N. W. Rep.* 900.

The crossing of the track of one railroad company by the track of another company, and the necessary delay to the trains of the existing company, is not a taking and damaging of private property, within the meaning of Missouri Constitution, relating to taking private property for public use. *Kansas City, St. J. & C. B. R. Co.* v. *St. Joseph Terminal R. Co.*, 97 *Mo.* 457, 3 *L. R. A.* 240, 10 *S. W. Rep.* 826.

Where land is dedicated for a public street, and the legislature authorizes the construction of a railroad through it, any damage to individuals by reason of the construction of the road in a reasonable and proper manner is *damnum absque injuria. Corey* v. *Buffalo, C. & N. Y. R. Co.*, 23 *Barb.* (*N. Y.*) 482.—APPLYING Gould *v.* Hudson River R. Co., 6 N. Y. 522. DISAPPROVING Fletcher *v.* Auburn & S. R. Co., 25 Wend. (N. Y.) 462. RECONCILING Brown *v.* Cayuga & S. R. Co., 12 N. Y. 486. REVIEWING Presbyterian Soc. *v.* Auburn & R. R. Co., 3 Hill (N. Y.) 567.—APPLIED IN Barnes *v.* South Side R. Co., 2 Abb. Pr. N. S. 415.

One whose property does not abut on that part of a street taken for a railroad cannot claim damages. *In re New York & H. R. Co.*, 39 *Hun* (*N. Y.*) 338.

In the lawful vacation of a street and the appropriation of the ground by a railroad, the owners of the abutting property will not, in the absence of any special legislative provision for damages in such cases, be subject to the constitutional condition that compensation shall first be made for property taken, injured, or destroyed. *McGee's Appeal*, 114 *Pa. St.* 470, 8 *Atl. Rep.* 237.

The mere proximity of a railroad may render dwelling houses less desirable, and diminish their market value, without imposing any liability on the company for the loss sustained by their owners. *Jones* v. *Erie & W. V. R. Co.*, 151 *Pa. St.* 30, 25 *Atl. Rep.* 134.

Where a company is authorized by its charter to build into a city, and under certain conditions to occupy the streets, one whose private right of way in the land of another is thereby obstructed cannot maintain an action for damages. He may have compensation if his case falls within the provisions made for compensation; otherwise there can be no compulsory remedy for either damages or compensation. *McLauchlin* v. *Charlotte & S. C. R. Co.*, 5 *Rich.* (*So. Car.*) 583.

258. Subsequent grantee not entitled.—Where private lots in a city are physically damaged, or injured in value, by the construction and operation of a railroad in close proximity thereto along a public street, the right of action, if any exists, is vested in the owner of lots immediately upon the construction of the railroad, to recover for all damages, past, present, and future; and a subsequent grantee of the lots cannot maintain an action at all for the proper use and operation of the road, after his purchase. *Chicago & E. I. R. Co.* v. *Loeb*, 27 *Am. & Eng. R. Cas.* 415, 118 *Ill.* 203, 8 *N. E. Rep.* 460.—DISTINGUISHED IN Chicago, B. & Q. R. Co. *v.* Schaffer, 34 Am. & Eng. R. Cas. 174, 124 Ill. 112, 14 West. Rep. 139, 16 N. E. Rep. 239; Lamm *v.* Chicago, St. P., M. & O. R. Co., 45 Minn. 71; Atlantic & D. R. Co. *v.* Peake, 87 Va. 130.

259. Owner on opposite side of street. — The owner of an abutting lot, whose title extends to the middle of a highway forty feet wide, cannot maintain an action for damages for an unlawful obstruction on the opposite side, caused by the construction thereon by a railroad company, for a roadbed, of an embankment eleven feet in width, the only effect of which is to render access to his property more difficult and inconvenient, and to force the travel on the highway nearer to his lot, as the injury is the same in kind as that suffered by the community in general, differing only in degree. *Indiana, B. & W. R. Co.* v. *Eberle*, 32 *Am. & Eng. R. Cas.* 220, 110 *Ind.* 542, 9 *West. Rep.* 206, 11 *N. E. Rep.* 467.

Where the owner of a lot is entitled to exercise a right which he possesses in common with the public, and the exercise of which is necessary to the enjoyment of his property in the usual manner, it must appear, to warrant a recovery, that the obstruction complained of presents a physical disturbance of such right, so as to impair its use in the manner previously enjoyed, and causes peculiar damage to the property to which the right is appendant. *Indiana, B.*

& W. R. Co. v. *Eberle*, 32 *Am. & Eng. R. Cas.* 220, 110 *Ind.* 542, 9 *West. Rep.* 206, 11 *N. E. Rep.* 467.

Although the sides or eaves of a passing car extend a few inches over one side of an alley, and a few inches of filling may be necessary in the alley, these facts do not entitle the owner of a lot on the opposite side of the alley to damages, under Wis. Laws of 1889, ch. 255. *Morris* v. *Wisconsin Midland R. Co.*, 82 *Wis.* 541, 52 *N. W. Rep.* 758.

b. Assessment. Evidence on Question of Damages.

260. How damages should be assessed, generally. — Where an abutting lot owner owns the fee to one half of the street, and sues for damages for the taking of the street for a railroad track, his measure of damages is the value of his interest in the portion of the street taken when the company entered; and the measure of damages to his lot is the difference between its value at the time the railroad entered and its value when it was completed; and in arriving at the value of the lot all the capabilities or uses to which it is adapted should be taken into consideration. *Muller* v. *Southern Pac. Branch R. Co.*, 83 *Cal.* 240, 23 *Pac. Rep.* 265.

Where a company has a general discretion to construct and operate a railroad in a city, property owners whose property will be damaged thereby will be entitled to have their damages estimated with reference to any use to which the petitioner, under its charter, may see fit to apply its railroad when built. But the company, having such unlimited power, may, by stipulation, duly authorized, restrict itself as to the purposes of the road, the character of its machinery and appliances, and the fuel to be used, and such stipulation will thereafter be binding on the company. *Lieberman* v. *Chicago & S. S. R. T. R. Co.*, 51 *Am. & Eng. R. Cas.* 581, 141 *Ill.* 140, 30 *N. E. Rep.* 544.

Pa. Act of Feb. 19, 1849, § 10, provides that "whenever any company shall locate its road in and upon any street or alley in any city or borough, ample compensation shall be made to the owners of lots fronting on such street or alley, for any damages they may sustain by reason of any excavation or embankment made in the construction of such road, to be ascertained as other damages are authorized to be ascertained by this act." *Held*, that where it is proven that an embankment was made in front of plaintiff's property, the burden is upon the company to show that there was an established grade of the street to which it conformed. *Pittsburg, V. & C. R. Co.* v. *Rose*, 74 *Pa. St.* 362, 3 *Am. Ry. Rep.* 56, 6 *Am. Ry. Rep.* 343. — FOLLOWED IN Hays *v.* Briggs, 74 Pa. St. 373.

In such case, a borough plan is evidence to show where the line of a street is; but not to show whether plaintiff's house was over the line. *Pittsburg, V. & C. R. Co.* v. *Rose*, 74 *Pa. St.* 362, 3 *Am. Ry. Rep.* 56, 6 *Am. Ry. Rep.* 343.

Where an abutting lot owner sues a company for excavating in the street for the purpose of laying its track, and asks for both damages and an injunction, the past damages caused by the trespass may be assessed by the court, or perhaps the judge may impanel a jury for the purpose; but permanent damages which accrue from the continued use of the street can only be ascertained in the manner prescribed by the statute. *Ford* v. *Chicago & N. W. R. Co.*, 14 *Wis.* 609. — FOLLOWING Davis *v.* La Crosse & M. R. Co., 12 Wis. 16; Pettibone *v.* La Crosse & M. R. Co., 14 Wis. 479.—REVIEWED IN Uline *v.* New York C. & H. R. R. Co., 23 Am. & Eng. R. Cas. 3, 101 N. Y. 98, 4 N. E. Rep. 536.

261. Assessment by arbitrators.— A company and the owner of a lot fronting on a street submitted to arbitration, under the compensation clause of the company's charter, the question of how much damages, if any, the lot owner had received by the building of the road through the street. It appeared that the road had authority from the state (before the Code) to run from point to point in a general direction, which might be through the town, and authority from the town authorities to run through said street; and that, in fact, the road had not used the street either for its track or embankment. *Held:* (1) that the court erred in holding that the road had no authority to use the street; (2) that the court erred in holding that the road was estopped by the submission from showing that, in fact, the street was not occupied. *Atlantic & G. R. Co.* v. *Mann*, 43 *Ga.* 200.

262. Assessment by jury.—Under a statute which authorizes a company to construct its road, in a public street, but not

before the payment of all damages which will be occasioned thereby to the property of any person, and which allows either the company or the property owner to commence proceedings to have the damages assessed, the company, on the trial of an appeal entered by it from the assessment made in a proceeding commenced by it, is entitled to open and conclude, the burden of proof being upon it to show either that the property in question was not damaged, or if it was, the amount which would compensate the owner, and which must be paid or tendered by the company before constructing its road in the street on the terms prescribed by the statute. *Streyer* v. *Georgia Southern & F. R. Co.*, 51 *Am. & Eng. R. Cas.* 638, 90 *Ga.* 56, 15 *S. E. Rep.* 637.

In a suit by a property owner to recover damages against three railroads for laying tracks in the street, near his dwelling, whereby smoke, dust, and cinders were thrown upon his house and lot, and otherwise creating a nuisance, depreciating the value of his property, where plaintiff, on the trial, enters a *nolle prosequi* as to damages arising from certain tracks shown to belong to one of the companies exclusively, a finding of damages for the depreciation caused by all the roads, as well as general depreciation of real estate after the construction of the several roads, cannot be sustained, and a *remittitur* of $800 out of $2000 found by the jury will not cure the error, as it cannot be known how much the jury allowed for damages occasioned by the tracks to which the *nolle* applied. *Chicago, M. & St. P. R. Co.* v. *Hall*, 90 *Ill.* 42.

Under Iowa Code, § 1245, the sheriff's jury can only assess damages for land taken by a railroad, and not damages for injury to property abutting on a street in which the railroad is laid. *Stough* v. *Chicago & N. W. R. Co.*, 30 *Am. & Eng. R. Cas.* 396, 71 *Iowa* 641, 33 *N. W. Rep.* 149.—FOLLOWING Mulholland *v.* Des Moines, A. & W. R. Co., 60 Iowa 740; Wilson *v.* Des Moines, O. & S. R. Co., 67 Iowa 509.

In an action to recover damages caused by the construction of a railway on a public road immediately in front of plaintiff's residence, the grade being between eight and nine feet in height, and access to the property obstructed, and the value thereof diminished, the evidence showed that the property was thereby greatly diminished in value, and that the jury had based their verdict on the lowest estimate of the witnesses. *Held*, that the verdict would not be set aside. *Nebraska & C. R. Co.* v. *Scott*, 31 *Neb.* 571, 48 *N. W. Rep.* 390.

263. Time up to which damages are to be computed.—The measure of damages for a railroad-crossing in a street is the difference in the value of the abutting property before and after the construction of the crossing. *Nicks* v. *Chicago, St. P. & K. C. R. Co.*, 84 *Iowa* 27, 50 *N. W. Rep.* 222.

Where a company obstructs an alley in a city by a track, so as to make it useless as an alley, an abutting lot owner has the right, if he chooses, to consider the obstruction as a permanent taking and appropriation of the alley by the company, and the measure of his damages will be the injury to his lot at the time the alley was taken and appropriated, and not at the time of the trial. *Central Branch U. P. R. Co.* v. *Andrews*, 5 *Am. & Eng. R. Cas.* 370, 26 *Kan.* 702; *further appeal* 14 *Am. & Eng. R. Cas.* 248, 30 *Kan.* 590, 2 *Pac. Rep.* 677.

If a company, in constructing its road and surfacing its track, makes holes or other temporary obstructions in a street or highway, an abutting lot or land owner may recover all special damages suffered by him prior to the commencement of his action; but he cannot, on account of such defects or obstructions in the street or highway, recover for a supposed depreciation in value of his property, upon the ground of a permanent appropriation for the right of way. *Chicago, K. & W. R. Co.* v. *Union Inv. Co.*, 56 *Am. & Eng. R. Cas.* 679, 51 *Kan.* 600, 33 *Pac. Rep.* 378.

The measure of damages for obstructing a street is not the diminution in value of the abutting property by the wrongful obstruction, the injury not being to the freehold nor permanent in its nature, but should be confined to compensation for the injury occasioned by the unlawful obstruction up to the time of the commencement of the suit. *Brakken* v. *Minneapolis & St. L. R. Co.*, 7 *Am. & Eng. R. Cas.* 593, 29 *Minn.* 41, 11 *N. W. Rep.* 124.—APPROVED IN Carli *v.* Union Depot, St. R. & T. Co., 32 Minn. 101. DISTINGUISHED IN Baldwin *v.* Chicago, M. & St. P. R. Co., 27 Am. & Eng. R. Cas. 402, 35 Minn. 354; Byrne *v.* Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. Rep. 339. FOLLOWED IN Brakken *v.* Minneapolis & St. L. R. Co., 31 Minn. 45.

264. Evidence on question of damages, generally.*—Evidence as to what the value of a lot not taken, but abutting on land that was taken, would have been had the railroad been built upon another street is not admissible to show the damage to the lot, since the damage to be allowed is not a failure to realize a profit which, under another state of matters, might have been realized, but the loss actually suffered, and it is error to refuse to instruct the jury that such supposed value cannot be considered. *Muller* v. *Southern Pac. Branch R. Co.*, 83 *Cal.* 240, 23 *Pac. Rep.* 265.

As there can be but one recovery for depreciation in the value of real estate caused by the construction and operation of a railroad, a plaintiff should be allowed to prove the special disadvantages, such as annoyances and inconveniences interfering with and abridging the full enjoyment of his property. *Chicago, P. & St. L. R. Co.* v. *Leah*, 41 *Ill. App.* 584.—FOLLOWING Lake Erie & W. R. Co. *v.* Scott, 132 Ill. 436.

Where an abutting owner sues for damages on account of a railroad built in the street, witnesses who have given their opinion as to the depreciation of the value of the property caused by the road are properly allowed to state that the road was built and maintained with the top of the rails from eight to twelve inches above the surface of the street. Such statement is competent as showing one of the facts upon which the witnesses based their opinion. *Eslich* v. *Madison City & Ft. D. R. Co.*, 75 *Iowa* 443, 39 *N. W. Rep.* 700.

An abutting owner who sues for damages resulting from the operation of a railroad in the public street is entitled to show such damages as would properly have been open to consideration by a jury of inquest empaneled to assess compensation, upon the condemnation of the street for that purpose. *Grand Rapids & I. R. Co.* v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich.* 393, 11 *N. W. Rep.* 212.

In an action under W. Va. Const. art. 3, § 9, the owner may recover damages necessarily resulting from the ordinary and proper use by a company of its track in a street, and may give evidence developing the character of this ordinary and proper use and how it affects the value of his property. *Fox* v. *Baltimore & O. R. Co.*, 34 *W. Va.* 466, 12 *S. E. Rep.* 757.

265. Evidence of depreciation in value for previous uses.*—It is competent to show that premises which had previously been used as a residence and shoe shop were specifically diminished in value by a railroad cut. *Selma & M. R. Co.* v. *Knapp*, 42 *Ala.* 480.

In an action for damages for the depreciation in value of property, occasioned by the construction and operation of a railway in the street on which the property abuts, where there is a conflict in the evidence as to the amount of depreciation of the property, part of the witnesses placing it as greater than that found by the jury, and the jury having viewed the premises, the verdict will not be set aside as excessive. *Denver & K. G. R. Co.* v. *Bourne*, 32 *Am. & Eng. R. Cas.* 227, 11 *Colo.* 59, 16 *Pac. Rep.* 839.

266. Showing rental value before and after construction of road.†—On the trial of an action for damages for the depreciation of plaintiff's abutting property, occasioned by the construction and operation of a railway in the streets, plaintiff and others, against the objection of defendant, testified as to the decrease in the rents and rental value of the property by reason of the construction of the railroad, but that they did not know its market value before or since the building of the railroad. *Held*, that this evidence, having been properly qualified by the instructions given, was admissible to aid in determining the actual depreciation of the realty and improvements in market value. *Denver & R. G. R. Co.* v. *Bourne*, 32 *Am. & Eng. R. Cas.* 227, 11 *Colo.* 59, 16 *Pac. Rep.* 839.—FOLLOWING Denver *v.* Bayer, 7 Colo. 113, 2 Pac. Rep. 6.

An abutting property owner is entitled to recover as damages whatever diminution in value his real estate may have undergone in consequence of laying the track; and to show this, testimony should be introduced as to the market value of the property before and since the injury. On this head proof of the rental value before and since the construction of the road would furnish some criterion by which to determine the extent of the injury caused to the property

* See also *ante*, **242, 243.**

* See also *post*, **274.**
† See also *post*, **290.**

by such construction. *St. Louis, V. & T. H. R. Co.* v. *Capps*, 67 *Ill.* 607.

The recovery of damages for injury to property fronting on a street over which a railroad passes is confined to the direct physical injury to the property by the operation of the road; and it is erroneous to permit plaintiff to prove what the value of the property and its rental value is with the railroad, and what it would be without the railroad. *Chicago, B. & Q. R. Co.* v. *McGinnis*, 79 *Ill.* 269, 9 *Am. Ry. Rep.* 334.—FOLLOWED IN Chicago & E. I. R. Co. *v.* Hall, 8 Ill. App. 621.

In estimating the permanent damage, the jury may inquire into the value of the property, and, as a guide or assistance in so doing, it is not improper to hear evidence of its rental value, or of an offer to purchase which plaintiff had refused. *Fox* v. *Baltimore & O. R. Co.*, 34 *W. Va.* 466, 12 *S. E. Rep.* 757.

267. Showing loss of rental value of property similarly situated.—In an action for injury to a house and lot in a town, by the construction of a railroad cut in the street opposite, it is competent to show that the value of the rent of the property was thereby diminished; but not that the rent of other property, similarly situated but belonging to third persons, was diminished by the same cause. *Selma & M. R. Co.* v. *Knapp*, 42 *Ala.* 480.

In such case it is competent to show that the premises, which had previously been used as a residence and shoe shop, were specifically diminished in value by the railroad cut. *Selma & M. R. Co.* v. *Knapp*, 42 *Ala.* 480.

268. Showing decline of plaintiff's business.—In a suit to recover damages sustained by plaintiff in his business as a merchant, in consequence of the construction of a track in front of his premises, and the making of a deep excavation in the street, plaintiff proved the extent of his business in the preceding year and the decrease in the year after. The company then offered to prove the fact of a general decline in the business in which plaintiff was engaged, which the court refused. *Held*, that the court erred, as the testimony offered would have tended to show that plaintiff's business was affected in some degree by the decline, in common with others and without regard to the construction of the road. *St. Louis, V. & T. H. R. Co.* v. *Capps*, 67 *Ill.* 607.

In determining the damage for an obstruction of a highway leading to plaintiff's property, the effect upon the use and enjoyment of plaintiff's property and upon the extent of his business may properly be considered. *Park* v. *Chicago & S. W. R. Co.*, 43 *Iowa* 636, 14 *Am. Ry. Rep.* 489.

Plaintiffs were engaged, at a warehouse owned by them on the line of defendant's railway, in buying wheat to be manufactured into flour at their mill to which the wheat was shipped, and in selling the products of the mill at the same warehouse; and while so engaged, and for a considerable time, their business was interrupted and interfered with by the obstruction of a street leading to the warehouse by the unlawful occupation thereof with defendant's cars and trains. *Held*, that in estimating plaintiffs' damages, evidence of the diminution of the profits of their business, including the manufacture of flour, was incompetent, as embracing too many elements of uncertainty to form a basis for estimating damages. *Todd* v. *Minneapolis & St. L. R. Co.*, 36 *Am. & Eng. R. Cas.* 191, 39 *Minn.* 186, 39 *N. W. Rep.* 318.

269. Proof of probable and reasonable profits.—Plaintiff is entitled to damages for interruption to his business during such time as would necessarily have been employed in accommodating himself to another place of business, equally eligible, and his removal thereto. During such time, the damages to his business should be ascertained by proof of the probable and reasonable profits which might have been made upon sales had there been no interruption. The necessary reasonable expense of removal is also a proper element of damages. *St. Louis, V. & T. H. R. Co.* v. *Capps*, 67 *Ill.* 607.

270. Evidence of damage from smoke, noise, dust, sparks, etc.*—In a suit against a company, upon an ordinance whereby it is bound to pay all damages to property owners caused by the construction of its road, where there have been no sales of property of a character similar to that claimed to be injured, either before or after the construction of the road, from which the depreciation in value can be ascertained, it is proper to resort to evidence of the noise and jarring of the earth, and smoke and dust caused by passing trains, rendering the house, if a dwelling, uncom-

* See also *ante*, **255.**

fortable and injuring the furniture and walls of the house, as an aid to the jury in estimating the depreciation in value of the property. *St. Louis, V. & T. H. R. Co.* v. *Haller*, 82 *Ill.* 208.

In an action by the owner of property abutting on a street which is occupied by a railroad track under an agreement with the municipal authorities, by virtue of Ohio Rev. St. § 3283, to recover against the company for injury to such property by the laying of the track, it is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noise, and sparks of fire, occasioned by running locomotives and cars in front of the property. *Columbus, H. V. & T. R. Co.* v. *Gardner*, 32 *Am. & Eng. R. Cas.* 243, 30 *Am. & Eng. R. Cas.* 409, 45 *Ohio St.* 309, 11 *West. Rep.* 264, 13 *N. E. Rep.* 69.—APPLYING Hatch *v.* Cincinnati & I. R. Co., 18 Ohio St. 92. NOT FOLLOWING Parrot *v.* Cincinati, H. & D. R. Co., 10 Ohio St. 624. QUOTING Adden *v.* White Mts. (N. H.) R. Co., 55 N. H. 413; Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush (Ky.) 382; Grand Rapids & I. R. Co. *v.* Heisel, 38 Mich. 62; Ham *v.* Wisconsin, I. & N. R. Co., 61 Iowa 716; Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268.

271. Evidence in mitigation of damages.— Where plaintiff claims damages on account of injuries to his property by excavations made in the streets by defendant company, the fact that the damage was repaired by the city within a month after the work was done is admissible as evidence for defendant in mitigation of damages. *Alabama Midland R. Co.* v. *Coskry*, 92 *Ala.* 254, 9 *So. Rep.* 202.

On the assessment of damages of lots abutting upon a street sought to be taken for a side track, the owner gave evidence that the proposed location would render his lots useless for business purposes. *Held*, that it was competent for the company to show that the property could be beneficially used for warehouse purposes, or for any other purpose. *Mix* v. *Lafayette, B. & M. R. Co.*, 67 *Ill.* 319.

The owner of property abutting on an alley which is unlawfully obstructed by a railroad is not required to enter upon the alley for the purpose of changing the track or repairing the alley, and thus to lessen the injury and reduce the damages to which he is entitled by reason of such obstruction. *Central Branch U. P. R. Co.* v. *Andrews*, 41 *Kan.* 370, 21 *Pac. Rep.* 276.—APPROVING Atchison & N. R. Co. *v.* Garside, 10 Kan. 552; Heller *v.* Atchison, T. & S. F. R. Co., 28 Kan. 630; Central Branch U. P. R. Co. *v.* Andrews, 30 Kan. 590; Ottawa, O. C. & C. G. R. Co. *v.* Larson, 40 Kan. 301.

Where an abutting lot owner sues to recover damages caused by the construction and use of a railroad in a public highway, the company may show in mitigation of damages that certain work done by it in grading the highway enhanced the value of plaintiff's property. *Porter* v. *North Mo. R. Co.*, 33 *Mo.* 128.

Where an abutting lot owner sues to recover damages for obstructing a street, the rights of the parties are fixed at the time when suit is brought. Therefore it is error to allow the company to prove, for the purpose of mitigating the damages, that plaintiff has sold a part of his lots since the suit was brought. *Van Brunt* v. *Ahearn*, 23 *Hun* (*N. Y.*) 288.

c. Elements and Measure of Damages. Benefits.

272. Measure of damages, generally.*—Where a company owns all the land on one side of an alley, and seeks to condemn the land on the opposite side, the owners of such land, in estimating the value of the lot, have a right to claim compensation for the easement in the alley and the right to a half interest therein when it ceases to be used as such. *Cincinnati & G. R. Co.* v. *Mims*, 71 *Ga.* 240.

The right to recover damages for an injury to private property occasioned by the occupancy of a public street by a railroad, or the taking of other property for public use, is secured to the property owner by Ill. Const. of 1870, art. 2, § 13, and a company will be liable to such abutting owner for all direct physical damages accruing from the construction and operation of such railroad. The action for damages to property not taken may be regarded as in the nature of one kind of condemnation proceeding,

* Measure of damages to abutting owners caused by construction and operation of railroads. Recovery of prospective damages. Multiplicity of suits, see notes, 53 AM. REP. 123; 15 L. R. A. 413.

and in all cases where no land is taken there should be but one proceeding for the recovery of damages, in which the recovery should include the entire damages, past, present, and future. *Penn Mut. L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

Where a railroad is built and operated through the streets of a municipality, under an ordinance granting permission, the owner of abutting lands is not entitled to recover all the damages sustained by him by the location and operation of the road, including the loss in the market value of his property which is common to other owners or the public. He is limited to such damages as are peculiar to his property and which are of a physical nature, such as cutting off access to his premises, jarring his buildings, or casting smoke and cinders thereon. *Chicago & W. I. R. Co.* v. *Berg*, 10 *Ill. App.* 607.—QUOTING Chicago, M. & St. P. R. Co. *v.* Hall, 90 Ill. 42.

A judgment for damages for injuries to property abutting upon a street, arising from the construction of a railroad therein, includes all damages resulting to property owners from the legitimate and necessary use of the same for railroad purposes, including the right to lay, at a future date, necessary additional tracks or side tracks. *White* v. *Chicago, St. L. & P. R. Co.*, 43 *Am. & Eng. R. Cas.* 156, 122 *Ind.* 317, 23 *N. E. Rep.* 782, 7 *L. R. A.* 257.

It seems that, in proceedings by a corporation to acquire a right to lay its tracks in a street or highway the fee of which is in the owner of the adjoining land, the proper compensation is the full value of the land taken and a fair and adequate compensation for all the injury the owner has sustained and will sustain by the railroad; and for this purpose it is proper to ascertain and determine what effect the conversion of the street into a railroad track will have upon the residue of the owner's land. *Henderson* v. *New York C. R. Co.*, 78 *N. Y.* 423; *affirming* 17 *Hun* 344.—DISTINGUISHED IN Re New York, L. & W. R. Co., 27 Hun 151; Third Ave. R. Co. *v.* New York El. R. Co., 19 Abb. N. Cas. (N. Y.) 261. FOLLOWED IN McGean *v.* Metropolitan El. R. Co., 133 N. Y. 9; In re New York C. R. Co., 11 N. Y. S. R. 866, 46 Hun 679. RECONCILED IN Uline *v.* New York C. & H. R. R. Co., 23 Am. & Eng. R. Cas. 3, 101 N. Y. 98, 4 N. E. Rep. 536. REFERRED TO IN Glover *v.* Manhattan R. Co., 19 J. & S. (N. Y.) 1, 66 How. Pr. 77.—*In re New York C. R. Co.* 11 *N. Y. S. R.* 866, 46 *Hun* 679, *mem.*—FOLLOWING Henderson *v.* New York C. R. Co., 78 N. Y. 423.

N. Y. Act of 1881, ch. 258, authorized defendant company to carry its tracks upon a bridge over a certain street in the city of Albany, and to lower the grade of the street so as to pass under the bridge. The expenses of the improvement were to be borne by the railroad company and the city, it being provided that the city should "pay any compensation which the owners or occupants of adjoining property may be entitled to, or damages which they may suffer by reason or on account of such changes of grade or improvement." *Held*, that the company was only liable to pay for land taken. *In re New York C. R. Co.*, 11 *N. Y. S. R.* 866, 46 *Hun* 679, *mem.*

The lowering of the grade of a highway so as to adjust it to the grade of a railroad track laid across the highway is a taking of property for which compensation must be made; and the company is liable to an abutting lot owner who is injured, though the track does not encroach upon that portion of the highway owned by such lot owner. *Buchner* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 447, 60 *Wis.* 264, 19 *N. W. Rep.* 56.

273. Value of land permanently taken.—Where a company seeks to appropriate the whole of a lot for right-of-way purposes, it is not error for the court to instruct the jury that the measure of the owners' damages is the market value of the lot at the time it was taken—there being no evidence that the company's easement is not perpetual, nor that the fee remaining in the owners is of any value to them by reason of anything upon or under the surface of the lot which they could enjoy or remove without interfering with the company's easement. *Hollingsworth* v. *Des Moines & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 113, 63 *Iowa* 443, 19 *N. W. Rep.* 325.—FOLLOWED IN Clayton *v.* Chicago, I. & D. R. Co., 67 Iowa 238.

274. Depreciation in value of property.*—Under a provision of California Constitution that private property

* See also *ante*, **265.**

Construction of railroads in streets. Right of abutting owner to recover damages for depreciation in value of property, see 56 AM. & ENG. R. CAS. 682, *abstr.*

shall not be "taken or damaged" for public use without compensation, any lot owner, the value of whose lot is diminished by the laying of a railroad track and the running of trains in the street, may have an action for damages. *Frankle* v. *Jackson*, 30 *Fed. Rep.* 398.

The damage to contiguous property resulting from the construction of a railroad in a street which Ga. Act of December 17, 1888, contemplates, is such damage as must be compensated for by reason of that provision of the Constitution which declares that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." The ultimate and only measure of such damage is the diminished market value of the property. Market value for this or that particular use, and change in the same by reason of locating the railroad in the street, are irrelevant save as evidence tending to show general market value, that is, value in the open market without respect to any particular use. Diminished rental value for any purpose is no basis for compensation except as to its result, if any, on the general value. *Streyer* v. *Georgia Southern & F. R. Co.*, 51 *Am. & Eng. R. Cas.* 638, 90 *Ga.* 56, 15 *S. E. Rep.* 637.

In determining the damages and assessing the amount, the physical property (land and buildings) and the easement of access thereto from the street are not to be considered as having separate values, as if they were two different parcels of property, but are to be treated as parts of one and the same estate. Whether damage has been or will be done by the construction and use of the railroad depends upon whether the market value of the whole estate as one object of ownership has been or will be diminished thereby. *Streyer* v. *Georgia Southern & F. R. Co.*, 51 *Am. & Eng. R. Cas.* 638, 90 *Ga.* 56, 15 *S. E. Rep.* 637.

In an action to recover damages to a house and lot by the construction and operation of tracks in a street in close proximity to the property, the true measure of damages is the loss sustained by the nuisance, the injury from jarring the building, and the throwing of cinders and smoke upon the premises, and the depreciation of value by these causes may be considered, but not general depreciation in value from other causes, such as mere inconvenience in approaching or leaving the property, or the noise and confusion in the vicinity. *Chicago, M. & St. P. R. Co.* v. *Hall*, 90 *Ill.* 42. —FOLLOWED IN Chicago & E. I. R. Co. *v.* Hall, 8 Ill. App. 621. QUOTED IN Chicago & W. I. R. Co. *v.* Berg, 10 Ill. App. 607.

Where a company, under a city ordinance, or the statute, constructs and operates its road in a street or highway, but leaves sufficient space between the roadbed and abutting lands or lots for ordinary vehicles, teams, and travel, there is no such obstruction of access to abutting lands or lots as to permit damages for any depreciation in value thereof. *Chicago, K. & W. R. Co.* v. *Union Inv. Co.*, 56 *Am. & Eng. R. Cas.* 679, 51 *Kan.* 600, 33 *Pac. Rep.* 378.

The measure of damage for deprivation of access to property is the diminution of the value of the property occasioned by these circumstances, and not the difference between the value thereof before and after the building of the road. *Elizabethtown, L. & B. S. R. Co.* v. *Combs*, 10 *Bush* (*Ky.*) 382. —QUOTED IN Columbus, H. V. & T. R. Co. *v.* Gardner, 32 Am. & Eng. R. Cas. 243, 45 Ohio St. 309, 11 West. Rep. 264, 13 N. E. Rep. 69.

The measure of damages which a lot owner may recover is the diminution in value of his houses and lot occasioned by the location of the tracks, and the uses to which they are authorized to be put by the grant from the city authorities. If the location and operation of the road in front of the houses diminished their value, say, twenty *per centum*, then the diminution should be proportioned to their value just preceding the time at which it became generally known that the street had been selected as the line of the road. *Jeffersonville, M. & I. R. Co.* v. *Esterle*, 13 *Bush* (*Ky.*) 667, 17 *Am. Ry. Rep.* 111.

The jury should ascertain what the value of the property was just before it became generally known that the roads were to be located in front of it, and then determine what proportion of that value was taken from the houses and lot by the obstruction of the street and the annoyances incident to the movement of engines and trains of cars along and over the roads. *Jeffersonville, M. & I. R. Co.* v. *Esterle*, 13 *Bush* (*Ky.*) 667, 17 *Am. Ry. Rep.* 111.

The depreciation of the market value of adjacent property caused by a railway in the street is the most certain measure of damages to the owner. *Rosenthal* v. *Tay-*

lor, B. & H. R. Co., 79 *Tex.* 325, 15 *S. W. Rep.* 268.

But in estimating this market value it is proper to prove a particular use to which the property has been devoted, and an impaired use or loss to the business may be proved as showing the depreciation in the value of the property. *Belt Line St. R. Co.* v. *Crabtree*, 2 *Tex. App.* (*Civ. Cas.*) 579.

Where a party sues a company for damages for constructing new tracks in front of his premises, the damages are not necessarily to be measured by the proportion that the new tracks bear in number to the old ones, but may be estimated from evidence of witnesses who state in a general way that, in their opinion, the premises were damaged a certain amount. *Gulf, C. & S. F. R. Co.* v. *Necco*, (*Tex.*) 18 *S. W. Rep.* 564.

Where a railroad is laid down in a public street, the abutting property is damaged within the meaning of W. Va. Const. art. 3, § 9, to the extent of the depreciation caused by the construction and operation of the road. *Stewart* v. *Ohio River R. Co.*, 38 *W. Va.* 438, 18 *S. E. Rep.* 604.

The measure of the damages is such a sum as will make the owner whole—that is, the depreciation of the market value of the abutting property caused by the company laying its track and running trains in the street. *Stewart* v. *Ohio River R. Co.*, 38 *W. Va.* 438, 18 *S. E. Rep.* 604.

In such case, if the fair market value of the abutting property is as much immediately after the construction of the railroad as it was immediately before such improvement was made, no damages are sustained for which a recovery can be had. *Stewart* v. *Ohio River R. Co.*, 38 *W. Va.* 438, 18 *S. E. Rep.* 604.

275. Impairment of available uses of property.—The fact that a lot is rendered less valuable for the particular business for which the owner is using it, by reason of taking the street in front of it for a railroad, may be considered on the question of damages. *Muller* v. *Southern Pac. Branch R. Co.*, 83 *Cal.* 240, 23 *Pac. Rep.* 265.

Where a company builds its road, without right, along a street, the measure of damages to abutting owners is the loss and inconvenience sustained by them, in view of the use to which such land has been put during the existence of such nuisance. The fact that in this interval of time the abstract salable value of the land has been diminished does not enhance the legal measure of damages, in the absence of proof that the owner had been prevented from selling, or from turning the premises to other contemplated uses which would have been more profitable. *Hatfield* v. *Central R. Co.*, 33 *N. J. L.* 251

Where a railroad is authorized in a street, but an abutting property owner sues for damages caused by its unlawful use, his measure of damages is the impairment of the value of the use of his property during the continuance of the unlawful use of the road. The difference in the market value of the property cannot be considered. *Harmon* v. *Louisville, N. O. & T. R. Co.*, 87 *Tenn.* 614, 11 *S. W. Rep.* 703.—FOLLOWED IN Smith *v.* East End St. R. Co., 38 Am. & Eng. R. Cas. 470, 87 Tenn. 626, 11 S. W. Rep. 709.

In determining the damages to property, caused by building a track through a street in front of it, it is proper to take into consideration the purpose for which the property was used at the time. *McFadden* v. *Schill*, 84 *Tex.* 77, 19 *S. W. Rep.* 368.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Fuller, 63 Tex. 467.

Where lot owners own the fee to one half of the streets, and a railroad occupies a street so as to destroy the ordinary use of it on plaintiff's side to the middle thereof, it will be deemed as having taken the whole of his half of the street, though some five feet of it is not actually occupied, and he may recover as for the taking of the whole of his half of the street. *Hegar* v. *Chicago & N. W. R. Co.*, 26 *Wis.* 624, 1 *Am. Ry. Rep.* 35.

276. Difference in value before and after construction. — In a suit under a town ordinance providing for the payment of damages to property occasioned by constructing a railroad track, the difference in the value of the property caused by the construction of the road is the measure of damages; and this may be shown by a comparison of the sales of other property similarly situated, before and after the construction of the road, or by the difference in its rental value, if held for the purpose of renting; but if not held for that purpose, then the difference in rental value would not be a criterion. *St. Louis, V. & T. H. R. Co.* v. *Haller*, 82 *Ill.* 208.

Where the value of land is reduced by the construction of a railroad in the street,

the measure of damages is the difference between its market value before the construction and afterwards. *Chicago, P. & St. L. R. Co.* v. *Leah*, 41 *Ill. App.* 584.

In an action by an abutting owner for damages, the true measure of his damages is the value of the property immediately before and immediately after construction in the street of a railroad, and a witness should not be allowed to give his opinion as to the amount of damages, that being a question for the jury. *New Mexican R. Co.* v. *Hendricks*, (*N. Mex.*) 30 *Pac. Rep.* 901.

Where the fee to streets is in the city, the measure of compensation to be made to an abutting lot owner for constructing a railroad in the street is the difference in the value of his premises immediately before the construction of the road and their value afterwards. *In re Brooklyn El. R. Co.*, 55 *Hun* 165, 28 *N. Y. S. R.* 627, 8 *N. Y. Supp.* 78.

In ascertaining this, if the lots were before valuable for residence purposes the jury may estimate the depreciation in value caused by cuts and excavations, and the noises, bell ringing, whistle blowing, and smoke and cinders incident to opening the road. *Ft. Worth & N. O. R. Co.* v. *Pearce*, 75 *Tex.* 281, 12 *S. W. Rep.* 864.

An instruction that such damages shall be assessed as will compensate for such depreciation, if any, of said property before and after construction of defendant's road caused by same, makes it sufficiently apparent that the measure of damages is the difference in the market value of the property immediately before and after the construction of such road. *Ft. Worth & R. G. R. Co.* v. *Downie*, 82 *Tex.* 383, 17 *S. W. Rep.* 620. *Haney* v. *Gulf, C. & S. F. R. Co.*, 3 *Tex. App.* (*Civ. Cas.*) 336.

277. Difference in rental value before and after building of road.—Ordinarily, the measure of damages for the destruction of plaintiff's ingress and egress to and from his property is the difference in rental value occasioned by the destruction, though under some circumstances the recovery may be greater, and the company cannot complain of an instruction authorizing the jury to return a verdict for the difference in rental value. *Jackson* v. *Kiel*, 40 *Am. & Eng. R. Cas.* 297, 13 *Colo.* 378, 22 *Pac. Rep.* 504.

278. Difference in value with and without the railroad.—The measure of damages for a right of way across a city or town lot is the difference between the value of the whole land without the road at the time it was built and the value of the portion remaining after it is built; and in estimating this value the jury should consider all present and prospective actual damages resulting to the owner from the prudent construction and operation of the road; the effect the road will have in decreasing the value of the land for gardening purposes and for the building of stables and outhouses; the dangers occasioned by the risk from fire; the care of family and stock, as well as inconveniences caused by embankments, excavations, ditches, and obstruction to the free egress from and ingress to the premises, and from the sounding of whistles, ringing of bells, and rattling of trains. *Little Rock, M. R. & T. R. Co.* v. *Allen*, 20 *Am. & Eng. R. Cas.* 254, 41 *Ark.* 431.

Where abutting lot owners own the fee to streets, in ascertaining the compensation that shall be made for constructing a railroad in the streets, the streets should be regarded as a part of the adjoining lots, subject to the street easement, and the damages to which the lot owners are entitled is the difference in the market value of the whole property, including the lots and the street, before the road was built, and the value after it is built. *In re Prospect Park & C. I. R. Co.*, 13 *Hun* (*N. Y.*) 345; *affirmed in* 16 *Hun* 261.—QUOTED IN Re New York C. & H. R. R. Co., 15 Hun 63. REVIEWED IN Fayetteville & L. R. R. Co. *v.* Combs, 51 Ark. 324.

279. Difference in value with road as built, and with road properly built.—Where an abutting lot owner sues to recover damages for the negligent or improper manner in which a railroad is constructed in the street, his measure of damages is the difference between the value of his property with the road as constructed and its estimated value with the road properly constructed. *Cadle* v. *Muscatine Western R. Co.*, 44 *Iowa* 11. *O'Connor* v. *St. Louis, K. C. & N. R. Co.*, 5 *Am. & Eng. R. Cas.* 324, 56 *Iowa* 735, 10 *N. W. Rep.* 263.

280. Tenant's loss of profits.—The measure of recovery of a tenant for injury to his business by the location and operation of a railroad in the street in front of his place of business is limited to the loss of probable profits of his business from the time of the construction of the road

and its operation on the street to such time as the tenant might, by the use of reasonable diligence, have procured another place of business equally eligible for his purposes, including a reasonable time for removal thereto. *Penn Mut. L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

281. Measure of damages in actions of trespass.—Where abutting lot owners merely sue a company in trespass for breaking and entering a close by running trains over said close, upon land which has been condemned and opened by the city, they cannot recover compensation for the use of the track on the theory that they own it; neither is the measure of damages dependent upon the value of the property, or the sum awarded in the condemnation proceeding by the city. *Baltimore & O. R. Co.* v. *Boyd*, 63 *Md.* 325.

The damages recoverable cannot exceed the difference between what would have been the rental value of the premises (during the continuance of the trespass, down to the commencement of the action), in case there had been no railroad on the street, and their actual rental value with the railroad constructed and operated as it was. *Blesch* v. *Chicago & N. W. R. Co.*, 43 *Wis.* 183, 17 *Am. Ry. Rep.* 90.

A lot owner sued alleging that defendant company constructed its road on an embankment in the street in front of his lot, and thereby obstructed access to the same and diminished its value in the sum of $1000, and that he sold his property, some time after the road was built, for $1000 less than he otherwise could have procured for it. *Held*, that the action must be treated as one for damages for a continuing trespass. *Carl* v. *Sheboygan & F. du L. R. Co.*, 46 *Wis.* 625, 21 *Am. Ry. Rep.* 412. — REVIEWED IN Uline *v.* New York C. & H. R. R. Co., 23 Am. & Eng. R. Cas. 3, 101 N. Y. 98, 4 N. E. Rep. 536.

But in such an action plaintiff can recover nothing more than the damages to the property resulting from the trespass between the building of the road and the commencement of the action, and such a recovery will be no bar to a future recovery by the grantee for subsequent damages caused by maintaining the road; therefore evidence of the permanent depreciation of the property is not admissible. *Carl* v. *Sheboygan & F. du L. R. Co.*, 46 *Wis.* 625, 21 *Am. Ry. Rep.* 412.

But the measure of damages in such an action is not the mere value of the use of that part of the street occupied by the railroad, but includes the difference between the value of the use of the whole lot without the railroad and its value with the road in the street, with any other special and temporary damages sustained by plaintiff. *Carl* v. *Sheboygan & F. du L. R. Co.*, 46 *Wis.* 625, 21 *Am. Ry. Rep.* 412.

282. Elements of damages, generally.* — A company built its track over a street under an ordinance requiring it to erect and maintain a suitable bridge so as to allow the use of the full width of the street. The street was afterwards widened, the city taking property on each side from the company for that purpose. *Held*, that the cost of reconstructing the bridge was an element of damages to be allowed to the company. *Kansas City* v. *Kansas City Belt R. Co.*, 47 *Am. & Eng. R. Cas.* 157, 102 *Mo.* 633, 14 *S. W. Rep.* 808.

In a suit for damages to lots it is not error in the court to exclude from the consideration of the jury such damages, if any, as result from the grant by the city of the right to use the street, made prior to the acquisition of the land by plaintiff. *Morrow* v. *St. Louis, A. & T. R. Co.*, 81 *Tex.* 405, 17 *S. W. Rep.* 44.

283. Cost of removal.—Where a railroad is liable to a property owner by reason of interruption to his business, he is, if he chooses to remain and submit to the interruption and loss of profits, entitled to recover, as damages, the necessary cost of avoiding such loss by a removal. *St. Louis, V. & T. H. R. Co.* v. *Capps*, 72 *Ill.* 188.

284. Deprivation of access, light, and air.—It is not necessary that a portion of a lot should actually have been taken by a company to entitle the owner to damages for the obstruction; but if access to and egress from the property have been cut off by the railroad, the owner suffers a peculiar and special injury for which he is entitled to compensation. *Leavenworth, N. & S. R. Co.* v. *Curtan*, 56 *Am. & Eng. R. Cas.* 636, 51 *Kan.* 432, 33 *Pac. Rep.* 297.

Where a railroad is so located in a street as to deprive an abutting owner of the

* Elements of damage where lots are taken, see note, 14 AM. & ENG. R. CAS. 175.

Damages for closing street by construction of railroad, see 51 AM. & ENG. R. CAS. 628, *abstr.*

means of ingress and egress with ordinary vehicles on either side of the road when trains are passing or standing on the street, such owner is entitled to recover damages. *Elizabethtown, L. & B. S. R. Co.* v. *Combs*, 10 *Bush* (*Ky.*) 382.

In estimating damages caused to a lot by the construction and maintenance of a railway in the street, but beyond the centre line thereof, only such injuries to the property should be considered as proximately result from interference with the appurtenant easement for purposes of access, light, and air which the owner has in that part of the street. *Lamm* v. *Chicago, St. P., M. & O. R. Co.*, 46 *Am. & Eng. R. Cas.* 42, 45 *Minn.* 71, 47 *N. W. Rep.* 455.

Where a railroad is authorized in a street, but the company raises an embankment several feet high, the measure of damages to an abutting owner is the depreciation of his property by reason of the embankment. It is error to take into account plaintiff's loss of business and the inconvenience suffered by him from noise and smoke incident to running the cars. *Reming* v. *New York, L. E. & W. R. Co.*, 1 *N. Y. S. R.* 733.—DISTINGUISHING Uline *v.* New York C. & H. R. R. Co., 101 N. Y. 98.

A company owned corner lots, diagonally opposite each other, at the intersection of two public streets. It built abutments on its own land at each corner, and, with the consent of the city, threw a bridge from one abutment to the other, the height of the bridge above the street being twenty-three feet. The bridge overhung no land except what was included within the limits of the streets. Plaintiff owned a dwelling house situated at one of the corners. *Held*, that the only element of damages was the additional servitude, if any, imposed upon plaintiff's property, such, for example, as the exclusion of light and air from his dwelling. *Jones* v. *Erie & W. V. R. Co.*, 151 *Pa. St.* 30, 25 *Atl. Rep.* 134.

285. Injuries suffered by plaintiff in common with others.*—An instruction that the abutting property owner is not entitled to recover damages which he or his tenants may have sustained, or will sustain, by reason of any annoyance, inconvenience, or loss suffered by them in common with the rest of the public, by reason of the construction and operation of said track—*held*, proper, the jury being also instructed that depreciation in the value of plaintiff's property on such account would entitle him to recover. *Cook* v. *Chicago, M. & St. P. R. Co.*, 83 *Iowa* 278, 49 *N. W. Rep.* 92. — DISTINGUISHING McClean *v.* Chicago, I. & D. R. Co., 67 Iowa 570.

In an action for damages for constructing a switch line along a street it is proper to charge the jury: "In estimating the damages you will not take into consideration either the benefits or injuries to plaintiff's property which he may receive in common with the community generally where said property is situated, resulting from operating the road, and not peculiar to him and connected with his ownership and enjoyment of said property." *Morrow* v. *St. Louis, A. & T. R. Co.*, 81 *Tex.* 405, 17 *S. W. Rep.* 44 —FOLLOWING Gulf, C. & S. F. R. Co. *v.* Fuller, 63 Tex. 467.

286. Injuries to contiguous property.— Depreciation in the value of real estate, not abutting on a railroad, caused by crossing the street leading thereto with the railroad track, is not damages recoverable under Mass. Rev. St. ch. 39, § 56. *Prop'rs of Locks, etc.*, v. *Nashua & L. R. Corp.*, 10 *Cush.* (*Mass.*) 385. — DISTINGUISHED IN Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504. REVIEWED IN Leroy & W. R. Co. *v.* Ross, 40 Kan. 598.

In proceedings to condemn for railroad purposes two city lots the owner of which also asserted title of the entire block, which was vacant and unoccupied—*held*, that he was not entitled to compensation for injury resulting to other lots than the two touched by the railroad, although the whole comprised one body or block of land. *Wilcox* v. *St. Paul & N. P. R. Co.*, 35 *Minn.* 439, 29 *N. W. Rep.* 148.—FOLLOWED IN Koerper *v.* St. Paul & N. P. R. Co., 42 Minn. 340.

In assessing damages to the owner of land abutting on a public street, for the construction and maintenance of a railroad in that part of the street opposite plaintiff's premises, damages are not, in general, to be included for the construction and maintenance of the railroad through other parts of the street. *Demueles* v. *St. Paul & N. P. R. Co.*, 44 *Minn.* 436, 46 *N. W. Rep.* 912. —FOLLOWING Adams *v.* Chicago, B. & N. R. Co., 39 Minn. 286.

287. Noise, vibration, smoke, sparks, cinders, etc. — The use of a street may be granted to railroads without

* See also *ante*, **214-216.**

endangering the street by obstructions or embankments, yet if the use of locomotives inflicts injury upon those who live on the street, by throwing smoke through their houses, or by shaking them or breaking the walls, and by the noise and screeching of whistles and engines, the legislative right to run over the street does not make such acts harmless, and the injury inflicted upon the legal rights of the parties is not *damnum absque injuria*. But the evidence should be limited to actual damage. The right to use the street with reasonable obstruction in the passage of trains is permitted by law, and is not an element of damage, nor is the jolting over the rails an element, nor the apprehension of the safety of children, nor are possibilities in cases of sickness, nor any inconvenience to visitors, not obstructing ingress or egress, nor any fanciful or speculative damages or sentimental injuries, elements of damage. But the damage which the law recognizes must be actual, tangible, and determinable by proof. And the depreciation of the property not only from obstructions to access, but by smoke and injury to walls, and traceable as effect from cause, and the like, may be inquired into to form the total of the injury. (McCay, J., dissenting.) *South Carolina R. Co.* v. *Steiner*, 44 *Ga.* 546, 3 *Am. Ry. Rep.* 86.—CRITICISED IN Colorado C. R. Co. *v.* Mollandin, 4 Colo. 154.

Depreciation in the value of property by reason of the construction and operation of a railroad through an adjacent street, or annoyance from noise necessarily attending the same, is no ground for an action by the lot owner; nor is an annoyance from smoke and fire, unless he is damaged by their actual contact with his premises. *Cosby* v. *Owensboro & R. R. Co.*, 10 *Bush* (*Ky.*) 288.

Damages may be recovered for the diminution of the value of adjacent property by smoke, sparks, cinders, cracking of the walls of houses, etc. If the tracks have been so located as unreasonably to obstruct the abutting lot owner's means of ingress and egress over the street to and from his lot, or if his houses have been injured by having smoke, sparks, or cinders thrown or blown into or upon them, or if their walls have been cracked by the rapid movement of heavy trains, he is entitled to recover for the damages directly resulting therefrom. *Jeffersonville, M. & I. R. Co.* v. *Esterle* 13 *Bush* (*Ky.*) 667, 17 *Am. Ry. Rep.* 111.

Damage from smoke, soot, or fire from locomotives thrown or blown into or against adjacent houses will entitle the owner to recover therefor. *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 *Bush* (*Ky.*) 382.

In an action by a landowner against a company that had constructed its road on a public street immediately in front of his premises, it appeared that the charter authorized the company to construct its road to any given point in the town. *Held*, that the discretion of the directors in so locating the road could not be inquired into; and that, in the absence of any express provision therefor in the charter, the company was not liable in damages for the annoyance arising from the noise, cinders, and smoke, and the hindrance to the passage of carriages. *Struthers* v. *Dunkirk, W. & P. R. Co.*, 87 *Pa. St.* 282.—REVIEWED IN Philadelphia, G. & N. R. Co. *v.* Pennsylvania S. V. R. Co., 16 Phila. (Pa.) 636.

The operation of a railroad on land taken by eminent domain by the railroad and abutting on a public city street, although by reason of smoke and noise it is an annoyance, diminishing the value of houses on the other side of the street, is nevertheless *damnum absque injuria*, for which the owners of such houses are not entitled to compensation under section 8, art. 16, of the Pennsylvania Constitution, providing for compensation where private property is taken, injured, or damaged. *Pennsylvania R. Co.* v. *Lippincott*, 30 *Am. & Eng. R. Cas.* 399, 116 *Pa. St.* 472, 8 *Cent. Rep.* 818, 9 *Atl. Rep.* 871, 19 *W. N. C.* 513.—DISTINGUISHING Pusey *v.* Allegheny, 98 Pa. St. 522; Pittsburgh Junction R. Co. *v.* McCutcheon, 18 W. N. C. 527; Pennsylvania R. Co.'s Appeal, 18 W. N. C. 418; Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352. QUOTING Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. (Pa.) 71.—DISTINGUISHED IN Pennsylvania S. V. R. Co. *v.* Walsh, 38 Am. & Eng. R. Cas. 466, 124 Pa. St. 544. FOLLOWED IN Pennsylvania R. Co. *v.* Marchant, 33 Am. & Eng. R. Cas. 116, 119 Pa. St. 541; Dooner *v.* Pennsylvania R. Co., 142 Pa. St. 36.

The mere fact that horses in approaching plaintiff's dwelling might be frightened at the passage of trains over a bridge will not make the bridge an obstruction to access to plaintiff's premises; and neither this fact nor the exposure to noise, smoke, dust, etc., will entitle plaintiff to recover damages under the Constitution making persons

or corporations exercising the right of eminent domain liable to make "just compensation for property taken, injured, or destroyed by the construction or enlargement of their works." *Jones* v. *Erie & W. V. R. Co.*, 56 *Am. & Eng. R. Cas.* 664, 151 *Pa. St.* 30, 25 *Atl. Rep.* 134.

288. Obstruction of the street.— On the assessment of damages to an adjoining lot owner, caused by the establishment of a side track in a public street, it is error to exclude from the estimate of damages the obstruction of the street from the necessary running of trains. *Mix* v. *Lafayette, B. & M. R. Co.*, 67 *Ill.* 319.

The ordinance of a town prohibited the obstruction of its streets by trains for more than fifteen minutes. *Held*, not to legalize such obstruction for that length of time, so as to exclude it from the estimate of damages to contiguous property which might be injuriously affected thereby. *Mix* v. *Lafayette, B. & M. R. Co.*, 67 *Ill.* 319.

289. Overflow of water. — If the mere construction unlawfully of a railroad in front of one's lot, on his side of the street, necessarily and without reference to any future use of the railroad immediately lessens the value of the lot, the owner may recover for such diminution in value; and if it causes the water to stand on his lot, and run into his cellar and well, though that may not occur for some time, he may recover for it. *Adams* v. *Hastings & D. R. Co.*, 18 *Minn.* 260 (*Gil.* 236).

290. Reduction of rental value.* —Reduction in rental value is a recognized element of annual damage in all cases of injuries to abutting owners from the misuse of highways. *Grand Rapids & I. R. Co.* v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich.* 393, 11 *N. W. Rep.* 212.

Where an abutting owner sues for damages for the wrongful appropriation of an alley along his property, but there is nothing to show that the alleged wrongful act of the defendant caused any permanent injury to his property, the proper measure of damages is the difference between its fair rental value with the railroad track as constructed and its rental value without such track. *Carli* v. *Union Depot, St. R. & T. Co.*, 32 *Minn.* 101, 20 *N. W. Rep.* 89. — APPROVING Brakken *v.* Minneapolis & St. L. R. Co., 29 Minn. 41, 31 Minn. 45.

291. Various inconveniences not reparable in damages. — The plaintiff cannot recover damages for such annoyance as unavoidably results from the lawful use of the defendant's road, nor by reason of loud and profane swearing, distinctly audible in plaintiff's dwelling, in the neighborhood where defendant loads and unloads its cars, when it is not shown that the profanity complained of is practised by persons employed by defendant. *Neitzey* v. *Baltimore & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 553, 5 *Mackey* (*D. C.*) 34.

In an action for damages against a company which carried granite from its quarry to the main line of a railroad by means of a railroad of its own, which passed through the street of a village, and by reason of which it was alleged that injury resulted to the owners of property abutting on the street, danger of possible collision of animals and persons with the trains running on the track along the street, or of persons or animals being thereby frightened, were not elements of damages. *Guess* v. *Stone Mountain G. & R. Co.*, 28 *Am. & Eng. R. Cas.* 236, 72 *Ga.* 320.

The difficulty of crossing a railroad track in a public street, the detention by trains, the frightening of horses, the danger to persons crossing the track, and the like, are inconveniences which property owners on the street have to suffer, and for which they cannot recover in a suit for damages. *Stone* v. *Fairbury, P. & N. W. R. Co.*, 68 *Ill.* 394. —CRITICISED IN Adams *v.* Chicago, B. & N. R. Co., 36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493. QUOTED IN Lake Shore & M. S. R. Co. *v.* Cincinnati, S. & C. R. Co., 30 Ohio St. 604. REVIEWED IN Spencer *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 406.

292. Benefits. — In an action by the owner of abutting property against a company, for damage to the freehold and for diminishing the annual value of the premises for use, there can be no recovery as to the freehold where the market value has been increased; but as to the latter cause of action, there may be a recovery notwithstanding such increase in the market value. A wrongdoer cannot set off increase of market value caused by his wrongful act against loss of rents and profits occasioned thereby. *Davis* v. *East Tenn., V. & G. R. Co.*, 50 *Am. & Eng. R. Cas.* 137, 87 *Ga.* 605, 13 *S. E. Rep.* 567.

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*See also *ante*, **266**.

Where a lot is divided by a street, benefits to one part cannot be set off against damage to the other part on the other side of the street, caused by laying railroad tracks in the street. *Pittsburg, Ft. W. & C. R. Co.* v. *Reich*, 101 *Ill.* 157.

If the construction and operation of a railroad and side track along a public street in front of a house and lot will not have the effect of decreasing the market value of the property, but the same will sell for more money in the open market than if the tracks of the railroad had not been constructed and operated, there will be no damages and no cause of action. *Chicago & G. W. R. Co.* v. *Wedel*, 144 *Ill.* 9, 32 *N. E. Rep.* 547.

The measure of damages is the difference between the fair market value of the property immediately before laying the track and the like value immediately thereafter, irrespective of the benefit that may have resulted to the property from the laying down of such track. *Cook* v. *Chicago, M. & St. P. R. Co.*, 83 *Iowa* 278, 49 *N. W. Rep.* 92.

Benefits arising directly from or out of an unauthorized act may sometimes be considered in the determination of the sum to be recovered by the injured party, but in all cases these benefits must be direct and immediate. They must be confined to the proximate consequences of the act complained of, and be of like kind with the opposite injuries for which the recovery is sought. If the railways afford the complaining lot owner increased or additional facilities for ingress and egress to and from his houses and lot, or for the movement of articles in which he may deal, or supplies which it is necessary that he shall procure, this benefit may be taken into consideration in estimating the damages he has sustained. *Jeffersonville, M. & I. R. Co.* v. *Esterle* 13 *Bush* (*Ky.*) 667, 17 *Am. Ry. Rep.* 111.

d. Consequential, Prospective, and Nominal Damages.

293. Consequential damages. — Where, under charter authority, a company carries a street over its tracks by bridge and embankments, an abutting owner may recover consequential damages in trespass, but whether he is appreciably damaged is a question for the jury; the company is not necessarily a trespasser. *Nicholson* v. *New York & N. H. R. Co.*, 22 *Conn.* 74.

The guaranty of a constitution that private property shall not be "taken" or "appropriated" without compensation does not extend to mere consequential damages resulting to property abutting on a street from a change of grade of the street, or other improvement thereof not constituting a diversion of the street for street purposes, by municipal authorities acting within the scope of their charter powers, but only to a trespass upon or physical invasion of the abutting property. *Selden* v. *Jacksonville*, 28 *Fla.* 558, 10 *So. Rep.* 457.

Where the fee of a street is in a municipal corporation, and such corporation grants to a railroad company the right to construct its track and operate its road thereon, such company is not liable to an abutting lot owner for consequential damages unless they result from the negligent or improper construction of the road. *O'Connor* v. *St. Louis, K. C. & N. R. Co.*, 5 *Am. & Eng. R. Cas.* 324, 56 *Iowa* 735, 10 *N. W. Rep.* 263.

A company having authority from the city may construct and operate its road over streets and public grounds without compensation to the abutting lot owners for the use of the same, and without being liable to such lot owners for consequential damages arising from noise, smoke, offensive vapors, sparks, fires, shaking of the ground, and other inconveniences and annoyances, where the railroad is operated in a legal and proper manner; and in fact it may so construct and operate its road without being liable to said lot owners for any damages, where the road is constructed and operated in a legal and proper manner; but where the property is a street or highway, the railroad company will be liable to any person who may receive actual injury from the illegal or unnecessary blocking up or obstructing of such street or highway by the railroad company, whether the obstruction be permanent or only temporary. *Atchison & N. R. Co.* v. *Garside*, 10 *Kan.* 552. — APPROVED IN Central Branch U. P. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. Rep. 276. FOLLOWED IN Central Branch U. P. R. Co. *v.* Twine, 23 Kan. 585. QUOTED IN Ottawa, O. C. & C. G. R. Co. *v.* Larson, 40 Kan. 301.

As against abutting owners who have no title to the bed of a city street, it is competent for the legislature to authorize the construction of a horse or steam surface railroad therein without making compensation to them for consequential damages

arising from a reasonable use of the street for purposes of such a railroad, not exclusive in its nature, and when the road is substantially on the same grade as the street itself and passage across and through the street is left free and unobstructed for the public use. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238. *Chapman* v. *Albany & S. R. Co.*, 10 *Barb.* (*N. Y.*) 360.—APPROVING First Baptist Church *v.* Utica & S. R. Co., 6 Barb. 313. DISAPPROVING Fletcher *v.* Auburn & S. R. Co., 25 Wend. (N. Y.) 462. QUOTING Drake *v.* Hudson River R. Co., 7 Barb. 508. REVIEWING Lexington & O. R. Co. *v.* Applegate, 8 Dana (Ky.) 289.—QUOTED IN Morris & E. R. Co. *v.* Mayor, etc., of Newark, 10 N. J. Eq. 352.—*Louisville & F. R. Co.* v. *Brown*, 17 *B. Mon.* (*Ky.*) 763.—FOLLOWING Wolfe *v.* Covington & L. R. Co., 15 B. Mon. 409. QUOTING AND APPROVING Chapman *v.* Albany & S. R. Co., 10 Barb. 360. REVIEWING Lexington & O. R. Co. *v.* Applegate, 8 Dana 289.—APPROVED IN Cosby *v.* Owensboro & R. R. Co., 10 Bush 288. FOLLOWED IN Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332. REVIEWED IN Newport & C. Bridge Co. *v.* Foote, 9 Bush 264; Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush 382.—*Morris & E. R. Co.* v. *Mayor, etc., of Newark*, 10 *N. J. Eq.* 352.—APPROVING Radcliff *v.* Mayor, etc., of Brooklyn, 4 N. Y. 195. QUOTING Chapman *v.* Albany & S. R. Co., 10 Barb. 360.—QUOTED IN Beseman *v.* Pennsylvania R. Co., 33 Am. & Eng. R. Cas. 107, 50 N. J. L. 235; Spencer *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 406.

Where, however, for ordinary street uses, the street is practically and substantially closed against such owners, they are entitled to compensation. *Reining* v. *New York, L. & W. R. Co.*, 50 *Am. & Eng. R. Cas.* 205, 128 *N. Y.* 157, 28 *N. E. Rep.* 640, 40 *N. Y. S. R.* 401; *affirming* 35 *N. Y. S. R.* 731, 13 *N. Y. Supp.* 238.

It is not error to refuse to give a charge that plaintiff could only recover when some actual physical damage was done to the lot by the construction of the road, and that the jury should reject from consideration all claim for damages based upon probable injury to occur from fire, from noise of trains, from probable running off the track of cars on the premises of plaintiff, and from the probable scaring of horses. *Gulf, C. & S. F. R. Co.* v. *Bock*, 63 *Tex.* 245.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

294. Prospective damages.—A right of action accrues to a lot owner for damages for any injury to the lot caused by the location and operation of a railroad in the street in front thereof, from the time of the completion of the road and its operation, in which he may recover prospective as well as present damages. But such owner is not bound to sue immediately, and defendant cannot complain that he waits until his damages become susceptible of absolute proof before bringing his action, instead of resorting to prospective damages. *Penn Mut. L. Ins. Co.* v. *Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

Where the wrong done by a railroad company is temporary in its nature, as in unnecessarily leaving cars on its track, or while engaged in the work of laying down its track, something existing to-day and not to-morrow, fluctuating in extent and depending on the ever-repeated action of the company, only such damages as have fully accrued prior to the commencement of the suit are recoverable, and none based upon any presumed continuance or repetition of the wrong. *Central Branch U. P. R. Co.* v. *Twine*, 23 *Kan.* 585.—DISTINGUISHED IN Ft. Scott, W. & W. R. Co. *v.* Fox, 40 Am. & Eng. R. Cas. 331, 42 Kan. 490, 22 Pac. Rep. 583.

But where the wrong is of a permanent nature, and springs from the manner in which the track as fully completed affects approach to the lot, then, notwithstanding the right which the state retains to control the manner of use of a highway by a railroad company, even, if deemed necessary, to compel an entire removal of its track, the lot owner may treat the act of the company as a permanent appropriation of the right of access to his lot, and recover as damages the consequent depreciation in value of the lot. *Central Branch U. P. R. Co.* v. *Twine*, 23 *Kan.* 585.—DISTINGUISHED IN Inter-State Con. R. T. R. Co. *v.* Early, 46 Kan. 197.

Where the action is to recover damages for laying a track in a street, in the absence of any ordinance fixing the grade of the street, and where the evidence shows that the existing condition of the street is but temporary, the fact that the track is a little

above the surface of the street should not be regarded as an intent permanently to establish a nuisance in the street, and the recovery should be limited to the actual damages up to the commencement of the action. *Smith* v. *Kansas City, St. J. & C. B. R. Co.*, 98 *Mo.* 20, 11 *S. W. Rep.* 259.—DISTINGUISHED IN Wallace *v.* Kansas City & S. R. Co., 47 Mo. App. 491. FOLLOWED IN Gaus & S. Mfg. Co. *v.* St. Louis, K. & N. R. Co., 113 Mo. 308. REVIEWED IN Taylor *v.* Kansas City Cable R. Co., 38 Mo. App. 668.

In an action to recover damages resulting from the raising of the grade of a street by a railroad company, the abutting owner is not entitled to recover for the permanent diminution in the value of his property, but only for such damages as he has sustained prior to the commencement of the action. *Ottenot* v. *New York, L. & W. R. Co.*, 43 *Am. & Eng. R. Cas.* 129, 119 *N. Y.* 603, 2 *Silv. App.* 469, 23 *N. E. Rep.* 169, 28 *N. Y. S. R.* 483; *reversing* 19 *N. Y. S. R.* 465, 2 *N. Y. Supp.* 722.—FOLLOWING Uline *v.* New York C. & H. R. R. Co., 101 N. Y. 98.—DISTINGUISHED IN Reining *v.* New York, L. & W. R. Co., 128 N. Y. 157, 40 N. Y. S. R. 392. FOLLOWED IN Rauenstein *v.* New York, L. & W. R. Co., 120 N. Y. 661, mem.

295. Nominal damages. — Where a railroad is authorized in a street, but the company exceeds its authority in the use of the road, an abutting owner may recover damages; but where the abuses have been only occasional and no particular damage is shown, he is entitled only to nominal damages. *Iron Mountain R. Co.* v. *Bingham*, 38 *Am. & Eng. R. Cas.* 444, 87 *Tenn.* 522, 4 *L. R. A.* 622, 11 *S. W. Rep.* 705.

V. STATE AND MUNICIPAL REGULATION.

*. *In General.*

296. Statutory provisions to insure safety.*—A company with its yards on both sides of a street, connected by tracks which it has owned and operated for many years without objection, is invested with the right to the reasonable use and enjoyment of its rights of way, and its yards on opposite sides of the street, with the right to cross the streets with its engine and cars in a reasonable and proper manner; and these rights the municipality has no power to take away or destroy by virtue of any inherent power or legislative grant of power. *Mayor, etc., of Birmingham* v. *Alabama G. S. R. Co.*, 98 *Ala.* 134, 13 *So. Rep.* 141.

Maine Act of Feb. 4, 1872, ch. 32, which prohibits any company from constructing or maintaining a track, or running engines or cars, on any street or highway so near any depot of any other railroad as to endanger the safe and convenient access to such depot and the use of it for ordinary depot purposes, being only a police regulation for the safety of the public, no constitutional objection exists against its application to a road chartered before its passage. *Portland, S. & P. R. Co.* v. *Boston & M. R. Co.*, 65 *Me.* 122, 10 *Am. Ry. Rep.* 117.

As to the duties and liabilities of railroad companies in Tennessee, see *East Tenn., V. & G. R. Co.* v. *Scales*, 2 *Lea* (*Tenn.*) 688. *East Tenn., V. & G. R. Co.* v. *Swaney*, 5 *Lea* (*Tenn.*) 119. *Nashville & C. R. Co.* v. *Thomas*, 5 *Heisk.* (*Tenn.*) 262. *Collins* v. *East Tenn. & V. R. Co.*, 9 *Heisk.* (*Tenn.*) 841. *Louisville & N. R. Co.* v. *Connor*, 9 *Heisk.* (*Tenn.*) 19.

297. Municipal regulation, generally.—(1) *In general.*—The power of the city of Birmingham over railroads is limited by its charter to the right "to regulate and control the running of cars or locomotives upon or across the streets, avenues, or alleys of said city, and to regulate and control the speed of such cars, engines, or trains within the corporate limits of said city," and as is provided by Ala. Code, § 1519. *Mayor, etc., of Birmingham* v. *Alabama G. S. R. Co.*, 98 *Ala.* 134, 13 *So. Rep.* 141.

Power in a city charter to regulate the moving of cars across its streets implies the right in the company to move cars, and confers the authority only to prescribe the manner in which they may be moved. The city cannot deny the right of the company to cross the streets in the legitimate exercise of the demands of its lawful business, but may forbid its stopping its engines and cars across a street in making up a train. *Mayor, etc., of Birmingham* v. *Alabama G. S. R. Co.*, 98 *Ala.* 134, 13 *So. Rep.* 141.

The power to regulate does not imply the power to prohibit. Incident to the ownership and legitimate sue of its property, the company has the right, whenever reasonably

*Statutory provisions to prevent accidents on railroads, see note, 13 L. R. A. 185.

demanded by the needs of its business, to distribute its cars throughout its yards, and for that purpose to cross a street, subject to reasonable municipal regulation and control as to the manner of crossing. *Mayor, etc., of Birmingham* v. *Alabama G. S. R. Co.*, 98 *Ala.* 134, 13 *So. Rep.* 141.

Township authorities have a special interest in its highways, beyond that of the public at large, and may properly file a bill in their corporate name to restrain an unwarranted, unjustifiable, and injurious interference with the highways, threatening special injury to the township, and of such a character and extent as to call for the preventive aid of equity. *Greenwich* v. *Easton & A. R. Co.*, 24 *N. J. Eq.* 217; *affirmed in* 25 *N. J. Eq.* 565.

An order of the board of public works of a city requiring a company, on twenty-five days' notice, to tear up a part of its track, which would prevent it from running trains to its general depot and continuously over its lines beyond such depot, as it had done without objection or interruption for eighteen years, is beyond the authority of said board. *Sinnott* v. *Chicago & N. W. R. Co.*, 81 *Wis.* 95, 50 *N. W. Rep.* 1097.

By 16 Vict., ch. 169, municipalities are authorized to pass by-laws sanctioning the construction of branch railways of limited length, "under such restrictions as the councils may see fit." Acting under this statute, a city passed a by-law authorizing a railway to construct a branch line on and across certain streets. When the works were nearly completed, the corporation discovered that the probable effect of the works if completed in the manner proposed would be to produce a large body of stagnant water, whereupon it required the company to fill in the space, or to desist from the completion of the works, with which requirements the company refused to comply, and the corporation filed a bill seeking to compel the company to perform the work according to the views of the corporation. The court refused the relief prayed and dismissed the bill with costs. *Kingston* v. *Grand Trunk R. Co.*, 8 *Grant's Ch.* (*U. C.*) 535.

A municipal corporation filed a bill seeking to restrain a company from trespassing by running its track along a street without the consent of the municipality, thus impeding traffic, in contravention of the Railway Act (C. S. C. ch. 66, § 12, subsec. 1), *Held*, that by virtue of the municipal act there is such power of management and control bestowed upon municipalities, and such a responsibility cast upon them, as to justify them in intervening on behalf of the inhabitants for the preservation of their rights. *Fenelon Falls* v. *Victoria R. Co.*, 29 *Grant's Ch.* (*U. C.*) 4.

(2) *In Illinois—Chicago.*—Under Illinois Act of 1872, art. 5, § 62, relating to the incorporation of cities and villages, the whole subject of the control of railroads in streets is committed to the local government of such cities and villages. They are empowered to enforce police regulations as to the running of trains, and to compel companies to raise or lower their tracks so as to conform to established grades, and when the tracks run lengthwise on any street, alley, or highway, to keep the track on a level therewith. *Cairo & V. R. Co.* v. *People*, 92 *Ill.* 170.—DISAPPROVED IN Moundsville *v.* Ohio River R. Co., 37 W. Va. 92. DISTINGUISHED IN Metropolitan City R. Co. *v.* Chicago, 2 Am. & Eng. R. Cas. 291, 96 Ill. 620.

A court of chancery will not assume jurisdiction to control the use by a railroad company of a street in an incorporated city, or the manner in which the track is laid, or in which the business of the road is operated thereon, for the reason that this power is conferred by law upon the corporate authorities of the city, and the courts cannot supervise the exercise of such power at the suit of the people. *Cairo & V. R. Co.* v. *People*, 92 *Ill.* 170.

Under Ill. General Incorporation Law, art. 5, § 1, clauses 9 and 25, the common councils of cities incorporated under that law are vested with the exclusive control and regulation of the streets of their cities, and with the power to direct and control the location of railroad tracks within the limits of their cities; and being inconsistent with the ninth clause of section 1, article 5, of the amended charter of the city of Chicago, adopted in 1867, must prevail over the latter, which must be regarded as not in force in that city. *Chicago D. & C. Co.* v. *Garrity*, 115 *Ill.* 155, 3 *N. E. Rep.* 448.

The power of the city council to control the location of tracks in streets in this respect is subject to the limitation imposed by the ninetieth clause of section 1, article 5, of the above act, making a petition by the owners of the land representing more than

one half of the frontage of the street necessary to the grant of the right to lay a track in any street. *Chicago D. & C. Co.* v. *Garrity*, 115 *Ill.* 155, 3 *N. E. Rep.* 448.—FOLLOWING Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 522.

Ill. Act of 1872, relating to cities and villages, confers upon them full authority to regulate the use of streets, to provide for and change the location, grade, and crossings of railroads, to require railroad companies to fence their roads, to construct cattle-guards and crossings of streets, to keep the same in repair, to maintain flagmen at such crossings, to compel the roads to raise or lower their tracks, etc. This invests incorporated cities and villages with exclusive authority over the matter of railroad crossings over streets and highways within their limits, and excludes the jurisdiction of the county or town authorities. *Cook County* v. *Great Western R. Co.*, 119 *Ill.* 218, 10 *N. E. Rep.* 564.

(3) *In Louisiana—New Orleans.*—Under the power expressly granted to the city of New Orleans to regulate the use of its streets by railways, a discretion is vested as to method and means of regulation which will not be judicially interfered with, unless it is manifestly unreasonable and oppressive. *State* v. *Cozzens*, 46 *Am. & Eng. R. Cas.* 168, 42 *La. Ann.* 1069, 8 *So. Rep.* 268.

The power to regulate the use of streets for railway purposes is a persisting power, inhering continuously in the city government, and one council cannot, by one exercise of the power, deprive succeeding councils of the power to exercise it again when such exercise is found necessary for the public interest. *New Orleans City & L. R. Co.* v. *New Orleans*, 50 *Am. & Eng. R. Cas.* 391, 44 *La. Ann.* 728, 11 *So. Rep.* 78.

Whether or not the legislature itself possessed, under prior Constitutions, the power to grant such exclusive privileges, under the general and cautious terms of the legislative charter of the city no such power is delegated to the latter. *New Orleans City & L. R. Co.* v. *New Orleans*, 50 *Am. & Eng. R. Cas.* 391, 44 *La. Ann.* 728, 11 *So. Rep.* 78.

While valid contract rights must be respected, or only interfered with in the constitutional exercise of the power of eminent domain, claims to exclusive privileges, under grants which are *ultra vires*, cannot be permitted to thwart or obstruct the municipal discretion in the exercise of the power to regulate the streets confided to the city to be used for the benefit of the people. *New Orleans City & L. R. Co.* v. *New Orleans*, 50 *Am. & Eng. R. Cas.* 391, 44 *La. Ann.* 728, 11 *So. Rep.* 78.

298. Right of city to control and improve streets.—The fact that land is conveyed by a deed to be used "as a street" does not limit the control thereof by the municipal authorities; their authority over such street is the same as over any other street, and they may do any act not incompatible with the street use, including the granting of authority to lay a railroad track thereon. *Murphy* v. *Chicago*, 29 *Ill.* 279.

Md. Act. of 1828, ch. 135, under which Park street in the city of Baltimore was opened, does not limit the authority of the city or the legislature over the street. Under the provisions of that act it became a public highway, and as such is subject to precisely the same uses as any other street. *Hodges* v. *Baltimore Union Pass. R. Co.*, 10 *Am. & Eng. R. Cas.* 270, 58 *Md.* 603.

299. —— to erect gates at crossings.—City authorities have the power to establish such reasonable appliances in the public thoroughfares, where railroads pass, as will, by a temporary arrest of travel, protect the public from the danger of meeting passing trains. *Textor* v. *Baltimore & O. R. Co.*, 13 *Am. & Eng. R. Cas.* 635, 59 *Md.* 63, 43 *Am. Rep.* 540.

Assuming that the device of a post and beam for a gate at a street railroad crossing is an approved one, the planting of the necessary post and the temporary interruption thereby of travel near the crossing, during the period of danger, must be submitted to, notwithstanding the fact that from the propinquity of a man's residence to the railway track it may work more interruption to him than to others. *Textor* v. *Baltimore & O. R. Co.*, 13 *Am. & Eng. R. Cas.* 635, 59 *Md.* 63, 43 *Am. Rep.* 540.

Where the city, by express legislative sanction, has a right to allow the laying of tracks through the streets, upon such terms and conditions as it may prescribe, and such tracks have accordingly been laid, it must follow that whatever precautions are reasonably incident to the danger from the passing to and fro of trains in a crowded community may be lawfully adopted. *Textor* v. *Baltimore & O. R. Co.*, 13 *Am. & Eng. R. Cas.* 635, 59 *Md.* 63, 43 *Am. Rep.* 540.

300. City cannot relinquish control over streets.—The city of Quincy, under its charter and without any other legislative act, has no power to give consent, or make any contract, or adopt any ordinance conferring upon a company the use of its streets, if such consent, contract, or ordinance would be to relinquish its own control over such street, or to abandon its duty to keep the same in repair. *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 *Ill.* 563, 27 *N. E. Rep.* 192.

The right given to a company by a city council to lay down and use tracks in one of its streets is subject to the right of the general public also to use such street. The privilege thus conferred is not exclusive, but must be exercised in common with the general public. The city may still improve and control such street, and adopt all needful rules and regulations for its management and use, and it cannot alien or otherwise dispose of the same. *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 *Ill.* 563, 27 *N. E. Rep.* 192. *Hickey* v. *Chicago & W. I. R. Co.*, 6 *Ill. App.* 172.

The grant of a right of way to a company to lay its road along a street of a city is subject to the paramount right of the city to improve the street, which is continuous, and one that the city cannot barter away. *Kansas City, St. J. & C. B. R. Co.* v. *Morley*, 45 *Mo. App.* 304.

A contract between a city contractor for the construction of a sewer along a street and a company having a right of way over such street that the contractor will pay the company for supporting its tracks while he builds the sewer is a *nudum pactum* and void. *Kansas City, St. J. & C. B. R. Co.* v. *Morley*, 45 *Mo. App.* 304.

A city cannot make a valid contract with a railroad company which will interfere with its control over streets. *New York & H. R. Co.* v. *Mayor, etc., of N. Y.*, 1 *Hilt.* (*N. Y.*) 562.

A company's agreement to occupy streets subject to municipal control is a restriction upon and not a transfer of its power or franchise, and therefore is binding. *New York & H. R. Co.* v. *Mayor, etc., of N. Y.*, 1 *Hilt.* (*N. Y.*) 562.

2 *Ordinances, Generally.*

301. Power to pass, alter, and amend ordinances.—A company having submitted to construct its road through a city under an ordinance reserving the right to alter and amend must submit to such alterations, etc., as are reasonable and necessary. But such an ordinance can not be amended or repealed so as to affect essential and vested rights, or be allowed to act retrospectively, to take away rights previously granted. *Chicago, M. & St. P. R. Co.* v. *Minnesota C. R. Co.*, 10 *Am. & Eng. R. Cas.* 234, 4 *McCrary* (*U. S.*) 606, 14 *Fed. Rep.* 525.

A municipal corporation within the limits of which a company has located its road under legislative authority may, under the power to regulate the use of streets, pass ordinances regulating the use of streets by companies constructing and operating railroads within the city under legislative franchises, provided such regulations do not unreasonably interfere with the exercise of franchises conferred by the legislature. *Allen* v. *Mayor, etc., of Jersey City*, 49 *Am. & Eng. R. Cas.* 289, 53 *N. J. L.* 522, 22 *Atl. Rep.* 257.

A city has power to pass ordinances for regulating the running of trains through a city, although the places be not on the lines of streets, and is not confined to crossings. *Pennsylvania Co.* v. *James*, 81* *Pa. St.* 194.

302. Validity of ordinances, generally.—A city ordinance having for its purpose and effect the destruction of an irrevocable valuable franchise belonging to a company, and raising no question of police power, abatement of nuisance, or regulation of an admitted right, is void. *Mobile* v. *Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106.

It is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise is accompanied by acts constituting personal trespasses. *Mobile* v. *Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106.

Nor is it a valid objection to its exercise that the ordinance is *quasi* criminal in its character. *Mobile* v. *Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106.

An action was commenced against a company for violation of an ordinance in allowing cars to stand on a street beyond the limit fixed in the ordinance. This ordinance prescribed no penalty for its violation, but referred to another ordinance, but the record showed that the ordinance referred to was passed some time after the act com-

plained of. *Held*, that no recovery could be had. *Toledo, P. & W. R. Co.* v. *Chenoa*, 43 *Ill.* 209.

A street railway is subject to proper police regulations and control. A city ordinance prescribing the place and mode of construction and operation is valid, and will, after its acceptance by a railway company, be regarded as determining the control to be exercised by the city. *Clinton* v. *Clinton & L. Horse R. Co.*, 37 *Iowa* 61.

303. Must not be unreasonable.—The legislative power of Jersey City is competent to regulate by ordinance the use of the streets by railroad companies, but such regulations must not be unreasonable. If such ordinance be unreasonable only in its application to one or two streets, the entire ordinance on that account will not be vacated; the remedy is to resist its enforcement in such localities. *State* (*Pennsylvania R. Co., Pros.*) v. *Mayor, etc., of Jersey City*, 26 *Am. & Eng. R. Cas.* 400, 47 *N. J. L.* 286.

A city ordinance which prohibits digging up the surface of any street except by permission of the board of aldermen first had and obtained, as applied to a railroad company laying its track across a street within its located right of way, is not a reasonable regulation of the company's exercise of its corporate franchises. Such an ordinance in effect declares that a right conferred by the legislature shall not be exercised except by the consent of the city government, and in that respect the ordinance is illegal and void. *Allen* v. *Mayor, etc., of Jersey City*, 49 *Am. & Eng. R. Cas.* 289, 53 *N. J. L.* 522, 22 *Atl. Rep.* 257.

304. Forbidding the storing of crude petroleum. — A city ordinance making it unlawful to keep for sale any crude petroleum, or to keep any quantity beyond one barrel of such petroleum, or refined carbon oil, in any building except in the cellar, is violated where a railroad company keeps more than one barrel in its warehouse, though it is for shipment, and not held beyond a reasonable time. *Wright* v. *Chicago & N. W. R. Co.*, 27 *Ill. App.* 200.

305. Forbidding the storing of fertilizers. — A city ordinance providing that "no person or persons shall be allowed to store any guano or commercial fertilizer at any point within the corporate limits of the city" does not prevent a railroad company from storing fertilizers in its warehouse within the city, where it is authorized by law to build its road into the city and to erect necessary storehouses or warehouses. *Mayor, etc., of Athens* v. *Georgia R. Co.*, 29 *Am. & Eng. R. Cas.* 477, 72 *Ga.* 800.

And where the company has its warehouse in the suburbs of the city, where such fertilizers would be less offensive, but it moves nearer the centre of the city, and erects at great expense new depot buildings, without objection from the municipal authorities, they are estopped from asserting an ordinance against the company prohibiting the storage of such fertilizers. *Mayor, etc., of Athens* v. *Georgia R. Co.*, 29 *Am. & Eng. R. Cas.* 477, 72 *Ga.* 800.

306. Forbidding wooden structures within fire limits.—A city ordinance which forbids any person to "build any wooden house, shed, or other structure of wood, within the fire limits, * * * or repair with wood or other combustible material the roof of any building within the fire limits, or enlarge or elevate a wooden building of any kind within the fire limits," does not apply to the extension or enlargement of a brick depot building by an addition at one end, two stories high, constructed of wooden framework, resting on brick pillars, and covered on the outside with corrugated iron. But whether the city authorities might not, under the powers granted by the charter, prohibit the erection of such structure within the fire limits, is not decided. *Montgomery City Council* v. *Louisville & N. R. Co.*, 84 *Ala.* 127, 4 *So. Rep.* 626.

307. Limiting time trains may block a street.—A city has the power to forbid by ordinance any company to leave an engine, train, or car stationary on any track owned or used by it, where it is crossed by any street of the city, for a longer time than ten minutes, except in case of an accident, and it is in violation of the common law as well as of the ordinance to do so. *McCoy* v. *Philadelphia, W. & B. R. Co.*, 5 *Houst.* (*Del.*) 599.

Where a city charter confers upon the city the right and control over its public streets and upon the council the power to pass any ordinance "usual or necessary for the well-being of the inhabitants," such city has the right to limit the time trains may block a street to ten minutes. *Burger* v. *Missouri Pac. R. Co.*, 112 *Mo.* 238, 20 *S. W. Rep.* 439.

An ordinance prohibiting a train from standing directly across a public street

longer than two minutes at one time is not unreasonable. *State* (*Long, Pros.*) v. *Mayor, etc., of Jersey City*, 37 *N. J. L.* 348.

308. Prohibiting boys from riding on engines and cars. — A municipal ordinance providing that "boys and other persons unconnected with railroad trains, except passengers and other persons in the act of taking passage, are prohibited from getting off or on engines or cars at the depot or elsewhere in the city limits" is not void for want of uniformity or as being unreasonable. *Bearden* v. *Madison*, 73 *Ga.* 184.

The court will not presume that the municipal authorities will give an unreasonable construction to such an ordinance, so as to prevent those having relatives or friends arriving or departing on trains from entering thereon to see after their safety or comfort. *Bearden* v. *Madison*, 73 *Ga.* 184.

A general charter power to pass all laws and ordinances that the municipal authorities may consider necessary for the preservation of the health, peace, prosperity, and security of the citizens of said city, not inconsistent with the Constitution and laws of the state, would authorize the passage of such an ordinance. *Bearden* v. *Madison*, 73 *Ga.* 184.

309. Prohibiting obstruction of streets by cars.—An ordinance providing that "no person shall put or cause to be put in any street, sidewalk, or other public place within the city limits, any dust, dirt, filth, shavings, or other rubbish or obstructions of any kind" will include the obstruction of a street by a company with its cars. *Illinois C. R. Co.* v. *Galena*, 40 *Ill.* 344.

The legislative charter of a city, authorizing the adoption of ordinances to prevent the incumbering of streets with carriages, will authorize an ordinance to prevent the obstruction of streets by cars. *Duluth* v. *Mallett*, 43 *Minn.* 204, 45 *N. W. Rep.* 154.

An ordinance prohibiting the stopping of cars or locomotives on a street crossing for the switching of cars is not *prima facie* unreasonable and void. *Duluth* v. *Mallett*, 43 *Minn.* 204, 45 *N. W. Rep.* 154.

310. Prohibiting running of trains on certain streets. — A company was chartered to build a road "from some point within the corporation of Richmond to be approved by the common council." A point was selected and approved, and the road built. Afterwards the city council passed an ordinance prohibiting the running of cars on the streets at or near the terminal point. *Held*, that the ordinance did not impair any vested right of the company, nor deprive it of its property without due process of law. *Richmond, F. & P. R. Co.* v. *Richmond*, 96 *U. S.* 521.

An ordinance that prohibits a company from running trains on certain streets is not open to the objection that it denies to the company the equal protection of the law, when it is the only company that has the right to run cars on such streets. *Richmond, F. & P. R. Co.* v. *Richmond*, 96 *U. S.* 521. —QUOTED IN Spencer *v.* Point Pleasant & O. R. R. Co., 23 W. Va. 406. REVIEWED IN Toronto *v.* Toronto St. R. Co., 15 Ont. App. 30.

311. Requiring construction of bridges and viaducts. — An ordinance which requires the widening of a street crossing a railroad under its track, and for the construction of a railroad bridge over the enlarged crossing, to be paid for principally by taxing the company's contiguous property, without any compensation to the company for the burden attempted to be imposed on it, is not only unreasonable, but clearly in excess of the powers conferred on the city council, and void. *Bloomington* v. *Chicago & A. R. Co.*, 134 *Ill.* 451, 26 *N. E. Rep.* 366.

In Kansas a city of the first class has the power, in proper cases and in a proper manner, to order a company to construct a viaduct over its tracks where they cross a public street. *State* v. *Missouri Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 45, 33 *Kan.* 176, 5 *Pac. Rep.* 772.

Where a city of the first class, by ordinance, orders three railroad companies jointly to construct a viaduct, and the ordinance is vague and indefinite with respect to the dimensions of the viaduct and the materials to be used in its construction, and its construction as ordered by the city would require a change of the grade of certain streets of the city, in violation of certain provisions of the statutes, a mandamus will not lie to enforce the construction of such viaduct. *State* v. *Missouri Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 45, 33 *Kan.* 176, 5 *Pac. Rep.* 772.

312. Requiring fences where road passes parks and public places.—A city ordinance granting to a railroad a right of way over public grounds, on condition that the company erect fences for the pro-

tection of persons and property, is not merely a contract, but has the force of a law within the city, if authorized by the legislature. *Hayes* v. *Michigan C. R. Co.*, 15 *Am. & Eng. R. Cas.* 394, 111 *U. S.* 228, 4 *Sup. Ct. Rep.* 369. — DISTINGUISHED IN State ex rel. *v.* New Orleans & C. R. Co., 37 La. Ann. 589.

Where the power is conferred upon cities to require railroads to provide necessary protection for persons and property, the method of accomplishing the protection is at the discretion of the city authorities, and an ordinance requiring fences, separating the track from parks and other grounds, is within the authority of the city. *Hayes* v. *Michigan C. R. Co.*, 15 *Am. & Eng. R. Cas.* 394, 111 *U. S.* 228, 4 *Sup. Ct. Rep.* 369.

313. Requiring gates and watchmen at crossings.*—An ordinance of a borough which prohibits a company from running trains across streets without erecting gates and providing watchmen is penal in its nature, and must be construed strictly. *Winton* v. *Delaware & H. Canal Co.*, 1 *Pa. Dist.* 701.

Where, in a suit for a penalty under such an ordinance, the record of the justice of the peace does not show over or across what street or streets the railroad ran its trains without having first complied with the borough ordinance, a judgment against the railroad will be reversed upon *certiorari*. *Winton* v. *Delaware & H. Canal Co.*, 1 *Pa. Dist.* 701.

314. Requiring safe platforms for passengers.†—Authority to trustees of a village to pass by-laws to compel all persons or corporations landing passengers within the limits of said village to construct such suitable and safe platforms and accommodations as are necessary for the safety of passengers does not authorize a by-law directing a railroad company to reconstruct a platform and stairway upon land not belonging to it, but which, it is alleged, could be purchased for a reasonable sum. *People ex rel.* v. *New York, N. H. & H. R. Co.*, 11 *Hun* (*N. Y.*) 297.

And if such ordinance or by-law was valid, it could not be enforced by mandamus. The only method of compelling obedience to ordinances is by affixing a penalty to their violation and enforcing the same by action. *People ex rel.* v. *New York, N. H. & H. R. Co.*, 11 *Hun* (*N. Y.*) 297.

315. Requiring stops to be made at certain crossings. — Where an ordinance is general in its terms and applies to all railroads alike, requiring trains to stop at a certain street crossing, it is not invalid as discriminating against defendant company, on the ground that it is the only road crossing the street; such ordinance being a reasonable exercise of the power conferred by the city charter, giving it the power "to prohibit or regulate the use of locomotive engines and of steam, and to regulate the motive power or speed of any portion of any railroad within the city." *Buffalo* v. *New York, L. E. & W. R. Co.*, 27 *N. Y. Supp.* 297, 57 *N. Y. S. R.* 829, 6 *Misc.* 630, *mem.*

316. Violation of ordinances — Negligence.* — A municipal ordinance prohibiting, under penalty of a fine, the backing of a railroad engine at a greater speed than four miles an hour, is a reasonable police regulation, the violation of which is negligence and renders the railroad company liable for damages at the suit of a person injured. *Louisville & N. R. Co.* v. *Webb*, 49 *Am. & Eng. R. Cas.* 427, 90 *Ala.* 185, 8 *So. Rep.* 518.

Railroad companies and their employés using railways in a city must take notice of all valid city ordinances duly promulgated. *Central R. & B. Co.* v. *Brunswick & W. R. Co.*, 87 *Ga.* 386, 13 *S. E. Rep.* 520.

If an engineer of a railway company, knowing that persons are accustomed to cross the track between the streets of a large and crowded city, drives his engine forward recklessly, or with indifference as to whether such persons are injured or not, and at a rate of speed greatly in excess of that limited by a city ordinance, an injury thereby inflicted upon one of such persons, even though he be a trespasser, will be regarded as the result of "such gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness." *Lake Shore & M. S. R. Co.* v. *Bodemer*, 54 *Am. & Eng. R. Cas.* 177, 139 *Ill.* 596, 29 *N. E. Rep.* 692; *affirming* 33 *Ill. App.* 479.

The violation by a train, at the time of an accident, of a city ordinance as to speed does not of itself constitute negligence,

*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **45-90.**

†See also STATIONS AND DEPOTS, **76-88.**

* Negligence in violation of municipal ordinances, see notes, 2 AM. & ENG. R. CAS. 183; 7 *Id.* 409.

unless the plaintiff shows that the injury would not otherwise have occurred. *Philadelphia, W. & B. R. Co.* v. *Stebbing*, 19 *Am. & Eng. R. Cas.* 36, 62 *Md.* 504.

But it is competent evidence as tending to show negligence. *Meek* v. *Pennsylvania Co.*, 13 *Am. & Eng. R. Cas.* 643, 38 *Ohio St.* 632.

3. *Rate of Speed.**

317. Statutory regulation of speed.† — The law requires that a train in passing through a small town shall be run with a greater degree of care, and hence at a less rate of speed, than is generally observed in the movement of the train. *Lafayette & I. R. Co.* v. *Shriner*, 6 *Ind.* 141.

The legislature has the power to regulate the speed of locomotives in passing through cities and towns, and the exercise of such power is no violation of the charter of a company. *Mobile & O. R. Co.* v. *State*, 51 *Miss.* 137.

Miss. Code, § 1047, which prohibits locomotives and cars from being run through towns, cities, and villages at a greater speed than six miles an hour, does not impose absolute liability on a company for an injury done while the statute is being violated, without regard to the conduct of the person injured, or the circumstances under which the injury occurred; and when a company violates the statute, one who could by the exercise of ordinary care have avoided the injury, and fai s to do so, cannot recover. *Strong* v. *Canton, A. & N. R. Co.*, (*Miss.*) 3 *So. Rep.* 465.—FOLLOWING Vicksburg & M. R. Co. *v.* McGowan, 62 Miss. 682; Mobile & O. R. Co. *v.* Stroud, 64 Miss. 784.

The above statute applies to damages and injuries done to real estate as well as to personal property. *Porterfield* v. *Bond*, 39 *Am. & Eng. R. Cas.* 48, 38 *Fed. Rep.* 391.

Wisconsin General Railroad Law of 1872, placing certain restrictions upon the rate of speed at which trains may run at crossings and within cities, is a limitation of a company's franchise; and the provision of the statute limiting the rate of speed in cities to six miles an hour is lawful, although the company's charter authorizes an unlimited speed. *Horn* v. *Chicago & N. W. R. Co.*, 38 *Wis.* 463.

The above statute was passed *in favorem vitæ*, and a strict observance of it is essential to the public welfare. *Haas* v. *Chicago & N. W. R. Co.*, 41 *Wis.* 44.—FOLLOWING Langhoff *v.* Milwaukee & P. du C. R. Co., 19 Wis. 489; Martin *v.* Western Union R. Co., 23 Wis. 437; Horn *v.* Chicago & N. W. R. Co., 38 Wis. 463; Ewen *v.* Chicago & N. W. R. Co., 38 Wis. 613.

318. Power of city or town to restrict rate of speed.* — (1) *Generally.* —There can be no question as to the power of the common council of a municipality to regulate by ordinance the speed of trains within its limits, but such ordinance must be reasonable and consistent with the laws and policy of the city, and must not be oppressive, unequal, unjust, or partial and discriminating in its operation. *Lake View* v. *Tate*, 33 *Ill. App.* 78. *East St. Louis Connecting R. Co.* v. *O'Hara*, 49 *Ill. App.* 282.

Municipal corporations may, under a charter grant, regulate the moving of trains by steam within their corporate limits, so as to prevent the destruction of life, and a disregard of such regulations places the person owning or controlling such trains in the position of a wrongdoer. *Kempinger* v. *St. Louis & I. M. R. Co.*, 3 *Mo. App.* 581.

It is improper to submit to the jury the question of the reasonableness of a city ordinance limiting the rate of speed over a track laid along the streets of the city. *Neier* v. *Missouri Pac. R. Co.*, 12 *Mo. App.* 25.

The fact that a company is authorized by the legislature to lay its tracks along the streets of a city does not prevent such city from regulating and limiting the rate of speed of locomotives. *Neier* v. *Missouri Pac. R. Co.*, 12 *Mo. App.* 25.

A company whose tracks are laid on uninclosed ground belonging to the company but open to the public must nevertheless observe all reasonable municipal regulations as to the movement of locomotives within the city limits. *Mers* v. *Missouri Pac. R. Co.*, 13 *Mo. App.* 589, 14 *Mo. App.* 459.

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* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **168–189.**

† Rate of speed in populous districts, see note 3 L. R. A. 683.

Rate of speed of trains, see note 11 L. R. A. 434.

* Municipal regulation of rate of speed of trains, see notes, 4 L. R. A. 776; 14 AM. & ENG. R. CAS. 627.

Violation of ordinances as to speed and signals, see note, 13 AM. & ENG. R. CAS. 647.

Municipal ordinances regulating speed of trains, construction and maintenance of fences, gates, etc., see 31 AM. & ENG. R. CAS. 448, *abstr.*

(2) *As police regulations.*—An ordinance regulating speed of trains, and requiring flagmen or watchmen to be kept at crowded crossings, may be passed and enforced by a city under the general grant of police powers usually found in municipal charters. No unreasonable ordinance can be valid. *Western & A. R. Co.* v. *Young*, 37 *Am. & Eng. R. Cas.* 489, 81 *Ga.* 397, 7 *S. E. Rep.* 912.

The charter privilege of a railroad to fix the rate of speed of trains is subordinate to the police laws of the state, and may be limited by municipal corporations. *Chicago, B. & Q. R. Co.* v. *Haggerty*, 67 *Ill.* 113.

Cities have the power to pass ordinances regulating the speed of trains within their limits. Such ordinances are police regulations, and to be valid must be reasonable. *Meyers* v. *Chicago, R. I. & P. R. Co.*, 7 *Am. & Eng. R. Cas.* 406, 57 *Iowa* 555, 42 *Am. Rep.* 50, 10 *N. W. Rep.* 896.

Laws and ordinances regulating the speed of railroad trains are police regulations. *Bluedorn* v. *Missouri Pac. R. Co.*, 108 *Mo.* 439, 18 *S. W. Rep.* 1103. *Gratiot* v. *Missouri Pac. R. Co.*, 55 *Am. & Eng. R. Cas.* 108, 116 *Mo.* 450, 21 *S. W. Rep.* 1094.

And extend to the inclosed lands of a company. *Merz* v. *Missouri Pac. R. Co.*, 26 *Am. & Eng. R. Cas.* 537, 88 *Mo.* 672.—FOLLOWED IN Brooks *v.* Hannibal & St. J. R. Co., 35 Mo. App. 571.

And the running of trains in violation thereof is negligence *per se*. *Tobin* v. *Missouri Pac. R. Co.*, (*Mo.*) 18 *S. W. Rep.* 996.

The delegation to a municipality of the power to regulate such trains need not be given in express terms, but may be implied from the power of the city to abate nuisances and provide for the general welfare. *Bluedorn* v. *Missouri Pac. R. Co.*, 108 *Mo.* 439, 18 *S. W. Rep.* 1103.—QUOTING Chicago, B. & Q. R. Co. *v.* Haggerty, 67 Ill. 113.

319. Charter power to restrict.—A legislature may empower municipal authorities to pass ordinances to regulate the speed of cars through cities; and municipal authorities have the right to adopt such ordinances without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions. *Whitson* v. *Franklin*, 34 *Ind.* 392.—QUOTING Buffalo & N. F. R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209.

The speed of the trains of a company organized under a special law may be regulated by a municipal ordinance enacted in pursuance of a general statute, although no reservation to regulate the speed of such company's trains is inserted in such special charter. *Cleveland, C., C. & I. R. Co.* v. *Harrington*, 49 *Am. & Eng. R. Cas.* 358, 131 *Ind.* 426, 30 *N. E. Rep.* 37.—FOLLOWING Coal-Float *v.* Jeffersonville, 112 Ind. 15.

Specific authority in a city charter to regulate by ordinance the speed of trains—*held*, not to restrict a general grant of authority which, standing alone, would have authorized the adoption of an ordinance requiring a flagman to be kept at a railroad crossing. *Green* v. *Eastern R. Co.*, 52 *Minn.* 79, 53 *N. W. Rep.* 808.

A town having the power to pass "by-laws and ordinances for the regulation and police of such town" has authority to regulate the speed of trains so as to protect life and property. *Robertson* v. *Wabash, St. L. & P. R. Co.*, 84 *Mo.* 119.

The city of St. Louis has authority under its charter to enact an ordinance regulating within its limits the speed and operation of cars and locomotives propelled by steam. *Merz* v. *Missouri Pac. R. Co.*, 26 *Am. & Eng. R. Cas.* 537, 88 *Mo.* 672.

A provision in a city charter authorizing the common council to enact ordinances "to prohibit or regulate the use of locomotive engines and of steam, and to regulate other motive power and speed on any portion of any railroad within the city," authorizes an ordinance restraining the rate of speed of trains. *Buffalo* v. *New York, L. E. & W. R. Co.*, 54 *N. Y. S. R.* 150, 23 *N. Y. Supp.* 303.

320. Interpretation of particular charter provisions.—That clause of the charter of Jersey City giving to the common council power, by general law, to declare nuisances and provide for their removal, does not give the right to regulate the running of locomotive engines and cars. The power to regulate the speed and running of locomotives and cars is given by a separate section of the charter. *State* v. *Mayor, etc., of Jersey City*, 29 *N. J. L.* 170.

A city charter empowered the common council "to regulate and control the running of engines and cars through the city and the rate of speed of the same." The council passed an ordinance providing that "no railroad company or corporation whose track passes through or within the limits of the city shall run any locomotive, engine or engines, or any car or cars, or any train of

cars, or permit the same to be run by their agent or agents, or by any person or persons in their employ, while passing through said city, at a greater rate of speed than at and after the rate of ten miles per hour, under the penalty of twenty-five dollars for each offense." *Held*, that the ordinance did not apply to engines used in moving cars and making up trains within the company's yards, and in and about its stations, but not within the limits of any public street or thoroughfare. *Green* v. *Delaware & H. Canal Co.*, 38 *Hun* (*N. Y.*) 51.—REVIEWING Buffalo & N. F. R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209.

321. Construction of ordinances, generally.— City ordinances regulating the speed of trains or the blowing of whistles on engines are only police regulations, and do not change the general law upon speed, or change the duties or rights of parties growing out of a failure to do what the ordinance commands or the doing of what it prohibits. *Whelan* v. *New York, L. E. & W. R. Co.*, 38 *Fed. Rep.* 15.

An ordinance limiting the speed of "passenger trains" does not apply to an engine and tender. They are not a train. *Lake Shore & M. S. R. Co.* v. *Probeck*, 33 *Ill. App.* 145.

322. To what places statutes or ordinances apply.— If a city ordinance regulating the speed of trains embraces in its language the whole area of the city, and is reasonable in itself, the court may submit to the jury the question as to whether, on account of the special local conditions and surroundings, it would or would not reasonably apply to the particular locality in question, that locality being just inside of the city limits. *Central R. & B. Co.* v. *Brunswick & W. R. Co.*, 87 *Ga.* 386, 13 *S. E. Rep.* 520.

A city ordinance prohibiting the running of trains within its limits at a greater than a prescribed speed will not be construed as applying merely to the streets and crossings, in the absence of any limitation to that effect in the ordinance. *Bluedorn* v. *Missouri Pac. R. Co.*, 108 *Mo.* 439, 18 *S. W. Rep.* 1103.—RECONCILING State *v.* Mayor, etc., of Jersey City, 29 N. J. L. 170.—APPLIED IN Jennings *v.* St. Louis, I. M. & S. R. Co., 112 Mo. 268.

But does apply to switch yards. *Crowley* v. *Burlington, C. R. & N. R. Co.*, 18 *Am. & Eng. R. Cas.* 56, 65 *Iowa* 658, 20 *N. W. Rep.* 467, 22 *N. W. Rep.* 918. *Grube* v. *Missouri Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 357, 98 *Mo.* 330, 11 *S. W. Rep.* 736, 4 *L. R. A.* 776.—DISTINGUISHING Rafferty *v.* Missouri Pac. R. Co., 91 Mo. 33.

And to all places within the limits of such municipality, without regard to whether the land is actually settled or not. *Illinois C. R. Co.* v. *Jordan*, 63 *Miss.* 458.—APPROVING Vicksburg & M. R. Co. *v.* McGowan, 62 Miss. 682.

The power given by a city's charter to regulate the speed of locomotives and cars does not authorize such regulation except in the streets of the city, its squares, and its public grounds. *State* v. *Mayor, etc., of Jersey City*, 29 *N. J. L.* 170.

Wis. Rev. St. § 1809 provides that no train shall run faster than six miles an hour in cities and villages "until after having passed all the traveled streets thereof." *Held*, that this exception only applies to trains leaving a city, and it is unlawful to run more than six miles an hour on entering a city, though no traveled streets have yet been reached. *Hooker* v. *Chicago, M. & St. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 498, 76 *Wis.* 542, 44 *N. W. Rep.* 1085.

323. Validity of ordinances.*— Ordinarily, an ordinance which limits the speed of the trains on one road and leaves another to run through the city without such limitation will be unreasonable; but where one road runs through a densely populated part of a city, and another road runs through a portion of the same city where there are but few inhabitants, an ordinance making a discrimination as to the speed at which trains of the two roads may be run can hardly be said to be unreasonable. *Lake View* v. *Tate*, 39 *Am. & Eng. R. Cas.* 703, 130 *Ill.* 247, 6 *L. R A.* 268, 22 *N. E. Rep.* 791; *affirming* 33 *Ill. App.* 78.

An ordinance designed to prevent danger to persons and property from the rapid movement of trains through a municipal corporation is in the nature of a police regulation, and is sustainable only as such. *Duggan* v. *Peoria, D. & E. R. Co.*, 42 *Ill. App.* 536.

To justify the courts in declaring void, as in restraint of trade, a city ordinance limiting the rate of speed of railroad trains and

* Validity of municipal ordinance limiting rate of speed, see 37 AM. & ENG. R. CAS. 494, *abstr.*; 56 *Id.* 503, *abstr.*

engines within the city, its unreasonableness or want of necessity as a police regulation must be clear, manifest, undoubted, so as to be an abuse of discretion on the part of the council. *Knobloch* v. *Chicago, M. & St. P. R. Co.*, 14 *Am. & Eng. R. Cas.* 625, 31 *Minn.* 402, 18 *N. W. Rep.* 106. — FOLLOWED IN Weyl *v.* Chicago, M. & St. P. R. Co., 40 Minn. 350.

Ordinance 10,305 of the city of St. Louis, regulating, within the city limits, the running and stopping of cars propelled by steam, does not violate either the Constitution of the state or of the United States. *Merz* v. *Missouri Pac. R. Co.*, 26 *Am. & Eng. R. Cas.* 537, 88 *Mo.* 672.

A section providing for the giving of danger signals and for the equipment of railroad cars is embraced in the title of an ordinance entitled "An ordinance to regulate the speed within the city limits of cars and locomotives propelled by steam." *Bergman* v. *St Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.* 588, 88 *Mo.* 678.

Plaintiff city passed an ordinance restricting the speed of trains crossing streets at grade to six miles an hour, except "passenger trains running on the Belt Line of the New York Central & Hudson River Railroad." *Held*, that the ordinance was not invalid as making an unreasonable discrimination between roads, it appearing that "the Belt Line" is not a railroad company, but a train run around the city for local passenger traffic only, and not competing with other roads. *Buffalo* v. *New York, L. E. & W. R. Co.*, 23 *N. Y. Supp.* 303, 54 *N. Y. S. R.* 150.—FOLLOWED IN Buffalo *v.* New York, L. E. & W. R. Co., 23 N. Y. Supp. 309.

324. Limiting speed to ten miles an hour.—An ordinance limiting the rate of speed in passing over crossings to ten miles an hour does not imply that this rate may not be exceeded between crossings; and in an action to recover damages for personal injuries, it is error to instruct the jury that if, at the time of the accident, the rate of speed was more than ten miles an hour, that would be negligence, if the injury was occasioned to plaintiff between crossings and sixty-five yards from the nearest one. *Central R. & B. Co.* v. *Smith*, 34 *Am. & Eng. R. Cas.* 1, 78 *Ga.* 694, 3 *S. E. Rep.* 397.

An ordinance which prohibits the running of trains at a greater speed than ten miles an hour in cities is not a license to run at such speed in all cases. If, in some places, that would be a dangerous rate, it would be negligence to run at that speed. The rate of speed must conform to the safety of the public. *Wabash R. Co.* v. *Henks*, 91 *Ill.* 406.—REVIEWED IN Wabash, St. L. & P. R. Co. *v.* Weisbeck, 14 Ill. App. 525.

An ordinance regulating the speed of trains to a rate not exceeding ten miles an hour is not unreasonable, though the town lies almost wholly on one side of the track, and none of its streets crosses the right of way. *Larkin* v. *Burlington, C. R. & N. R. Co.*, 85 *Iowa* 492, 52 *N. W. Rep.* 480.—DISTINGUISHING Meyers *v.* Chicago, R. I. & P. R. Co., 57 Iowa 556, 10 N. W. Rep. 896.

325. —— eight miles.—Where a statute provides that no ordinance shall limit the rate of speed in case of passenger cars to less than ten miles per hour, nor in any other case to less than six miles per hour, an ordinance limiting the speed of all trains to eight miles per hour is invalid, even as to freight trains. *Duggan* v. *Peoria, D. & E. R. Co.*, 42 *Ill. App.* 536.

326. —— six miles. — Provisions in a municipal charter that the authorities should declare what are nuisances, regulate the police, and make ordinances for the public good — *held*, to extend to an ordinance limiting trains to a speed of six miles an hour. *Chicago, B. & Q. R. Co.* v. *Haggerty*, 67 *Ill.* 113.—QUOTED IN Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439.

An ordinance which prohibits the running of trains or cars through the corporate limits at a greater speed than six miles an hour includes an engine running "wild," without cars attached. *East St. Louis Connecting R. Co.* v. *O'Hara*, 49 *Ill. App.* 282.

Miss. Code 1880, § 1047, fixing six miles an hour as the maximum speed of locomotives and cars in towns and cities, does not confer the right to maintain that rate of speed where, under all circumstances, the exercise of reasonable caution would require that they be run more slowly. *Louisville, N. O. & T. R. Co.* v. *French*, 69 *Miss.* 121, 12 *So. Rep.* 338.

One who sustains damages by the running of trains at a greater speed than six miles an hour through a town whose inhabitants comprise only ten families, including the company's section gang; whose municipal authorities have never held a session since the organization of the town; whose

mayor has no docket, and has never been called upon to perform an official act; whose town marshal has never been elected, nor does the evidence show the slightest need for him, and whose citizens dwell together in Arcadian simplicity and quiet, may nevertheless recover damages from the company. *Bell* v. *Kansas City M. & B. R. Co.*, (*Miss.*) 9 *So. Rep.* 289.

An ordinance limiting the speed of trains to six miles an hour is both reasonable and humane. *Gratiot* v. *Missouri Pac. R. Co.*, 55 *Am. & Eng. R. Cas.* 108, 116 *Mo.* 450, 21 *S. W. Rep.* 1094.

An ordinance of the city of St. Louis limiting the speed of locomotives over its streets to six miles an hour does not conflict with the franchise of the Missouri Pacific railroad company, and its franchise to lay tracks along a certain street does not authorize the running of locomotives thereon at the rate of fifteen miles an hour, in violation of a city ordinance. *Neier* v. *Missouri Pac. R. Co.*, 12 *Mo. App.* 25.

327. —— five miles. — The corporate authorities of a town enacted that "it shall be unlawful for any railroad company, by themselves or their agents, to run at a greater rate of speed within the corporate limits of the town of Cuba than five miles per hour," and provided a penalty for its violation of not less than $10 or more than $100. *Held*, that the corporate authorities had the power under the statute to pass the ordinance, and while it was somewhat informal, its meaning was plain enough to be easily understood. *Toledo, P. & W. R. Co.* v. *Deacon*, 63 *Ill.* 91, 7 *Am. Ry. Rep.* 150.

An ordinance limiting the rate of speed of trains, to have the effect of raising the statutory presumption that an injury results from the negligence of the company in running its trains at a rate prohibited by the ordinance, must conform to the statute. Where a statute declares that no ordinance shall limit the speed of passenger trains to less than ten miles per hour, an ordinance limiting the speed to five miles per hour is not competent evidence. *Chicago, B. & Q. R. Co.* v. *Dougherty*, 12 *Ill. App.* 181.

Where its charter authorizes a city to enact ordinances "not repugnant to the Constitution and laws of this state," and "to regulate and restrain the speed of cars in passing through said city," a statute allowing six miles per hour, an ordinance is void that prohibits the running of trains in certain parts of the city at a greater speed than five miles an hour. *Horn* v. *Chicago & N. W. R. Co.*, 38 *Wis.* 463.—FOLLOWED IN Haas *v.* Chicago & N. W. R. Co., 41 Wis. 44.

328. —— four miles. — An ordinance of a city requiring all trains within its limits to be run at a speed of not over four miles an hour, if its enactment is authorized by a statute, is valid, and evidence will not be heard that such ordinance is unreasonable, and therefore void. *Cleveland, C., C. & I. R. Co.* v. *Harrington*, 49 *Am. & Eng. R. Cas.* 358, 131 *Ind.* 426, 30 *N. E. Rep.* 37.

An ordinance limited the speed of trains, within the limits of the city, to four miles per hour, and the road ran for some three miles after entering the city limits, before reaching the inhabited portion thereof, through farm lands, where the track was fenced and no streets laid out. *Held*, that such ordinance as to the speed on that portion of the track was unreasonable and void. *Meyers* v. *Chicago, R. I. & P. R. Co.*, 7 *Am. & Eng. R. Cas.* 406, 57 *Iowa* 555, 42 *Am. Rep.* 50, 10 *N. W. Rep.* 896.

To justify the courts in declaring void, as in restraint of trade, a city ordinance limiting the rate of speed of trains and engines within a city to four miles an hour, its unreasonableness or want of necessity as a police regulation must be clear, manifest, and undoubted, so as to be an abuse of discretion on the part of the city council. *Knobloch* v. *Chicago, M. & St. P. R. Co.*, 14 *Am. & Eng. R. Cas.* 625, 31 *Minn.* 402, 18 *N. W. Rep.* 106.—FOLLOWED IN Weyl *v.* Chicago, M. & St. P. R. Co., 40 Minn. 350, 42 N. W. Rep. 24.—*Weyl* v. *Chicago, M. & St. P. R. Co.*, 40 *Minn.* 350, 42 *N. W. Rep.* 24. —FOLLOWING Knobloch *v.* Chicago, M. & St. P. R. Co., 31 Minn. 402.

An ordinance of a city limiting the speed of trains to four miles an hour is unreasonable and void as applied to a certain part of defendant's road in the suburbs of the city. *Evison* v. *Chicago, St. P., M. & O. R. Co.*, 45 *Minn.* 370, 48 *N. W. Rep.* 6.

An ordinance restricting the speed of trains to four miles an hour, passed by a town of the fourth class which has only incidental power to pass an ordinance restricting the speed of trains, and which has only a population of 1500, and of which only one third the area is platted, the remainder being farm lands, is unreasonable and invalid. *White* v. *St. Louis & S. F. R. Co.*, 44 *Mo. App.* 540.

329. —— two miles. — An ordinance that trains shall not be run across streets in the compact part of the city at a greater speed than two miles per hour, without sending a person ahead to give warning, is not in conflict with N. Y. Act of 1889, ch. 242, providing that in cities of less than 50,000 inhabitants it shall not be lawful for the common council to restrict the speed of cars to less than thirty miles per hour, when gates are established, where there is no proof that such city has less than 50,000 inhabitants. *Haywood* v. *New York C. & H. R. R. Co.*, 13 *N. Y. Supp.* 177, 59 *Hun* 617, *mem.*, 35 *N. Y. S. R.* 748; *affirmed in* 128 *N. Y.* 596, *mem.*, 38 *N. Y. S. R.* 1011, *mem.*

330. Actions for penalties. — One section of an ordinance of a city incorporated under the General Incorporation Law of 1867 was as follows: "That it shall not be lawful for any railroad company to run any locomotive or cars over any of the railroad tracks within the corporate limits of said city at a faster rate than four miles per hour." Another section provided that "any conductor, engineer, or other person having control of any engine, car, or railroad train, who shall violate any of the provisions of this ordinance, shall, upon conviction thereof before the mayor of said city, be fined not exceeding twenty dollars." *Held*, that in a complaint in the mayor's court against an engineer, to recover a penalty of him for violating the ordinance, reference should be made to both of said sections by their numbers and the date of adoption, and a complaint referring only to the former section was insufficient. *Whitson* v. *Franklin*, 34 *Ind.* 392.

An action brought by a municipal corporation to enforce a penalty for the violation of an ordinance regulating the rate of speed at which trains shall be run through the corporate limits is not a criminal proceeding, but is essentially a civil action, and where the provisions of the ordinance are violated by an engineer the penalty may be recovered in an action against the company. *Hammond* v. *New York, C. & St. L. R. Co.*, 5 *Ind. App.* 526, 31 *N. E. Rep.* 817.—REFERRING TO Hammond *v.* New York, C. & St. L. R. Co., 126 Ind. 597.

Where a company is sued to recover penalties for violating an ordinance, and the trial court gives judgment for penalties for two violations, as to one of which there is no evidence, the court on appeal will modify the judgment by reducing it to but one penalty. *Buffalo* v. *New York, L. E. & W. R. Co.*, 54 *N. Y. S. R.* 150, 23 *N. Y. Supp.* 303.

331. Defenses to actions for penalties. — A prosecution for a violation of such an ordinance cannot be defended on the ground that the company was engaged in carrying the mail under a contract with the United States, and was required by such contract to transport the mail within a prescribed time, which could not be done if the towns and cities through which the road ran were allowed to regulate the speed of trains in passing through them. *Whitson* v. *Franklin*, 34 *Ind.* 392.

A company violating an ordinance by running its trains at a rate faster than is allowed by the ordinance cannot set up as a defense that the officers and citizens of the city have never enforced such ordinance, although it was enacted many years before. *Cleveland, C., C. & I. R. Co.* v. *Harrington*, 49 *Am. & Eng. R. Cas.* 358, 131 *Ind.* 426, 30 *N. E. Rep.* 37.

It is no defense to an action against a company for a penalty under an ordinance restricting speed of trains that the acts complained of were done by a servant of the company without its knowledge or consent and against its express orders. *Buffalo* v. *New York, L. E. & W. R. Co.*, 54 *N. Y. S. R.* 150, 23 *N. Y. Supp.* 303.

4. *Signals.* Signboards. Lights. Lookouts. Flagmen.*

332. Statutes and ordinances requiring bell to be rung. — Under Ala. Code of 1886, § 1144, the engineer of a train is required to ring the bell, or blow the whistle, at intervals, "on entering into or passing through any village, town, or city"; but under former statutes (Code of 1876, § 1699) the duty extended only to "the corporate limits of any city or town." *Carrington* v. *Louisville & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 543, 88 *Ala.* 472, 6 *So. Rep.* 910.

The Georgia statute touching the ringing of the bell of a locomotive in a city, town, or village, instead of sounding the whistle, is confined to the signaling for the approach of crossings. It is not unlawful to make by whistling proper and necessary signals

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **91-163.**

of approaching a station, as warning to adjust the switches. *Akridge* v. *Atlanta & W. P. R. Co.*, 90 *Ga.* 232, 16 *S. E. Rep.* 81.

Under Wagn. Mo. St. 310, § 38, it is the duty of railroad companies to ring a bell in passing through cities, and not merely to sound a whistle. *Kennayde* v. *Pacific R. Co.*, 45 *Mo.* 255.—QUOTING Newson *v.* New York C. R. Co., 29 N. Y. 390; Gordon *v.* Grand St. & N. R. Co., 40 Barb. 550.—APPLIED IN Donohue *v.* St. Louis, I. M. & S. R. Co., 28 Am. & Eng. R. Cas. 673, 91 Mo. 357. DISTINGUISHED IN Zimmerman *v.* Hannibal & St. J. R. Co., 2 Am. & Eng. R. Cas. 191, 71 Mo. 476. FOLLOWED IN Tabor *v.* Missouri Valley R. Co., 46 Mo. 353. REVIEWED IN Solen *v.* Virginia & T. R. Co., 13 Nev. 106.

Where a city by its charter is empowered "to direct the use and regulate the speed of locomotive engines in said city, or to prevent or prohibit the use or running of the same within the city," it is authorized to enact an ordinance prohibiting the running of engines or cars in the city without a bell being rung before starting, and all the time the same is in motion in the city. *Texas & P. R. Co.* v. *Nelson*, 50 *Fed. Rep.* 814, 2 *U. S. App.* 213, 1 *C. C. A.* 688.

333. Statutes and ordinances forbidding blowing of whistle.—Within the corporate limits of the cities, towns, and villages of Georgia it is not lawful for railroad companies, as their trains approach crossings or public roads, to blow their whistles, but it is the duty of engineers to signal their approach to such crossings or public roads by tolling the bell of the locomotive. *Georgia R. Co.* v. *Carr*, 73 *Ga.* 557.

A statute which requires the ringing of a bell or the sounding of a whistle at highway crossings, except that the sounding of the whistle is not to apply to street crossings in cities, does not prohibit the sounding of the whistle in a city. *Mayer* v. *New York C. & H. R. R. Co.*, 8 *N. Y. Supp.* 461, 29 *N. Y. S. R.* 183, 55 *Hun* 608; *affirmed in* 132 *N. Y.* 579, *mem.*, 30 *N. E. Rep.* 867.

A municipal corporation has not power to suspend, alter, or change the general statutes of the state regulating the running of railroad trains, under its charter authority "to permit and regulate the laying of railroad tracks of iron, and the passage of railroad cars through the taxing district, and to remove such railroad track if it obstructs travel, or does not conform to the laws of the taxing district; and to make all suitable and proper regulations in regard to the use of the streets for street-cars, and to regulate the running of the same so as to prevent injury or inconvenience to the public." *Katzenberger* v. *Lawo*, 50 *Am. & Eng. R. Cas.* 443, 90 *Tenn.* 235, 16 *S. W. Rep.* 611.

Therefore an ordinance of such municipality forbidding the necessary blowing of the whistle of steam engines and declaring it a misdemeanor is a nullity. *Katzenberger* v. *Lawo*, 50 *Am. & Eng. R Cas.* 443, 90 *Tenn.* 235, 16 *S. W. Rep.* 611.—DISTINGUISHING Pennsylvania Co. *v.* Hensil, 6 Am. & Eng. R. Cas. 79, 70 Ind. 569.

334. What railroads are within the statute.— A company whose trains are operated by dummy engines is a railroad company within the statutory provisions requiring a whistle to be sounded or a bell rung at regular stopping places (Ala. Code, § 1144), so far at least as its road is outside of city limits; and a failure to comply with these statutory regulations is negligence *per se*, entitling a person injured to damages, if he was not guilty of contributory negligence. *Ensley R. Co.* v. *Chewning*, 50 *Am. & Eng. R. Cas.* 46, 93 *Ala.* 24, 9 *So. Rep.* 458.—FOLLOWING Birmingham Mineral R. Co. *v.* Jacobs, 92 Ala. 187.

335. To what places the requirement to give signals is applicable.*—The statutory duty imposed on an engineer of a train passing through a city or town to blow a whistle or ring a bell at short intervals is co-extensive with the corporate limits of the city or town; but a failure to perform this duty is negligence merely, and is not sufficient to overcome a defense of contributory negligence. *Savannah & W. R. Co.* v. *Meadors*, 95 *Ala.* 137, 10 *So. Rep.* 141.

A city ordinance requiring a man to be posted on the front of a locomotive within municipal limits, regulating the rate of speed, and requiring a bell to be rung when approaching cross streets, is not applicable where the engine is running at night in a part of the city where there are no streets, which is swampy and uneven, and where there are no lights. *Baltimore & O. R. Co.*

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* Statutory provisions as to signals relate only to safety of persons at crossings, see note, 15 AM. & ENG. R. CAS. 459.

v. *State*, 19 *Am. & Eng. R. Cas.* 83, 62 *Md.* 479, 50 *Am. Rep.* 233.

The term "highway" as used in Miss. Code of 1871, § 2424, requiring railroad companies to erect signboards where their tracks cross highways, means any public road in the country, but does not apply to a street in a city or town. *Mobile & O. R. Co* v. *State*, 51 *Miss.* 137.

The provision of the Tennessee Code that "on approaching a city or town, the bell or whistle shall be sounded when the train is at the distance of one mile, and at short intervals until it reaches the depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals until it has left the corporate limits," requires the bell or whistle to be sounded only when approaching incorporated towns and not when approaching an unincorporated town. *Webb* v. *East Tenn., V. & G. R. Co.*, 42 *Am. & Eng. R. Cas.* 44, 88 *Tenn.* 119, 12 *S. W. Rep.* 428.

Texas Rev. St., art. 4231, is limited expressly to public roads. And it and article 4232 are independent of each other, and relate to different requirements entirely, and because the first-named article uses the words "public roads," it does not follow that the words "any roads" used in the succeeding article must be construed to signify "any public roads." In the one the operation of it is restricted to public roads; in the other there is no such restriction. Art. 4232 applies to all roads that are traveled on horseback and in vehicles, and which were so used at the time of the construction of the railway. *International & G. N. R. Co.* v. *Jordan*, (*Tex.*) 10 *Am. & Eng. R. Cas.* 301.

A road opened across a railroad track, after the construction of the railroad, and without being established as a public road under the law, will not impose upon the railroad company the performance of the requirements of art. 4232. *International & G. N. R. Co.* v. *Jordan*, (*Tex.*) 10 *Am. & Eng. R. Cas.* 301.

The company, however, having recognized the road as a road, by placing and maintaining a crossing for it, and by giving the usual signals upon approaching it with trains, is estopped from refusing to recognize it as such a road as the law contemplates. *International & G. N. R. Co.* v. *Jordan*, (*Tex.*) 10 *Am. & Eng. R. Cas.* 301.

336. Signboards.* — Miss. Code of 1871, § 2424, is unconstitutional in so far as it gives to counties the fine collected from railroad companies for failing to erect signboards where their tracks cross highways. Such fine belongs to the school fund, and the state board of education is the proper party to bring suit for violation of the statute. *Mobile & O. R. Co.* v. *State*, 51 *Miss.* 137.—QUOTED IN Tucker *v.* Duncan, 4 Woods (U. S.) 652.

337. Lights.—A city ordinance which requires a company to keep a flagman by day and a red lantern by night at a street crossing, when the company has only a single track, over which only its usual trains pass, and where it does not appear that such crossing is unusually dangerous, or more so than ordinary crossings, is not a reasonable requirement, and is therefore within the constitutional limitations on the exercise of the police power. *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 *Ill.* 37.—REVIEWED IN Toronto *v.* Toronto St. R. Co., 15 Ont. App. 30.

A red lantern on the corner of a tender attached to a backing locomotive is not a sufficient compliance with a city ordinance requiring locomotives to carry "a brilliant and conspicuous light on the front end." *Chicago & N. W. R. Co.* v. *Trayes*, 33 *Ill. App.* 307.

The power of police regulation is vested in the legislature, and, in the exercise of this power, companies may constitutionally be required to light such portions of their railways as are within a city or incorporated village. *Cincinnati, H. & D. R. Co.* v. *Sullivan*, 32 *Ohio St.* 152.—QUOTING Thorpe *v.* Rutland & B. R. Co., 27 Vt. 149.

The provision of Ohio Act of May 7, 1869, authorizing city and village councils to require railroad companies to light such portions of their roads as are within the municipal limits, is constitutional; and the expense to the municipality of such lighting, where the company fails to do it, may be assessed and declared a lien on any real estate of the company within the municipality. *Cincinnati, H. & D. R. Co.* v. *Sullivan*, 32 *Ohio St.* 152.

The liability of a company to pay such expense can only be enforced by suit or

*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **60-62.**

Liability of company for failing to erect signboards, see note, 23 AM. & ENG. R. CAS. 329.

action, or, in the language of the Constitution, "by due course of law." It is not a tax, or an assessment in the nature of a tax for local improvements, and cannot be summarily placed upon the county duplicate and collected as a tax or assessment proper. *Cincinnati, H. & D. R. Co.* v. *Sullivan*, 32 *Ohio St.* 152.

338. Lookouts.*—Though it is unlawful for one not connected with a railroad to walk upon its tracks, and it is presumed that every one will obey the law, yet this will not relieve a railroad corporation from the duty of keeping a careful lookout while running its trains upon the streets of a city. *Frick* v. *St. Louis, K. C. & N. R. Co.*, 5 *Mo. App.* 435. — DISTINGUISHING Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 482; Maher *v.* Atlantic & P. R. Co., 64 Mo. 276. — DISTINGUISHED IN O'Donnell *v.* Missouri Pac. R. Co., 7 Mo. App. 190.

339. —— on rear end of backing train. — A city ordinance requiring a watchman to be stationed on the rear end of trains running backward through a city, in order to avoid accidents, does not require the watchman to stop the train or sound a warning when he has reason to believe that the person in the way of the train can and does see it approaching, and is in a situation to avoid danger by the exercise of his own volition; and the failure of the watchman so to act under such circumstances does not charge the company with negligence. *Cincinnati, I., St. L. & C. R. Co.* v. *Long*, 31 *Am. & Eng. R. Cas.* 138, 112 *Ind.* 166, 11 *West. Rep.* 328, 13 *N. E. Rep.* 659.

A city ordinance required that when a locomotive engine is in use within the limits of the city a man should be required to ride on the front of the locomotive when going forward, and on the tender when going backward, not more than twelve inches from the bed of the road. It was found to be unsafe to place a man in the position required by the ordinance upon an engine of modern construction. *Held*, that the company would not be guilty of negligence for not doing that which would endanger the life of the employé. *Baltimore & O. R. Co.* v. *Mali*, 28 *Am. & Eng. R. Cas.* 628, 66 *Md.* 53, 5 *Atl. Rep.* 87.

An ordinance requiring a man to be stationed on a backing train to give danger signals does not apply where the employés are simply engaged in setting cars in a yard. *Rafferty* v. *Missouri Pac. R. Co.*, 91 *Mo.* 33, 3 *S. W. Rep.* 393.

Defendant company was required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train. *Held*, that defendant did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the track. *Levoy* v. *Midland R. Co.*, 15 *Am. & Eng. R. Cas.* 478, 3 *Ont.* 623.

340. Flagmen.*—It is error to submit to the jury whether there was a valid ordinance in a city requiring railroad companies to keep a flagman at railroad crossings, whose duty it was to notify and warn persons about to pass over such crossings of approaching trains, as it leaves to the jury matters of law as well as of fact. *Chicago, R. I. & P. R. Co.* v. *Jones*, 13 *Ill. App.* 634.

Under Iowa Laws of 1880, ch. 189, § 1, giving to mayors of cities of the second class exclusive jurisdiction of violations of city ordinances, the district court has no jurisdiction of an action against a company for violating an ordinance requiring railroads to keep certain flagmen in the city. *Lansing* v. *Chicago, M. & St. P. R. Co.*, 85 *Iowa* 215, 52 *N. W. Rep.* 195.

The charter of Long Island City (Laws of 1871, ch. 461) gives to its common council power to regulate the use of streets by vehicles and railways, with the reservation that it shall have no power to prohibit or control the use of steam power on any railroad from any part of Long Island to the East river, but making it the special duty of companies to furnish suitable guards or signals at street crossings. *Held*, that the common council has no power to make and enforce an ordinance requiring a company to place a flagman at every street crossed by its track. *Long Island City* v. *Long Island R. Co.*, 79 *N. Y.* 561; *affirming* 8 *Hun* 58.

5. *Repairs. Paving. Local Assessments.*†

341. California.—The right of a company to lay its tracks through the streets of

*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **164-167**; NEGLIGENCE, **25**.

*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **63-84**.

†Assessment on railways for local improvements, see notes, 13 AM. & ENG. R. CAS. 417; 7 *Id.* 236.

a city, and to run its cars thereon, is an interest in the land, and is local—fixed to the particular land and particular street—and this property may be enhanced in value by a proposed improvement of a street. *Appeal of North Beach & M. R. Co.*, 32 *Cal.* 499.

The interest or easement of a railroad will be benefited by the widening of a street on which its line runs, when it is probable that by reason of the increased traffic, travel, and business upon such street resulting from the improvement a greater number of people will ride upon its cars. *Appeal of North Beach & M. R. Co.*, 32 *Cal.* 499.

A company whose track runs along a street which it is proposed to widen will be assessed in common with other property owners, according to the ratio of the benefits received, and a statute providing for this method of assessment upon the railroad and other owners thus benefited is constitutional. (Sanderson and Rhodes, JJ., dissenting.) *Appeal of North Beach & M. R. Co.*, 32 *Cal.* 499.—DISTINGUISHING State *v.* Newark, 27 N. J. L. 186.

It will be presumed that commissioners appointed to assess against a railroad and other landowners the cost of a proposed improvement upon a street have adopted a correct construction of the statute in regard to the rule of apportionment, and error must be affirmatively shown. *Appeal of North Beach & M. R. Co.*, 32 *Cal.* 499.

An act providing for assessment upon the property of a railroad for the cost of an improvement of a street is not unconstitutional because it provides that the amount shall be a lien upon all the property of the railroad within the city and county. *Appeal of North Beach & M. R. Co.*, 32 *Cal.* 499.

Under Cal. Civil Code, § 498, by which a company is required to keep in repair that portion of a street over which its track is laid, the company cannot be assessed with a portion of the expense incurred for the improvement of the street under a contract between the city and contractors. *McVerry* v. *Boyd*, 89 *Cal.* 304, 26 *Pac. Rep.* 885.

342. Connecticut.—Where a street is laid out along a railroad track, and lapping a little on the company's right of way, the company is not liable for an assessment for benefits, where such assessment is based upon the fact that the opening of the street and the removal of obstructions to vision along the right of way will give a better view along the track, and enable the company to run trains faster, with less danger of accidents. *Bridgeport* v. *New York & N. H. R. Co.*, 36 *Conn.* 255.

An assessment upon the franchise of a railroad company is legal only when grounded upon a direct and immediate benefit, such as to increase the value of the company's property and stock. The franchise having no assignable or marketable value, there is no other mode in which its value can be increased. *Bridgeport* v. *New York & N. H. R. Co.*, 36 *Conn.* 255.—FOLLOWED IN St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359. REVIEWED IN New York, N. H. & H. R. Co. *v.* New Britain, 13 Am. & Eng. R. Cas. 400, 49 Conn. 40.

A company in front of whose passenger station and along whose track a street has been paved by a city is not liable to an assessment for a portion of the expense, under a provision in the city charter authorizing the city to assess the expense of street improvements upon property "specially benefited." Such assessment cannot be justified on the ground that access to the station is made more easy, nor on the ground that the land occupied by the company has been made more valuable. *New York & N. H. R. Co.* v. *New Haven*, 42 *Conn.* 279, 10 *Am. Ry. Rep.* 162.—REVIEWED IN New York, N. H. & H. R. Co. *v.* New Britain, 13 Am. & Eng. R. Cas. 400, 49 Conn. 40.

Land owned by a company in fee and with no restriction upon its use, and which is occupied only as a place for running off and leaving freight cars, but which is well situated for mechanical and manufacturing purposes, is liable to a city assessment for a public sewer by which it is benefited. *New York, N. H. & H. R. Co.* v. *New Britain*, 13 *Am. & Eng. R. Cas.* 400, 49 *Conn.* 40.—QUOTING Park Ecclesiastical Soc. *v.* Hartford, 47 Conn. 91. REVIEWING Clapp *v.* Hartford, 35 Conn. 66; Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255; New York & N. H. R. Co. *v.* New Haven, 42 Conn. 279.

It was found by a committee that the land would "in all probability" continue to be held and used for railroad freight purposes. *Held*, that a mere probability was not sufficient to affect the case, and that if a degree of probability which amounted to a practical certainty was intended, the facts on which the conclusion was based should have been found, that the court might see

on what it rested. *New York, N. H. & H. R. Co.* v. *New Britain*, 13 *Am. & Eng. R. Cas.* 400, 49 *Conn.* 40.

342a. Georgia.—Where a railroad has, thirty years before, without lawful authority, changed a public road, built a bridge, and kept the same in repair, and the public has abandoned the old road and used the new one, the company nevertheless is under no implied contract with the county that it will keep such road and bridge in repair any more than a private individual would be in a like case. *Brookins* v. *Central R. & B. Co.*, 48 *Ga.* 523, 11 *Am. Ry. Rep.* 383.—DISTINGUISHED IN Dyer County *v.* Chesapeake, O. & S. W. R. Co., 38 Am. & Eng. R. Cas. 676, 87 Tenn. 712, 11 S. W. Rep. 943.

A company using a public street of a city as its right of way is bound to repair street crossings. *Western & A. R. Co.* v. *Atlanta*, 19 *Am. & Eng. R. Cas.* 233, 74 *Ga.* 774.

A city ordinance authorizing the construction of a railway in a street contained, with many other mutual stipulations, a clause as follows: "In the event of the paving by the city of the whole or any portion of the street used by such railway, the portion of the track between the rails shall be paved and kept in good order and thorough repair by the company at its own expense and cost." These stipulations being assented to by the railroad company, and the railway being constructed thereunder, the ordinance is a contract between the city and the railway company. *Coast Line R. Co.* v. *Mayor, etc., of Savannah*, 30 *Fed. Rep.* 646.—FOLLOWED IN Western P. & S. Co. *v.* Citizens' St. R. Co., 46 Am. & Eng. R. Cas. 176, 128 Ind. 525.

343. Illinois.— Ill. Act of 1879, § 2, relating to special assessments or taxes by the park commissioners for the improvement of certain streets, and authorizing such assessments or special taxes to be assessed "upon contiguous property abutting on such streets or avenues," does not apply to a railroad right of way in a street. *South Park Com'rs* v. *Chicago, B. & Q. R. Co.*, 13 *Am. & Eng. R. Cas.* 415, 107 *Ill.* 105.— EXPLAINED IN Chicago & N. W. R. Co. *v.* People ex rel., 31 Am. & Eng. R. Cas. 487, 120 Ill. 104.

There is no constitutional or statutory exemption from the assessing of railway property, if specially benefited, for park or boulevard purposes. *Chicago & N. W. R. Co.* v. *People ex rel.*, 31 *Am & Eng. R. Cas.* 487, 120 *Ill.* 104, 11 *N. E. Rep.* 418.—EXPLAINING South Park Com'rs *v.* Chicago, B. & Q. R. Co., 107 Ill. 105.

A city council has, by law, the power to widen, extend, and further to open the crossing of a public street under a railway track, but has no power, by special taxation or otherwise, to provide for the building of a railroad bridge over a street crossing as a local improvement. *Bloomington* v. *Chicago & A. R. Co.*, 134 *Ill.* 451, 26 *N. E. Rep.* 366.

Where an ordinance fails to show any proper case for special taxation of contiguous property, or it is grossly unreasonable, unjust, and oppressive, that may be shown in defense of an application to confirm a levy of special taxes. *Bloomington* v. *Chicago & A. R. Co.*, 134 *Ill.* 451, 26 *N. E. Rep.* 366.

A city council has the power, under Ill. Rev. St. ch. 24, art. 5, § 62, to construct a viaduct in a public street by special assessment. *Louisville & N. R. Co.* v. *East St. Louis*, 134 *Ill.* 656, 25 *N. E. Rep.* 962.

The fact that a viaduct over railway tracks in a street is proposed to be extended across a creek will not necessarily render invalid a proceeding to build the same by special assessment. *Louisville & N. R. Co.* v. *East St. Louis*, 134 *Ill.* 656, 25 *N. E. Rep.* 962.

A mere contract right in one company to run its trains over the track of another company, the right being held subject to being determined upon notice, does not invest the former company with such ownership in the right of way as can be subjected to special assessment. *Louisville & N. R. Co.* v. *East St. Louis*, 134 *Ill.* 656, 25 *N. E. Rep.* 962.

Commissioners, appointed to assess the benefits to accrue from the construction of a viaduct in a public street, assessed to a railway company "part of blocks 8 and 9, and right of way across Broadway." The blocks consisted of lots. On application to confirm the assessment, the report of the commissioners showing the assessments was offered in evidence and objected to on the ground that the benefits had not been assessed to each of the lots and right of way separately. *Held*, that the objection was well taken. *Louisville & N. R. Co.* v. *East St. Louis*, 134 *Ill.* 656, 25 *N. E. Rep.* 962.

The fact that a railway company to whom the right is granted to lay and use tracks in a street has agreed so to grade the street

and lay its tracks that carriages, wagons, etc., may conveniently cross the same, does not deprive the city of the power, nor absolve it from the duty, to keep the street in a safe and proper condition, and cannot be urged by the company as an objection to a special assessment to improve such street. *Chicago, B. & Q. R. Co.* v. *Quincy*, 139 *Ill.* 355, 28 *N. E. Rep.* 1069.

A city does not lose or surrender its power to pave or otherwise to improve one of its streets by allowing a railway company, by tacit consent or by ordinance, to lay down one or more tracks, and to use such tracks for a series of years, in running cars over the same. *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 *Ill.* 563, 27 *N. E. Rep.* 192.

And such city council may require such street to be paved whenever it may be deemed proper, notwithstanding such improvement may temporarily interfere with the business of the company. *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 *Ill.* 563, 27 *N. E. Rep.* 192.

A city block belonging to a railroad company was assessed for street improvements in two parts, one part being assessed higher than the other, the right of way of the company being accepted. When the report was filed in court for confirmation, the county judge modified the assessment, making it entire on the block, but in a sum equal to the aggregate of the assessments on the two parts. *Held*, that there was nothing in this to show that the right of way was assessed. *Chicago, R. I. & P. R. Co.* v. *Chicago*, (*Ill.*) 27 *N. E. Rep.* 926; *see also* 139 *Ill.* 573, 28 *N. E. Rep.* 1108.

An assessment of a city block for street improvements may be made on two parts, if the entire amount does not exceed the benefits received by the block as a whole. *Chicago, R. I. & P. R. Co.* v. *Chicago*, (*Ill.*) 27 *N. E. Rep.* 926.—DISTINGUISHING Warren *v.* Chicago, 118 Ill. 329, 9 N. E. Rep. 883.

A statute authorizing assessments upon abutting property for street improvements does not apply to a railroad right of way and track which cross a street. Such right of way and track are not abutting property. *Chicago, B. & Q. R. Co.* v. *South Park Com'rs*, 11 *Ill. App.* 562.

344. Indiana. — Where a company occupies and uses one side of a street of a town for a right of way, and owns real estate contiguous to said side, said real estate is liable to assessment for the improvement of the street. *Indianapolis, P. & C. R. Co.* v. *Ross*, 47 *Ind.* 25.

The track of a railroad which borders on a street is properly assessable for its due proportion of the cost of improvement of such street under an ordinance of the city. *Peru & I. R. Co.* v. *Hanna*, 68 *Ind.* 562.—REVIEWED IN Re Cedar Park, 1 How. Pr. N. S. (N. Y.) 257.

345. Iowa.—A company having a right to lay its track on a lot, but not having title to the lot, cannot be held liable for assessments levied on abutting owners for the paving of the adjoining street. *Muscatine* v. *Chicago, R. I. & P. R. Co.*, 88 *Iowa* 291, 55 *N. W. Rep.* 100.

346. Kentucky. — Where a city has levied an assessment upon all the real estate lying upon a certain street, for the purpose of improving the street, a lot upon the street owned by a railroad company is subject to the assessment. The fact that the lot is the property of a railway company, and is used for railroad purposes, furnishes no reason why it should be exempted from assessment. *Ludlow* v. *Cincinnati Southern R. Co.*, 7 *Am. & Eng. R. Cas.* 231, 78 *Ky.* 357. —DISTINGUISHING Phillips *v.* Winslow, 18 B. Mon. 431; Applegate *v.* Ernst, 3 Bush 648; Louisville & N. R. Co. *v.* Warren County, 5 Bush 243; Elizabethtown & P. R. Co. *v.* Elizabethtown, 12 Bush 233; Graham *v.* Mt. Sterling Coalroad Co., 14 Bush 425. REVIEWING Chicago *v.* Baer, 41 Ill. 306; Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 164; Burlington & M. R. R. Co. *v.* Spearman, 12 Iowa 112.

When a company lays its track over a public highway it is necessary that the company shall have paramount control over its track and the right to regulate the repairs necessary to the use of the public in crossing, and it is therefore responsible to the public as well as to individuals for a failure to keep such crossing in repair. *Paducah & E. R. Co.* v. *Com.*, 10 *Am. & Eng. R. Cas.* 318, 80 *Ky.* 147.

347. Louisiana.—A municipal corporation vested by law with control over its streets is bound to keep the same in good order and condition, sufficiently safe to prevent injury to travelers thereon. It may grant to a company the privilege of building its tracks and running its cars thereon, with the obligation of keeping them in proper order and condition. Such grant does not, however, exonerate the city from the duty

which it is bound primarily to fill. Independent of its contract, such company is bound to keep its own road, tracks, and rails in proper condition. *Cline* v. *Crescent City R. Co.*, 43 *La. Ann.* 327, 9 *So. Rep.* 122; *former appeal* 41 *La. Ann.* 1031, 6 *So. Rep.* 851.

348. Massachusetts. — If a company constructs its road across an existing highway, and the provision made at the outset by order of the county commissioners for draining the way after a time becomes ineffective, the county commissioners have the power, under Mass. Pub. St. ch. 112, §§ 135, 136, to make a new order for the effectual drainage of the way at the expense of the company, and by proceedings in equity in the supreme judicial court to have the same enforced. *Dickinson* v. *New Haven & N. R. Co.*, 155 *Mass.* 16, 34 *N. E. Rep.* 334.

349. Michigan. — The right to use a public highway, even though in a dangerous condition, cannot be abridged by the neglect to repair it. *Thayer* v. *Flint & P. M. R. Co.*, 93 *Mich.* 150, 53 *N. W. Rep.* 216.—FOLLOWING Maltby *v.* Chicago & W. M. R. Co., 52 Mich. 108.

Where a company, acting under a notification from the common council of a village, constructs a sidewalk across its right of way at a street crossing, and for years assumes to keep the walk in repair, it becomes its duty to keep the walk in a reasonably safe condition for public travel. *Retan* v. *Lake Shore & M. S. R. Co.*, 94 *Mich.* 146, 53 *N. W. Rep.* 1094.—APPROVING Spooner *v.* Delaware, L. & W. R. Co., 115 N. Y. 22. QUOTING Stewart *v.* Cincinnati, W & M. R. Co., 89 Mich. 328.

350. Minnesota.—Where the charter of a company gives it a right to construct its road upon and along any highway, road, or street, if necessary, but requires the company to "put such highway," etc., "in such condition and state of repair as not to impair or interfere with its free and proper use," the requirement is a continuing one, so that the company may at all times be required to keep the highway in the specified condition and state of repair so far as consistent with the presence of the railroad upon it. *Wayzata* v. *Great Northern R. Co.*, 50 *Minn.* 438, 52 *N. W. Rep.* 913.

The possession of a company entering under such a right given in its charter, no other claim of right appearing, and there being no exclusion of the public use, is consistent with, and not hostile to, the public right, and is not adverse. *Wayzata* v. *Great Northern R. Co.*, 50 *Minn.* 438, 52 *N. W. Rep.* 913.

But where the charter does not authorize the construction of buildings on the highway, the occupation of parts of the highway with such buildings in exclusion of the public use may be adverse to the public right, and may ripen into title by adverse possession. *Wayzata* v. *Great Northern R. Co.*, 50 *Minn.* 438, 52 *N. W. Rep.* 913.

351. New Jersey. — Where the use of a street by a railroad company is not exclusive, it still remains a public street, and the cost of improving it may be assessed against an abutting property owner. *State* (*Felix, Pros.*) v. *Atlantic City Council*, 34 *N. J. L.* 99.

An assessment for an improvement in grading a street cannot be sustained when made according to a statute fixing a standard otherwise than actual benefits, and limited only by political territorial divisions, if the legislature choose to make any such limitation. *State* (*Delaware, L. & W. R. Co., Pros.*) v. *Passaic*, 37 *N. J. L.* 137; *affirmed in* 37 *N. J. L.* 538.

An assessment on a company, for paving a street crossing its railroad, was set aside on the ground that the company derived no benefit therefrom in the improvement of its lands for the uses to which they were appropriated. *State* (*New Jersey R. & T. Co., Pros.*) v. *Elizabeth*, 37 *N. J. L.* 330.—FOLLOWING State *v.* Mayor, etc., of Newark, 27 N. J. L. 186; State *v.* Jersey City, 36 N. J. L. 56.

The effect of N. J. Act of 1873, § 9, for the taxation of railroads, is to subject the property of all railroad corporations of a character to be benefited by local improvements to special assessments for the cost of such improvements, when the public work benefits the property in the uses to which it is applied. *State* (*New Jersey Midland R. Co., Pros.*) v. *Mayor, etc., of Jersey City*, 1 *Am. & Eng. R. Cas.* 406, 42 *N. J. L.* 97.—FOLLOWED IN State (Patterson & H. R. R. Co., Pros.) *v.* Passaic, 54 N. J. L. 340.

352. New York.—Property which cannot be used except for the specific public purpose of a railroad cannot be benefited by laying a street across it. *New York & H. R. Co.* v. *Morrisania*, 7 *Hun* (*N. Y.*) 652.

A municipality has no power to sell the entire roadbed of a railroad company, nor

any lands necessarily used by it for the purposes of its franchise, under an assessment, under N. Y. Act of 1864, ch. 277, § 59, for opening a street across the track. *New York & H. R. Co.* v. *Morrisania*, 7 *Hun* (*N. Y.*) 652.

Where a railroad track is laid along an avenue in tunnels, or below the surface of the avenue, and the officers whose duty it is to assess the expense of paving the avenue report that there was no evidence to show that the company was in any way benefited by the pavement, it will not be held liable for an assessment. *People ex rel.* v. *Gilon*, 41 *Hun* 510, 3 *N. Y. S. R.* 358.

The franchise of a railroad company from the state, authorizing it to use a highway, is not liable to an assessment for opening the street. *In re Public Parks Com'rs*, 47 *Hun* 302, 13 *N. Y. S. R.* 581.

A company which locates its road upon a highway is bound to construct and keep the same in such condition as to render it reasonably safe for travelers. *Currier* v. *Ogdensburgh & L. C. R. Co.*, 25 *N. Y. S. R.* 87, 6 *N. Y. Supp.* 615, 2 *Silv. Sup. Ct.* 12; *affirmed in* 127 *N. Y.* 653, *mem.*, 27 *N. E. Rep.* 857, *mem.*

Where a new street is opened, and the lands of a railroad company are the only lands receiving a new frontage thereby, the company is properly assessed with a greater proportion of the cost of the improvement than is other adjacent property. *In re Alexander Ave.*, 17 *N. Y. Supp.* 933, 44 *N. Y. S. R.* 546, 63 *Hun* 630, *mem.*

After defendant company had acquired, at various times, the right to lay tracks in certain streets in New York city, on condition that it should pave some, and grade others, a statute was passed authorizing it to extend its track on a certain avenue, the company to have the same rights and privileges "as under former grants and laws." *Held*, that the statute did not impose upon the company the duty to pave between its tracks on the avenue. *Mayor, etc., of N. Y.* v. *New York & H. R. Co.*, 46 *N. Y. S. R.* 349, 19 *N. Y. Supp.* 67, 64 *Hun* 635, *mem.*; *affirmed in* 139 *N. Y.* 643, *mem.*, 35 *N. E. Rep.* 206, *mem.*, 54 *N. Y. S. R.* 933, *mem.*—DISTINGUISHING Mayor, etc., of N. Y. *v.* Eighth Ave. R. Co., 118 N. Y. 389, 29 N. Y. S. R. 17.

A provision in a city charter that railroad companies occupying portions of the streets should bear a portion of the expense of paving such streets is within the authority of the legislature, and the share of the expense to be borne is within its discretion. *Lake Shore & M. S. R. Co.* v. *Dunkirk*, 48 *N. Y. S. R.* 208, 65 *Hun* 494, 20 *N. Y. Supp.* 596.

An amendment to such charter undertook to consolidate different provisions relating to the construction of sewers and the grading and paving of streets, but omitted to repeal certain sections relating to notice of intention to construct sewers, etc. *Held*, that such sections, if they continue in force at all, continue only in respect to sewers, and not to grading and paving streets. *Lake Shore & M. S. R. Co.* v. *Dunkirk*, 48 *N. Y. S. R.* 208, 65 *Hun* 494, 20 *N. Y. Supp.* 596.

Town highway commissioners assessed highway labor against "H. R. R. Road," which was understood to mean Hudson River railroad, but it did not otherwise appear from the list whether the assessment was against the lands of a non-resident or against the corporation, whose principal office was not in the town. *Held*, that the assessment was against the corporation, and not against its real estate as lands of a non-resident. *Fowler* v. *Westervelt*, 17 *Abb. Pr.* (*N. Y.*) 59.

Where a city charter requires the cost of street improvements to be assessed "upon the property benefited," local assessors may not add to an assessment against a railroad company because it has built an embankment so as to add to the cost of the improvement. *People ex rel.* v. *Troy Assessors*, 2 *Abb. N. Cas.* (*N. Y.*) 86.

353. North Carolina.—A road used as a mill road may also, because of its location, be such a "plantation road" as will impose upon the company the burden of keeping it in repair, under N. Car. Code, § 1975. *Hinkle* v. *Richmond & D. R. Co.*, 109 *N. Car.* 472, 13 *S. E. Rep.* 884.

354. Ohio.—A lot is not exempt from street assessments because owned and occupied by a railroad company with its track, and as between the railroad and the person performing the work on the street (whatever may be the rights of *bona fide* mortgagees of the road), the lands so occupied may be sold to pay such assessment. *Northern Ind. R. Co.* v. *Connelly*, 10 *Ohio St.* 159.—REVIEWING Providence & W. R. Co. *v.* Wright, 2 R. I. 459.—FOLLOWED IN Daniels *v.* Keeler, 10 Ohio St. 169; Fitch *v.*

Keeler, 10 Ohio St. 169. REVIEWED IN Ludlow *v.* Cincinnati Southern R. Co., 7 Am. & Eng. R. Cas. 231, 78 Ky. 357.

Land appropriated by a company for its track through a city, and crossing an improved street at right angles, and upon which the track was constructed after the work of improvement had been completed, is liable to assessment for the cost of such work, the land so appropriated and occupied exclusively for that purpose being land within the meaning of section 116 of the act for the organization of cities. (Swan's Ohio Rev. St. 985.) *Northern Ind. R. Co.* v. *Connelly*, 10 *Ohio St.* 159.—REVIEWING Sangamon & M. R. Co. *v.* Morgan County, 14 Ill. 163.

Where a village council and a company agree, under the Ohio statute, as to the terms upon which the company may use the streets of the village for its road, whereby the company binds itself to grade and gravel the streets so used in a manner "to the acceptance of the council," a subsequent ordinance repealing the contract ordinance, passed with intent to rescind the entire contract, being inoperative, without the assent of the company, to rescind the grant of the right of way, is also inoperative to release the company from its obligation to grade and gravel streets. *Cincinnati & S. R. Co.* v. *Carthage*, 5 *Am. & Eng. R. Cas.* 306, 36 *Ohio St.* 631.

Where such contract provides for the improvement of a dedicated street which had not been previously accepted by the council, such contract for its improvement constitutes an acceptance of the dedication on the part of the village. *Cincinnati & S. R. Co.* v. *Carthage*, 5 *Am. & Eng. R. Cas.* 306, 36 *Ohio St.* 631.

Upon the failure of a company within a reasonable time to grade and gravel the streets of a village as per contract by which it secured a right to use the streets, a right of action accrues to the village without special notice, request, or demand on the company to perform its contract, and it is not essential to the right to maintain such action that the village should have established, by ordinance other than the contract ordinance, the permanent grade of such streets. *Cincinnati & S. R. Co.* v. *Carthage*, 5 *Am. & Eng. R. Cas.* 306, 36 *Ohio St.* 631.

355. Pennsylvania. — A municipal corporation cannot support a claim against a company for paving a street running by the side of the railroad. *Philadelphia* v. *Philadelphia, W. & B. R. Co.*, 33 *Pa. St.* 41. —FOLLOWED IN Junction R. Co. *v.* Philadelphia, 88 Pa. St. 424; Mt. Pleasant *v.* Baltimore & O. R. Co., 138 Pa. St. 365; Allegheny City *v.* Western Pa. R. Co., 138 Pa. St. 375.

Whenever a person or corporation bound to repair a public highway refuses to do so, when necessary, on notice from the proper public officers, they may make the necessary repairs, and recover the expense thereof in an action of assumpsit. *Pennsylvania R. Co.* v. *Duquesne*, 46 *Pa. St.* 223.

A municipality cannot support a claim for paving against the roadbed of a railroad, and it is immaterial whether the company has simply the right of way or owns the bed in fee. The right of way acquired by a company is exclusive at all times and for all purposes. *Junction R. Co.* v. *Philadelphia*, 88 *Pa. St.* 424.—FOLLOWING Philadelphia *v.* Philadelphia, W. & B. R. Co., 33 Pa. St. 41.—FOLLOWED IN Mt. Pleasant *v.* Baltimore & O. R. Co., 138 Pa. St. 365; Allegheny City *v.* Western Pa. R. Co., 138 Pa. St. 375. REVIEWED IN Bishop *v.* Union R. Co., 14 R. I. 314, 51 Am. Rep. 386.

A municipal claim for the paving of a sidewalk along the roadbed of a company cannot be sustained, inasmuch as the paving cannot possibly confer a special benefit upon the property known as the right of way, and hence the whole theory which justifies such charge fails in this instance. *Mt. Pleasant* v. *Baltimore & O. R. Co.*, 138 *Pa. St.* 365, 20 *Atl. Rep.* 1052.—FOLLOWING Philadelphia *v.* Philadelphia, W. & B. R. Co., 33 Pa. St. 41; Junction R. Co. *v.* Philadelphia, 88 Pa. St. 424.—*Allegheny City* v. *Western Pa. R. Co.*, 138 *Pa. St.* 375, 21 *Atl. Rep.* 763.—FOLLOWING Philadelphia *v.* Philadelphia, W. & B. R. Co., 33 Pa. St. 41; Junction R. Co. *v.* Philadelphia, 88 Pa. St. 424.—*Philadelphia* v. *Philadelphia, W. & B. R. Co.*, 2 *Phila.* (*Pa.*) 244.

This reason does not apply, however, to a passenger station, nor to ground used as a freight station or a lumber yard; and, in the exercise of police powers conferred upon boroughs by the act of April 3, 1851, ground used for such purposes and not forming part of the roadbed may be subject to such charge. *Mt. Pleasant* v. *Baltimore & O. R. Co.*, 138 *Pa. St.* 365, 20 *Atl. Rep.* 1052.—DISTINGUISHING Olive Cemetery Co. *v.* Philadelphia, 93 Pa. St. 129. — FOLLOWED

IN Allegheny City *v.* Western Pa. R. Co., 138 Pa. St. 375.

The provisions of the Pa. Act of April 1, 1870 (P. L. 751), directing the assessment of the cost of street improvements in Allegheny city against the owners of any interest in abutting properties, and that when the owner is a public corporation, and the property cannot for any reason in law be sold upon a municipal lien, the lien shall be prosecuted to judgment and collected by a writ of *fieri facias*, even if they are broad enough to cover and were intended to cover all railroad property, do not affect the above rule, especially in a case where the railroad is from twelve to fifteen feet lower than the bed of the street, as assessments for such improvements can be sustained only when the property is capable of benefit therefrom. *Allegheny City* v. *Western Pa. R. Co.*, 138 *Pa. St.* 375, 21 *Atl. Rep.* 763.—FOLLOWING Mt. Pleasant *v.* Baltimore & O. R. Co., 138 Pa. St. 365.

While, as a general rule, the property owner cannot defend upon the ground that his property is not benefited by a street improvement, this rule has no application to the roadbed of a railroad company, that being the one species of property which the law presumes incapable of being benefited. *Allegheny City* v. *Western Pa. R. Co.*, 138 *Pa. St.* 375, 21 *Atl. Rep.* 763. — DISTINGUISHING Western Pa. R. Co. *v.* Allegheny, 2 W. N. C. 229.

In the absence of any special benefit from such an improvement, and in a case where the courts can declare as a matter of law that no such benefit can arise, the legislature is powerless to impose upon the property the burden of special assessments for the cost of the improvement; this would not be a tax, but practical confiscation. *Allegheny City* v. *Western Pa. R. Co.*, 138 *Pa. St.* 375, 21 *Atl. Rep.* 763.

356. West Virginia.—License from a city to a company to build its track across, along, or upon a public street gives it no power to destroy the street, and it is bound to restore the street to its former state, or to such state as not unnecessarily to impair its usefulness, and also to build proper crossings over the railroad, and keep them in good repair. If it fail, it may be compelled to do so by mandamus; and as, in the event of failure, the company is guilty of maintaining a nuisance, equity may entertain a bill to abate such nuisance, and may compel the company to perform its duty. *Moundsville* v. *Ohio River R. Co.*, 54 *Am. & Eng. R. Cas.* 538, 37 *W. Va.* 92, 16 *S. E. Rep.* 514.—DISAPPROVING Cairo & V. R. Co. *v.* People, 92 Ill. 170. QUOTING State ex rel. *v.* Northeastern R. Co., 9 Rich. (So. Car.) 247. REVIEWING People ex rel. *v.* Dutchess & C. R. Co., 58 N. Y. 165; Indianapolis & C. R. Co. *v.* State, 37 Ind. 489; People ex rel. *v.* Chicago & A. R. Co., 67 Ill. 118; State ex rel. *v.* Dayton & S. E. R. Co., 36 Ohio St. 434; Jamestown *v.* Chicago, B. & N. R. Co., 69 Wis. 648; Oshkosh *v.* Milwaukee & L. W. R. Co., 74 Wis. 534; Storer *v.* Great Western R. Co., 2 Y. & C. Ch. 48.

357. Wisconsin.—By a city charter, the common council had full power over the streets and sidewalks, and authority to keep them in repair; and the street commissioners were authorized to make all necessary repairs therein. A company, after constructing its road through certain streets, neglected, though requested by the commissioners, to restore such streets and the sidewalks thereon to their former condition, as the statute requires, and the commissioners procured the necessary repairs to be made, for which payment was made by the city. *Held*, that the city may recover from the company all reasonable expenses so incurred. *Oconto* v. *Chicago & N. W. R. Co.*, 44 *Wis.* 231.—REVIEWED IN District of Columbia *v.* Washington & G. R. Co., 4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361.

Provisions of the charter establishing the general policy of repairing streets and sidewalks, under the direction of the street commissioners, at the expense of adjoining lots—*held*, inapplicable to the repairs in question. *Oconto* v. *Chicago & N. W. R. Co.*, 44 *Wis.* 231.

The company whose neglect of its own legal duty has compelled the city to make the repairs is not in a position to question, on technical grounds, the authority of the council to appropriate city funds to pay for the same. *Oconto* v. *Chicago & N. W. R. Co.*, 44 *Wis.* 231.

358. Canada.—A municipality may file a bill to compel a company to put streets and highways improperly traversed by its railway in good repair, and will not be restricted to proceedings by indictment or information. *Fenelon Falls* v. *Victoria R. Co.*, 29 *Grant's Ch.* (*U. C.*) 4.

Notwithstanding any liability which may be cast by statute upon a company to maintain and repair a bridge and its approaches by means of which a highway is carried over its railway, such highway is still a public highway, and as such comes within the provisions of the Municipal Act (Ont. Rev. St. ch. 184, § 531), requiring every public road street, bridge, and highway to be kept in repair by the municipal corporation, which is not absolved from liability for default by the liability, if any, of the company. *Mead* v. *Etobicoke Tp.*, 42 *Am. & Eng. R. Cas.* 81, 18 *Ont.* 438.

359. England. — Where the act of a company provides that so much of the Railways Clauses Consolidation Act, 1845, as relates to the mode of crossing roads and construction of bridges "shall respectively, except so far as the same may be by this act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated with and form part of this act," there are incorporated into the act the provisions of the general act which relate to crossings and the construction of bridges, section 65, imposing penalties for suffering roads and approaches to bridges to be out of repair, and section 145 and subsequent sections, relating to the mode of enforcing such penalties. *Bristol & E. R. Co.* v. *Tucker*, 13 *C. B. N. S.* 207, 7 *L. T.* 464.

An order of justices directing a company to repair damages to a road is sufficient if it states the length of the damaged part and orders the company to make it good; it is not necessary that the particulars of the damage be specified. Several highways in the same parish may be included in the order and conviction for disobedience. *London & N. W. R. Co.* v. *Wetherall*, 15 *Jur.* 247.

A company does not interfere with a road so as to bring the case within section 58 of the Railways Clauses Consolidation Act, 1845, by pulling down a county bridge and erecting another, but entering into an agreement with the trustees to repair such portions of the approaches as had previously been repaired by the county. *Ex parte Exeter Road Trustees*, 16 *Jur.* 669.

A railway company crossing a highway on a level must keep the part of the way used by the public in proper repair. *Oliver* v. *North Eastern R. Co.*, 43 *L. J. Q. B.* 198, *L. R.* 9 *Q. B.* 409.

A vacant lot of a railway company close to one of the piers of its bridge, and used for the purpose of repairing the bridge, and land which is partly vacant and partly a buttress or a support to the embankments of the railway, are within 25 & 26 Vict. c. 102, § 77, and the company may be compelled to contribute to the expense of paving a street on which such land abuts. *Higgins* v. *Harding*, *L. R.* 8 *Q. B.* 7, 42 *L. J. M. C.* 31, 27 *L. T.* 483, 21 *W. R.* 191.

A company whose line runs in a cutting adjoining a street and separated from it by a wall through which there is no connection between the street and the railway is liable to be assessed for the expense of paving such street. *London & N. W. R. Co.* v. *St. Pancras*, 17 *L. T.* 654.

The exemption of a company from borough assessments to meet the expenses of a local improvement act must be given effect by the authority which exercises the power of that act within the part of the district included in the borough. *Reg.* v. *London & N. W. R. Co.*, 46 *L. J. M. C.* 102.

Where a company has used highways by the carriage of materials in the carts of contractors or other persons employed by them, the justices have power to make an order compelling the company to repair such highways. *West Riding & G. R. Co.* v. *Wakefield Local Board of Health*, 5 *B. & S.* 478, 10 *Jur. N. S.* 1046, 33 *L. J. M. C.* 174, 12 *W. R.* 1076.

A justice of the peace, although interested, is not incompetent to act in proceedings to compel a railway company to repair damages to a public road, provided the party knowing that he was interested assented to his act. *Wakefield Local Board of Health* v. *West Riding & G. R. Co.*, 6 *B. & S.* 794, 10 *Cox C. C.* 162, 13 *L. T.* 590.

The same justice who makes an order to compel a company to repair a public road damaged by it must impose the penalty for disobedience of such order. *Wakefield Local Board of Health* v. *West Riding & G. R. Co.*, 6 *B. & S.* 794, 10 *Cox C. C.* 162, 13 *L. T.* 590. *Reg.* v. *Rawson*, 15 *L. T.* 179.

Where a street crosses a railway laid in a deep cutting by means of a bridge supported on stone piers erected on the slope of the cutting, the track and the slopes do not bound or abut upon the street within the meaning of the Metropolis Management Amendment Act, 1862, § 77, so as to require the company to contribute to the paving of

the road. *London, B. & S. C. R. Co.* v. *St. Giles, Camberwell, L. R.* 4 *Ex. D.* 239, 48 *L. J. M. C.* 186.

A railway company whose track is laid in a deep cutting crossed by a street which is carried over on a bridge is not liable to contribute to the paving of the road, where it ceases at one extremity of the bridge to be a "new street" within the meaning of the Metropolis Management Amendment Act, 1862, § 77. *London, B. & S. C. R. Co.* v. *St. Giles, Camberwell, L. R.* 4 *Ex. D.* 239, 48 *L. J. M. C.* 186.

A company which carries a highway over its track by means of a bridge having parapets consisting of two walls resting upon arches having their foundations in the railway company's land is not the "owner of land bounding or abutting on" the highway within section 77 of the Metropolis Management Act of 1862, and is not liable as owner of the walls to contribute to the expense of paving the street. *Great Eastern R. Co.* v. *Hackney Dist. Board of Works.* 13 *Am. & Eng. R. Cas.* 404, *L. R.* 8 *App. Cas.* 687, 52 *L. J. M. C.* 105, 49 *L. T.* 509, 31 *W. R.* 769; *reversing L. R.* 9 *Q. B. D.* 412, 51 *L. J. M. C.* 57, 46 *L. T.* 679, 30 *W. R.* 765.

VI. LIABILITY FOR INJURIES CAUSED BY NEGLIGENCE.

1. *Of the Town or City.*

360. City or town primarily liable for defects in streets. — A municipal corporation is liable to one who is injured by reason of the unsafe condition of a street rendered so by the construction of a railroad thereon, under authority of and in a manner prescribed by the city. *Barnes* v. *District of Columbia,* 91 *U. S.* 540.—FOLLOWED IN *Maxwell v.* District of Columbia, 91 U. S. 557.

The common council has exclusive power over the streets, highways, alleys, etc., within a city, and it is its duty to keep and maintain such streets and alleys unobstructed; and no matter by whom the obstruction may be placed in the street or alley, the city is primarily liable to an individual who may sustain damage by reason of the obstruction; and although the railroad company may be liable too, and although the city might have an action, after having paid damages and costs, against the railroad company for reimbursement, this would subject the city to endless litigation, but the evil complained of would still remain. *Indianapolis & C. R. Co.* v. *State ex rel.,* 37 *Ind.* 489, 5 *Am. Ry. Rep.* 170.

For injuries to travelers occasioned by necessary alteration of a highway, through want of sufficient notice or warning of such change, the town is primarily liable, although such change is being effected by a railroad company, under the authority of its charter. *Phillips* v. *Veazie,* 40 *Me.* 96.

When a passenger upon a highway receives an injury wholly by reason of an illegal defect therein, caused by its alteration by a railroad company, the town in which it is situated is liable for such injury. *Veazie* v. *Penobscot R. Co.,* 49 *Me.* 119.—MODIFIED IN Eaton *v.* European & N. A. R. Co., 59 Me. 520. QUOTED IN Potter *v.* Bunnell, 20 Ohio St. 150.

361. Consent to use of street by railway company no defense.—A city council, by ordinance, authorized a company to lay its tracks in a street, reserving the right to require it to cover any portion of the superstructure, except the rails, with plank, and to light its road with gas, as the council should prescribe. The company made and left open a ditch between its tracks, which, being unlighted at night, M. fell in and was injured. *Held,* in an action against the city, that its supervision of, and responsibility for, the street, subject only to the use by the company, continued, and that an answer pleading the ordinance as relieving the city from responsibility for so much of the street as was occupied by the tracks of the railroad was insufficient. *Steubenville* v. *McGill,* 41 *Ohio St.* 235.

362. Limits and exceptions to the rule. — A municipality charged with the duty and power to grade and alter the streets of its city is not answerable, in the performance of such work, for injury resulting to a citizen, unless negligence be shown. *District of Columbia* v. *Baltimore & P. R. Co.,* 4 *Am. & Eng. R. Cas.* 179, 1 *Mackey* (*D. C.*) 314.

Under Ind. Rev. St. of 1881, § 3106, the common council of a city may provide by ordinance for the security of citizens from the running of trains through the city, and to that end may require railroad companies to provide and use suitable safeguards at the intersection of streets or elsewhere within the city; but a city is not liable for

injuries to persons or property which may result from failing to require a company to provide such safeguards. *Kistner* v. *Indianapolis*, 100 *Ind.* 210. — APPLYING Faulkner *v.* Aurora, 85 Ind. 130; Robinson *v.* Evansville, 87 Ind. 334; Lafayette *v.* Timberlake, 88 Ind. 330. FOLLOWING Brinkmeyer *v.* Evansville, 29 Ind. 187.—DISTINGUISHED IN Williams *v.* Citizens' R. Co., 130 Ind. 71.

363. When town not liable. — A town is not liable for an injury occasioned to a traveler, passing from a public highway to a station through a road opened by the proprietors of the railroad for that purpose, by a block of stone, lying within the limits of the highway, as located, and obstructing the entrance to the road to the station, if it does not obstruct the roadbed of the highway. *Smith* v. *Wendell*, 7 *Cush.* (*Mass.*) 498.

A town is not liable for injuries done to a traveler on the highway by a locomotive engine run by a railroad corporation on its track illegally laid across the highway. *Vinal* v. *Dorchester*, 7 *Gray* (*Mass.*) 421.

364. Liability as regards crossings. — A company was required, by its charter, so to construct its railroad as not to obstruct the safe and convenient use of any highway. While it was building an embankment across a highway, a traveler sustained special damage from the obstruction. *Held*, that the town was liable to the sufferer. *Elliot* v. *Concord*, 27 *N. H.* 204.

A town may be liable under Mass. Gen. St. ch. 44, § 22, for an injury resulting to a traveler from a defect in a highway, although the defective place is within the location of a railroad which crosses the highway on a level therewith. *Pollard* v. *Woburn*, 104 *Mass.* 84.

Where a city is sued for an injury received by a street crossing being out of repair, it is no defense that the crossing was torn up for the purpose of laying a railroad track, and that an injunction had been obtained by a property owner enjoining the company from further interfering with that part of the street. *Dale* v. *Syracuse*, 71 *Hun* 449, 54 *N. Y. S. R.* 381, 24 *N. Y. Supp.* 968.

Where a railroad is in process of construction across a highway, and a new road is opened for the purpose of turning the travel from the old way which has become dangerous, it is the duty of the town to erect and maintain such warnings or obstructions upon the old road as to notify travelers that it is not to be used; and if it fails in this regard it is liable for any injuries sustained by individuals by reason of such failure. *Barber* v. *Essex*, 27 *Vt.* 62. — REVIEWING Willard *v.* Newbury, 22 Vt. 458.

365. —— bridges. — An incorporated town is charged by the law with the duty of keeping its streets in proper condition for travel, and this obligation extends to a bridge built in the street by a railroad company, on its right of way, as an approach to a crossing of its track. Whatever obligation may rest upon the company to keep such approach in safe condition, the town still remains liable for negligence in that regard. *Fowler* v. *Strawberry Hill*, 74 *Iowa* 644, 38 *N. W. Rep.* 521.

366. —— cattle-guards.—If the proprietors of a railroad, acting within the scope of their lawful authority, construct a cattle-guard in their road, at a place where it crosses a highway on the same level, and the town erects and maintains a sufficient and proper barrier against such cattle-guard, up to the railroad, and as far as can be done without impeding the passing of cars on the same, the town is not responsible for an injury sustained by a traveler on the highway in consequence of his falling into the cattle-guard without any fault or neglect on his part. *Jones* v. *Waltham*, 4 *Cush.* (*Mass.*) 299.

367. Contributory negligence of person injured.*—A person on a highway and approaching a railroad track has a right to presume that the statutory signals will be given of approaching trains, and he is not chargeable with contributory negligence for assuming that no train is sufficiently near to make the crossing dangerous when none has been seen or heard. *Kennayde* v. *Pacific R. Co.*, 45 *Mo.* 255.

Plaintiff was crossing a street on a crosswalk when he fell and was injured by reason of a portion of the walk having been torn up by a railroad company preparatory to laying its track. *Held*, that the question whether he was chargeable with contributory negligence for not noticing where he was stepping was for the jury, since it appeared that his attention had been momentarily diverted from the crossing. *Dale*

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **190-307.**

v. *Syracuse*, 71 *Hun* 449, 54 *N. Y. S. R.* 381, 24 *N. Y. Supp.* 968.

Where one, in consequence of not looking, steps over the edge of a sidewalk and is injured, he cannot recover from the city, notwithstanding its duty to keep its streets and bridges in such a state of repair as not to require one to be constantly on the lookout for dangerous places. *Muhr* v. *Mayor, etc., of N. Y.*, 16 *N. Y. S. R.* 688, 2 *N. Y. Supp.* 59.

368. Instructions to the jury.—In an action against a city by a street-car conductor, injured in the evening by a collision with a barrier put up to guard a point where a street had caved in, a witness testified that the danger from the caving in had ceased the morning before. The jury, in connection with an instruction that they might find the barrier to be a defect if such a change had occurred as to render its removal proper, were allowed to decide whether the witness meant that the danger to the public had ceased because the barrier had been put up, or because a further caving in was not to be feared, so that it was no longer necessary. *Held*, that the question was properly left to the jury. *Powers* v. *Boston*, 154 *Mass.* 60, 27 *N. E. Rep.* 995.

Plaintiff, at the time of the accident, stood upon the running board of an open car collecting fares, and his person, which he allowed to project beyond the outer edge of the board, coming in contact with a barrier which was placed by the city within two inches of such outer edge, he was knocked off and sustained the injuries in question. He admitted that he had a general idea that there were some obstructions there, but testified that he did not know they were so near or so dangerous as they were. *Held*, that the question of his negligence was properly left to the jury. *Powers* v. *Boston*, 154 *Mass.* 60, 27 *N. E. Rep.* 995.

2. *Of the Railroad Company.*

a. In General.*

369. Care required from the company, generally.†—Where a company is rightfully running its trains on a public street, it must do so in such a way as to be consistent with the safety of persons and property on the street. *Barley* v. *Chicago & A. R. Co.*, 4 *Biss.* (*U. S.*) 430.

When an engine is backing a train there should be a lookout to give notice of any persons or obstructions, and if there is steam or smoke upon the track great care and vigilance are required. *Barley* v. *Chicago & A. R. Co.*, 4 *Biss.* (*U. S.*) 430.

Where a company, in violation of a statute, has rendered the use of a highway unsafe, it is bound in operating its railroad to exercise proper care to prevent the injury of a person placed in danger by that wrong while in the lawful use of the highway. *Hoggatt* v. *Evansville & T. H. R. Co.*, 3 *Ind. App.* 437, 29 *N. E. Rep.* 941.

Greater care is to be exercised by the persons managing a train of cars within the limits of a town or city than is required in the country. *Frick* v. *St. Louis, K. C. & N. R. Co.*, 8 *Am. & Eng. R. Cas.* 280, 75 *Mo.* 595.

A less degree of vigilance will ordinarily be required between the streets of a town or city than will be required at a street crossing, or when running longitudinally in a street; but undoubtedly some vigilance is required even between the streets, and the degree required will necessarily vary with the attendant circumstances. In any case the requisite degree of vigilance may be properly designated by the words "ordinary care," that is, such care as would ordinarily be used by prudent persons performing a like service under similar circumstances. *Frick* v. *St. Louis, K. C. & N. R. Co.*, 8 *Am. & Eng. R. Cas.* 280, 75 *Mo.* 595.—QUOTED IN Stanley *v.* Union Depot R. Co., 114 Mo. 606.

If a railroad is a public highway, the owners are liable, like towns, for all injuries sustained because of defects in their road by persons traveling, either on foot, or in their own carriages, or in those of other persons. *Murch* v. *Concord R. Corp.*, 29 *N. H.* 9, 61 *Am. Dec.* 631.

The owners of railroads, which are public highways, are bound to make such landings or places of access to their roads as are necessary for the public accommodation, and to keep them in suitable and safe state

* As to amount of care railroad companies are required to use in running trains through cities and villages, see note, 78 AM. DEC. 185.

† See also NEGLIGENCE, **13.**

Personal injuries to persons in highway, see note, 15 L. R. A. 33.

Care required in management of locomotives on streets. Engine's emission of steam and smoke, see 43 AM. & ENG. R. CAS. 193, *abstr.*

for the accommodation of the persons who may be reasonably expected to use them. They are not bound to do anything where no passing can reasonably be expected. *Murch* v. *Concord R. Corp.*, 29 *N. H.* 9, 61 *Am. Dec.* 631.

Railroad corporations are bound to exercise reasonable care and diligence in the management and operation of their locomotives in the vicinity of highways, having due regard to the rights and safety of travelers thereon. *Gordon* v. *Boston & M. R. Co.*, 58 *N. H.* 396.

A company, when moving its locomotives or trains upon the public streets of a city, is bound to use due care and give some signal of their approach. *Solen* v. *Virginia & T. R. Co.*, 13 *Nev.* 106.—QUOTING Grippen *v.* New York C. R. Co., 40 N. Y. 42.

370. Greater care than in other localities.—It is required of a company to exercise more care than would otherwise be necessary when running its trains in a populous town. *Troy* v. *Cape Fear & Y. V. R. Co.*, 34 *Am. & Eng. R. Cas.* 13, 99 *N. Car.* 298, 6 *S. E. Rep.* 77, 6 *Am. St. Rep.* 521.

A company running its trains on city streets must use greater care than in less frequented localities, and any neglect of precautions proper in such case constitutes negligence. *Norfolk & W. R. Co.* v. *Burge*, 32 *Am. & Eng. R. Cas.* 101, 84 *Va.* 63, 4 *S. E. Rep.* 21.

371. Mutual rights of company and citizens.*—Railroad companies, in running cars on streets or other thoroughfares, are held to a very high degree of care and diligence. The use of that part of the street where the track is laid is not exclusive. The entire public has a right to use such streets. *Toledo, W. & W. R. Co.* v. *Harmon*, 47 *Ill.* 298.

Where a track is laid in a public street, the rights of the public and the company respecting the use thereof are mutual, though those of the latter are paramount. A person is not a trespasser who walks along such track, and if in so doing his foot becomes fastened in an opening which exists by reason of negligent construction of the track, and he is run upon by a train of the company which is negligently managed, he being without fault, the company is liable. *Louisville, N. A. & C. R. Co.* v. *Phillips*, 31 *Am. & Eng. R. Cas.* 432, 112 *Ind.* 59, 13 *N. E. Rep.* 132.—DISTINGUISHING Barker *v.* Hudson River R. Co., 4 Daly (N. Y.) 274; Zimmerman *v.* Hannibal & St. J. R. Co., 71 Mo. 476; Wilbrand *v.* Eighth Ave. R. Co., 3 Bosw. (N. Y.) 314; Jersey City & B. R. Co. *v.* Jersey City & H. Horse R. Co., 20 N. J. Eq. 61; Adolph *v.* Central Park, N. & E. R. R. Co., 65 N. Y. 554; Chicago W. D. R. Co. *v.* Bert, 69 Ill. 388. QUOTING Smedis *v.* Brooklyn & R. B. R. Co., 88 N. Y. 13.—FOLLOWED IN Ohio & M. R. Co. *v.* Walker, 113 Ind. 196.

The right of a company to use that part of a street where its track is laid is not exclusive; all other cars, carriages, and persons who are authorized by law to use the same place have the same rights as the company, but the same degree of care and caution must be exercised by each. *Mooney* v. *Hudson River R. Co.*, 1 *Sweeny* (*N. Y.*) 325.

372. Duty towards persons walking on the track.—When a track is laid by authority of law in a public thoroughfare, the right of the company owning the track to operate trains thereon is superior to the right of the general public to walk along said track, but having a superior right thereon does not relieve the company from liability to damage for injury to persons caused solely by its negligence in using said track. *Louisville & N. R. Co.* v. *Yniestra*, 29 *Am. & Eng. R. Cas.* 297, 21 *Fla.* 700.

An individual walking on a track in a city street is not a trespasser, and the company must run its trains with reference to him and to all others who may be rightfully upon the street. *Kansas Pac. R. Co.* v. *Pointer*, 9 *Kan.* 620.—QUOTED IN Louisville, N. A. & C. R. Co. *v.* Phillips, 31 Am. & Eng. R. Cas. 432, 112 Ind. 59; Solen *v.* Virginia & T. R. Co., 13 Nev. 106.

A company may be liable for negligence in propelling its cars at all while persons are upon its tracks, precisely as the owner of an ordinary carriage would, under like circumstances. Indeed, greater care may be required from the former, as its cars are stopped with difficulty and cannot be turned out of their course. *Mooney* v. *Hudson River R. Co.*, 1 *Sweeny* (*N. Y.*) 325.

A company is bound to use a degree of caution in operating its train over the streets of a city corresponding to the danger incident thereto, when from the

*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **8–11.**

absence of sidewalks near the track persons may be expected to walk along and across the track. *Gulf, C. & S. F. R. Co.* v. *Walker*, 37 *Am. & Eng. R. Cas.* 342, 70 *Tex.* 126, 7 *S. W. Rep.* 831.

373. Inevitable accident excuses the company.* — A company is held to the exercise of a very high degree of care in operating its road through the public streets of a city, and must not omit any reasonable duty that may tend to the safety of the public. But it is not an insurer against every casualty that may happen, or for an injury attributable to inevitable accident, which no vigilance could avoid. *Chicago, B. & Q. R. Co.* v. *Stumps*, 69 *Ill.* 409.

374. Proximate and remote cause. —The rate of speed of a train moving faster than is prescribed by an ordinance of a city is not the proximate cause of an injury to a trespasser who is injured in the attempt to get on board such moving train within the limits of the city. *Western R. Co.* v. *Mutch*, 97 *Ala.* 194, 11 *So. Rep.* 894.

While a woman on horseback was approaching a crossing, some section men who observed her approach, and had just reached the crossing, removed a hand-car from the track and placed it on the highway, ten feet from the centre thereof, in such a way as to frighten the horse, owing to which the woman was thrown and injured. *Held*, that the fact that the hand-car was so placed was the proximate cause of the injury, and a verdict against the company should be sustained. *Ohio & M. R. Co.* v. *Trowbridge*, 45 *Am. & Eng. R. Cas.* 200, 126 *Ind.* 391, 26 *N. E. Rep.* 64.

The fact that the woman knew the car was in the highway does not necessarily prove that she was guilty of contributory negligence. *Ohio & M. R. Co.* v. *Trowbridge*, 45 *Am. & Eng. R. Cas.* 200, 126 *Ind.* 391, 26 *N. E. Rep.* 64.

Plaintiff, who was employed in cleaning ice and snow from defendant's track, saw an approaching train, and got out of the way, but slipped and fell, and was struck and injured; but the evidence showed that the car was moving at a forbidden rate of speed at the time. *Held*, that it could not be said, as a matter of law, that the unlawful speed was not the proximate cause of the injury. *Crowley* v. *Burlington, C. R. & N. R. Co.*, 18 *Am. & Eng. R. Cas.* 56, 65 *Iowa* 658, 20 *N. W. Rep.* 467, 22 *N. W. Rep.* 918.—FOLLOWED IN Handelun *v.* Burlington, C. R. & N. R. Co., 72 Iowa 709, 32 N. W. Rep. 4.

The mere fact that a city ordinance is violated by failure to ring the bell, or by running at a too high rate of speed, will not authorize a party injured to recover. There must be some evidence connecting the violation of the ordinance with the injury, as a cause. *Kelley* v. *Hannibal & St. J. R. Co.*, 13 *Am. & Eng. R. Cas.* 638, 75 *Mo.* 138.—FOLLOWED IN Bowman *v.* Chicago & A. R. Co., 85 Mo. 533.

375. Injuries due to failure to keep highway in good repair. — Where a company owns premises adjacent to a city street, and, without authority, interferes with a sidewalk for its private purpose and fails to restore it to a safe condition, it is liable to any one who sustains injury thereby. *Thuringer* v. *New York C. & H. R. R. Co.*, 71 *Hun* 526, 55 *N. Y. S. R.* 87, 24 *N. Y. Supp.* 1087.

A company is liable for injuries resulting from a failure to keep the highways in good repair. *Mayberry* v. *Second & T. St. R. Co.*, 15 *Phila.* (*Pa.*) 253.

376. Injuries occasioned by violation of ordinances, generally. — If a company does not conform to the city ordinances providing certain safeguards in the use of its engines, it is not in the lawful pursuit of its business, and is responsible for any injury which it may occasion, if the party injured be not in fault. *Baltimore & O. R. Co.* v. *State*, 29 *Md.* 252.

Running a train in a city in violation of its ordinances is negligence *per se*. *Dahlstrom* v. *St. Louis, I. M. & S. R. Co.*, 108 *Mo.* 525, 18 *S. W. Rep.* 919. *Eswin* v. *St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 390, 96 *Mo.* 290, 9 *S. W. Rep.* 577.—FOLLOWING Keim *v.* Union R. & T. Co., 90 Mo. 314.—*Schlereth* v. *Missouri Pac. R. Co.*, 115 *Mo.* 87, 21 *S. W. Rep.* 1110.

Where coal merchants, for their exclusive use and benefit, and for the purpose of facilitating the reception of car loads of coal, had caused, by agreement with defendant railroad, a switch track to be connected with the track of the defendant, the merchants agreeing to keep a watchman to notify employés of their patrons of the approach of trains, and an employé is injured through failure of the merchants to provide a watchman to give such warning, such failure is no defense to the railroad in an action against

*See also NEGLIGENCE, 40.

it for an injury to such employé caused by its failure to observe a city ordinance requiring it to keep a watchman on the rear end of its freight trains to warn persons of danger, and to sound the bells of its locomotives within the city limits. *Dunkman* v. *Wabash, St. L. & P. R. Co.*, 95 *Mo.* 232, 10 *West. Rep.* 396, 4 *S. W. Rep.* 670.

Whether a train is "well manned with experienced brakemen at their posts" [illegible] the meaning of a city ordinance is a question for the jury. *Dahlstrom* v. *St. Louis, K. C. & S. R. Co.*, 108 *Mo.* 525, 18 *S. W. Rep.* 919.

377. — ordinances restricting speed.*—A company is liable to the owner of real estate, situated in an incorporated city or town, for damage and injury done to his house and buildings by vibrations of the soil, where it can be shown that such damage and injury are the direct result of running trains at a greater rate of speed than six miles per hour. *Porterfield* v. *Bond*, 39 *Am. & Eng. R. Cas.* 48, 38 *Fed. Rep.* 391.

An employé who was not in the habit of running trains took charge of an engine and backed it, with a car attached, through a street at the rate of twelve miles an hour, in violation of an ordinance restricting the speed to five miles an hour. It ran off the track and injured plaintiff, who was in a building twelve feet from the track. The evidence showed that the steam was not shut off after the engine left the track. *Held*, that the company was chargeable with negligence in violating the ordinance. *Mahan* v. *Union Depot St. R. & T. Co.*, 34 *Minn.* 29, 24 *N. W. Rep.* 293.

Persons on a public street in a municipality have the right to presume that a company will obey the municipal ordinances regulating the speed and management of trains, and have the right to act on such presumption. *Eswin* v. *St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 390, 96 *Mo.* 290, 9 *S. W. Rep.* 577.

A company running trains through and across the traveled streets of a city at a speed of fifteen miles an hour, in violation of an ordinance, does so at its peril, and if injury arises to a person as the direct consequence of such unlawful speed, he will, if otherwise entitled, have a good cause of action against the company. *Neier* v. *Missouri Pac. R. Co.*, 12 *Mo. App.* 25.

378. — ordinances requiring giving of signals. — Where a city ordinance prohibits running trains through the corporate limits at a speed greater than six miles an hour, and requires the placing of signals upon the engines of trains running in the night-time, if a company runs an engine without the signals and at an unlawful speed over a crossing which large numbers of people are in the daily habit of using, and fails to ring a bell on approaching such crossing, the negligence of the company is gross, and will authorize a recovery, even where the place of accident is not on a public highway, but on plaintiff's right of way. *East St. Louis Connecting R. Co.* v. *O'Hara*, 49 *Ill. App.* 282.

It is negligence to run a train in a city with twice the rapidity allowed by a city ordinance, and without ringing the bell, sounding the whistle, or giving any signal of approach. *St. Louis & S. E. R. Co.* v. *Mathias*, 50 *Ind.* 65.

In running a train backward through streets, the engineer should see that the b akeman is at his post and keeps a lookout on the track to warn him in case of danger. It is the duty of the fireman to ring the bell continually while passing through a town or village. *Hamilton* v. *Morgan's L. & T. R. & S. Co.*, 42 *La. Ann.* 824, 8 *So. Rep.* 586.

If an accident happens while thus running through streets, and one of these three men is not immediately at his post, although near, it gives good cause for examination and close investigation. *Hamilton* v. *Morgan's L. & T. R. & S. Co.*, 42 *La. Ann.* 824, 8 *So. Rep.* 586.

The failure to ring a bell on a moving railroad engine, as required by a city ordinance, constitutes negligence; and such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for, but not otherwise. *Hanlon* v. *Missouri Pac. R. Co.*, 104 *Mo.* 381, 16 *S. W. Rep.* 233.

379. — ordinances as to standing cars, movement of trains, etc.—Plaintiff was injured while attempting to cross defendant's track in a city through an opening between cars standing from twenty-five to fifty feet apart. He testified that he looked before crossing, and did not see that the cars were moving. The evidence also

* Liability of company in accidents for running trains at speed prohibited by city ordinances, see note, 53 AM. REP. 52.

showed that defendant was not observing the city ordinance regulating the movement of trains. *Held*, that the case was one for the jury. *Dahlstrom* v. *St. Louis, I. M. & S. R. Co.* 108 *Mo.* 525, 18 *S. W. Rep.* 919.

A company is chargeable with negligence in backing a train without notice, so that the rear car runs onto a street crossing. *Shoemaker* v. *New York C. & H. R. R. Co.*, 21 *N. Y. S. R.* 541, 4 *N. Y. Supp.* 931, 50 *Hun* 602, *mem.*

380. Injuries caused by negligence in operating turntables.—Persons operating a turntable in a public street are bound to such vigilance as may be reasonably necessary to prevent collisions. *Schureman* v. *Missouri R. Co.*, 7 *Mo. App.* 570.

Where no part of the testimony is preserved, and it appears from the instructions that the trial court found as a fact that the machine was so placed in a public street, near a crossing, that drivers turning the corner could not, with the exercise of reasonable precaution, avoid injury if the machinery was set in motion as they approached, there is nothing from which the appellate court can see that the trial court erred in declaring the law to be that those operating such a machine, under the circumstances, were bound to the utmost care. *Schureman* v. *Missouri R. Co.*, 7 *Mo. App.* 570.

381. Injuries caused by snow and ice on sidewalk.—Where the icy condition of a sidewalk, upon which plaintiff fell and was injured, is not the result of negligence in failing to remove naturally accruing ice and snow, but is caused by the action of defendant company in throwing water on the sidewalk, where it froze, the case is a proper one for the jury, and a verdict for plaintiff will not be disturbed. *Canfield* v. *Chicago & W. M. R. Co.*, 41 *Am. & Eng. R. Cas.* 566, 78 *Mich.* 356, 44 *N. W. Rep.* 385.

Plaintiff left a sidewalk which was impassable by reason of deep snowdrifts, and was walking in the street, and was injured by being struck by a team which shied at a passing train. The company was charged with negligence in constructing and maintaining its track in the street where it was so narrow as not to allow sufficient room for ordinary travel. *Held*, that the company was not liable. The accident was the result of a failure of the city to keep its sidewalks clear. *McCandless* v. *Chicago & N. W. R. Co.*, 71 *Wis.* 41, 36 *N. W. Rep.* 620.

382. Collisions with teams in streets.* — Where a team is injured by a train within the limits of a city, and upon one of its streets, and on the trial of an action to recover damages therefor there is testimony that the train was running at an unusual speed, that no effort was made to stop it or to warn the party in charge of the team of the approaching danger, and that no whistle was sounded or bell rung, it cannot be held that there is no evidence of negligence. *Pacific R. Co.* v. *Houts*, 12 *Kan.* 328.

Plaintiff was driving on a track, and was injured by an approaching car while attempting to turn from the track to the left. A statute of the state required carriages meeting to turn to the right. *Held*, that the statute did not apply, and that plaintiff was not chargeable with negligence in turning to the left. *Hegan* v. *Eighth Ave. R. Co.*, 15 *N. Y.* 380.—RECONCILED IN Mayor of N. Y. *v.* Third Ave. R. Co., 3 N. Y. S. R. 181.

Defendant company operated a street-car line using dummy engines for motive power. One of these was running at a high rate of speed on a dark and somewhat foggy night, without giving warning by bell or whistle at crossings, as it was required to do, and collided with plaintiff, who was driving on the street. *Held*, that the company was guilty of negligence. *Hennessy* v. *Brooklyn City R. Co.*, 73 *Hun* 569, 26 *N. Y. Supp.* 321, 56 *N. Y. S. R.* 151.

It is error to instruct a jury that if plaintiff was not guilty of negligence, then they must assume that defendant company was, from the fact that a collision had occurred in the street. The question whether the company was guilty of negligence was as material as whether plaintiff was, and that should have been made the primary question. *Altreuter* v. *Hudson River R. Co.*, 2 *E. D. Smith* (*N. Y.*) 151.

b. Procedure.

383. Declaration or complaint.—In an action to recover damage for falling into an unguarded excavation adjoining defendant's track in the city of V., it is not necessary for plaintiff to aver that he was ignorant of the existence of the excava-

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **13-16, 139, 140.**

tion where negligence is alleged and a general averment is made that defendant was negligent and plaintiff was without negligence. *Ohio & M. R. Co.* v. *Levy*, 134 *Ind.* 343, 32 *N. E. Rep.* 815.

In an action against a city and a railroad company to prevent the occupancy of a street by the latter, and for damages therefor, allegations in the petition to the effect that other streets were occupied by other railway companies are immaterial, and may be stricken out upon motion. *Davis* v. *Chicago & N. W. R. Co.*, 46 *Iowa* 389, 16 *Am. Ry. Rep.* 45.

Where a petition in an action against a railroad for personal injuries charges that defendant negligently and in violation of the city ordinance stopped a freight train across a public street, and that, while plaintiff was attempting to cross the street between the cars, defendant, without warning, backed the train, causing plaintiff's injuries, such two alleged causes of action are not separable in the sense that one only would be the proximate cause of the injury. *Burger* v. *Missouri Pac. R. Co.*, 112 *Mo.* 238, 20 *S. W. Rep.* 439.

In an action against a company, the complaint, though very vague and indefinite in its terms, set forth in substance that defendant made an excavation for its road near a certain street and left the same unguarded, and that plaintiff while walking along said street fell into the excavation and was injured, although she had used due care. *Held*, that the complaint set forth a cause of action and was not demurrable. *Rathburn* v. *Burlington & M. R. R. Co.*, 19 *Am. & Eng. R. Cas.* 137, 16 *Neb.* 441, 20 *N. W. Rep.* 390.—DISTINGUISHING Clary *v.* Burlington & M. R. R. Co., 14 Neb. 232.

A railroad, as such, is not necessarily a public highway. If a party's rights depend on the fact that such road is a public highway, that fact must be alleged in the declaration. *Murch* v. *Concord R. Corp.*, 29 *N. H.* 9, 61 *Am. Dec.* 631.

384. Necessity of pleading ordinance violated.—If suit is based on the violation of an ordinance it must be pleaded. Unless this is done it is error to instruct the jury to find for plaintiff if the speed of the train exceeded that named in the ordinance, without further submitting whether the rate of speed was, under the circumstances in proof, reckless. The ordinance, because not pleaded, did not make a rate of speed exceeding five miles per hour reckless *per se*. *Nutter* v. *Chicago, R. I. & P. R. Co.*, 22 *Mo. App.* 328.

385. Plaintiff must show negligence on part of company.—The tracks of a railway were on a portion of a turnpike. The employé of a contractor repairing the turnpike was injured by falling in an unfilled depression between the ties, and being run over by the horses he was driving. *Held*, that the company was not liable, plaintiff's evidence showing an endeavor to impute negligence to the company with which it was not chargeable. *Kelly* v. *Manayunk & R. I. P. & R. Co.*, (*Pa.*) 12 *Atl. Rep.* 598.

If a company is authorized to lay rails in public streets, it will not be liable for accidents resulting therefrom unless it is shown to be guilty of negligence in laying down, or in maintaining and operating, the tracks. *Mazetti* v. *New York & H. R. Co.*, 3 *E. D. Smith* (*N. Y.*) 98.

386. Contributory negligence, when a defense.—Where one, not a passenger, but a stranger to a railroad company, injured while crossing its track through the thoroughfares of a city, might have escaped such injury by the exercise of diligence such as is reasonably to be expected from the age and intelligence of such person, the company will not be liable in damages for such injury, although it may be chargeable with negligence. *Baltimore & O. R. Co.* v. *Breinig*, 25 *Md.* 378.

If plaintiff was guilty of contributory negligence he is not entitled to recover, even though the speed of the train was in violation of the provisions of the ordinance. *Philadelphia, W. & B. R. Co.* v. *Stebbing*, 19 *Am. & Eng. R. Cas.* 36, 62 *Md.* 504.

Miss. Code of 1880, § 1047, providing that railroad companies shall be liable for damages or injury which may be sustained by any one from a locomotive or cars running at a greater speed than six miles an hour through any city, town, or village, does not impose absolute liability upon a company for an injury done by it while violating this statute. If such injury could have been avoided by the exercise of ordinary care on the part of the person injured, the company is not liable. *Mobile & O. R. Co.* v. *Stroud*, 31 *Am. & Eng. R. Cas.* 443, 64 *Miss.* 784, 2 *So. Rep.* 171.—FOLLOWING Vicksburg & M. R. Co. *v.* McGowan, 62 Miss. 682. REVIEWING Chicago, R. I. & P. R. Co. *v.*

Houston, 95 U. S. 697.—*Vicksburg & M. R. Co.* v. *McGowan*, 62 *Miss.* 682.

A railroad company operating its road through a public and much-frequented street of a city must exercise a very high degree of care to prevent injuries, and persons traveling such street, in view of the greater danger, must likewise be held to the exercise of greater caution. *Louisville, N. O. & T. R. Co.* v. *French*, 69 *Miss.* 121, 12 *So. Rep.* 338.

A traveler and a company when using a public highway in common must each look out for the presence of the other; one to avoid being injured and the other to avoid inflicting injury. *Hanlon* v. *Missouri Pac. R. Co.*, 104 *Mo.* 381, 16 *S. W. Rep.* 233.

Where a long freight train stops on a street, a signal by bell or whistle on the engine may not be sufficient warning of an intention to back the train over a crossing; but a failure to give such signal will not relieve persons who are crossing the street from the obligation to exercise proper care and watchfulness. *Eaton* v. *Erie R. Co.*, 51 *N. Y.* 544, 5 *Am. Ry. Rep.* 524.—FOLLOWING Havens *v.* Erie R. Co., 41 N. Y. 296.—APPLIED IN Weber *v.* New York C. & H. R. R. Co., 58 N. Y. 451; Finklestein *v.* New York C. & H. R. R. Co., 41 Hun 34, 2 N. Y. S. R. 680.

Where a collision is caused by the concurring negligence of both parties, neither can maintain an action against the other to recover damages. *Owen* v. *Hudson River R. Co.*, 2 *Bosw.* (*N. Y.*) 374.

387. What amounts to contributory negligence.* — One about to cross a railroad track on a street is not chargeable with negligence because he fails to look along the track, when his view is cut off by obstructions left thereon by the company. *McGuire* v. *Hudson River R. Co.*, 2 *Daly* (*N. Y.*) 76.

Plaintiff, who was driving, found a street crossing obstructed by a standing train, and asked a man who had just left the train if it would be safe for him to pass in the rear of the train. He was advised not to do so, as the train might start at any moment, but it did not appear that such person was in the employ of the company. After waiting a few minutes plaintiff alighted and attempted to lead his horse across, when the train was suddenly backed and it struck and injured the horse and carriage. *Held*, that plaintiff was not guilty of contributory negligence, as a matter of law. His conduct was for the jury. *Eaton* v. *Erie R. Co.*, 51 *N. Y.* 544, 4 *Am. Ry. Rep.* 524.—QUOTED IN Duame *v.* Chicago & N. W. R. Co., 35 Am. & Eng. R. Cas. 416, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. Rep. 394.

388. Recovery notwithstanding contributory negligence.—A company is liable for an injury caused by its servants, notwithstanding plaintiff's contributory negligence in being on its track, if the observance by it of a city ordinance in force would have enabled its servants to have seen plaintiff in time to have avoided the accident. *Kelly* v. *Union R. & T. Co.*, 35 *Am. & Eng. R. Cas.* 396, 95 *Mo.* 279, 14 *West. Rep.* 721, 8 *S. W. Rep.* 420.—EXPLAINED AND QUALIFIED IN Dlauhi *v.* St. Louis, I. M. & S. R. Co., 105 Mo. 645. FOLLOWED IN Pope *v.* Kansas City Cable R. Co., 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891. REVIEWED IN Igo *v.* Chicago & A. R. Co., 38 Mo. App. 377.

389. Evidence, generally. — A private corporation is liable like any other private person making a specially authorized but extraordinary use of a public street. Such uses of public streets by private persons are lawful only because specially authorized, and while so conducted as to be harmless to others, but they become trespasses whenever injury occurs, whether resulting from negligence or not. Evidence, therefore, by such a defendant to show all possible care and diligence, if unaccompanied by any assertion of responsibility on the part of another, or of want of care on the part of the person injured, should be excluded as immaterial to the issue. *District of Columbia* v. *Baltimore & P. R. Co.*, 4 *Am. & Eng. R. Cas.* 179, 1 *Mackey* (*D. C.*) 314.

It is not necessary, in an action for injuries received while on the street, to show a formal acceptance of the dedication of the ground to public use. If the street on which the accident occurred had been dedicated to public use as a street, and was in use as such at the time of the injury, defendant company's right thereon is not exclusive. *Otto* v. *St. Louis, I. M. & S. R. Co.*, 12 *Mo. App.* 168.

A corporation adapting and using a public street for its peculiar method of transpor-

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **325**; *post*, **412**.

tation is in duty bound to an exact and continuous inspection, in order to prevent its structures from becoming a nuisance. Hence, it is never necessary to prove the duration of a defective condition, as raising an inference of notice to the corporation by lapse of time. *Keitel* v. *St. Louis C. & W. R. Co.*, 28 *Mo. App.* 657.—QUOTED IN Griveaud *v.* St. Louis C. & W. R. Co., 33 Mo. App. 458.

390. Ordinances as evidence—Proof of ordinance. — In an action on the case to recover for an injury for running a train in a city at a prohibited rate of speed, the declaration averred that defendant neglected to ring a bell, or sound a whistle, and otherwise carelessly conducted its train by not slacking the speed, and in not giving warning of its approach. *Held*, that under this averment the ordinance of the city, regulating the speed of trains, could be given in evidence. *Chicago, R. I. & P. R. Co.* v. *Reidy*, 66 *Ill.* 43.

In a suit against a company to recover for the killing of an animal within an incorporated town, on the ground of violation of an ordinance, in running its train at a prohibited rate of speed, it is indispensable to a recovery that plaintiff should prove that the ordinance was in force at the time of the alleged accident. *Chicago & A. R. Co.* v. *Engle*, 76 *Ill.* 317.

Where the suit is for injuries received in a street on the ground that the train causing the injury was running at a higher rate of speed than that authorized by an ordinance of the city, such ordinance must be put in evidence and made a part of the record. *Chicago & N. W. R. Co.* v. *Schumilowsky*, 8 *Ill. App.* 613.

In an action against a company for an injury alleged to have been caused by negligence in running a train in a city, an ordinance of the city regulating the running of trains, their speed, the ringing of the bell, etc., and the violation of the ordinance, may be shown in evidence as matter to be considered in deciding the question of negligence. *St. Louis & S. E. R. Co.* v. *Mathias*, 50 *Ind.* 65, 8 *Am. Ry. Rep.* 381.—FOLLOWED IN Pennsylvania Co. *v.* Horton, 132 Ind. 189.

391. Sufficiency of evidence. — Ill. Act of February 16, 1865, which renders railroad companies liable for damages resulting from running their trains within the corporate limits of cities and towns at a greater speed than that allowed by the ordinances, does not make the fact that stock was killed in the corporate limits of a town evidence that the train was running at a speed beyond the limit of the ordinance, but simply makes proof of the violation of the ordinance, and that the injury occurred while the train was so running at the prohibited rate of speed, presumptive evidence of negligence, rendering the company *prima facie* liable. *Chicago & A. R. Co.* v. *Engle*, 58 *Ill.* 381.

Proof of an ordinance requiring railway companies to ring a bell continuously while their trains are in motion within the city, and the testimony of witnesses that no bell was rung, or other warning given, until after a person was struck, are sufficient basis for an inference of negligence. *Chicago & N. W. R. Co.* v. *Dunleavy*, 39 *Am. & Eng. R. Cas.* 381, 129 *Ill.* 132, 22 *N. E. Rep.* 15; *affirming* 27 *Ill. App.* 438.

A jury might well consider a frog-like arrangement of a movable rail on a city sidewalk faulty construction, and the leaving a space between the fixed rail and the planking, sufficient to catch and hold a foot, culpable negligence. *Toledo, St. L. & K. C. R. Co.* v. *Clark*, 49 *Ill. App.* 17.

Plaintiff, a woman, had just left a steamboat with some 200 other persons, and while proceeding along a pier was struck by a train of freight cars, loaded with iron and running down a heavy grade at the rate of ten to fifteen miles an hour, without any locomotive attached. *Held*, sufficient to show gross negligence on the part of the company. *Malmsten* v. *Marquette, H. & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 291, 49 *Mich.* 94, 13 *N. W. Rep.* 373.

392. Burden of proof.—By express statutory provisions (Ala. Code of 1876, § 1700), when an injury to person or property is caused by the locomotive or cars of a railroad, within the limits of any city, town, or village, whether incorporated or not, the *onus* is on the company to repel the presumption of negligence, by showing that all the statutory precautionary signals were given, or that a compliance with the statutory regulations would not have availed to prevent the injury, or otherwise to relieve itself of the imputation of negligence. *Georgia Pac. R. Co.* v. *Blanton*, 84 *Ala.* 154, 4 *So. Rep.* 621.—QUOTING South & N. Ala. R. Co. *v.* Thompson, 62 Ala. 494.

While standing in a street plaintiff was injured by a door falling from a freight car

which was moving on the street. There was no evidence to show what caused it to fall, except that the fastenings had become insufficient, probably by wear or breakage. *Held*, that mere proof of the accident did not raise a presumption of negligence on the part of the company, so as to cast on it the burden of proof. Plaintiff must prove that the defect causing the accident came to the knowledge of the company before the accident, or existed for such a time that knowledge should be presumed. *Case* v. *Chicago, R. I. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 142, 64 *Iowa* 762, 21 *N. W. Rep.* 30. —DISTINGUISHED IN Timins *v.* Chicago, R. I. & P. R. Co., 31 Am. & Eng. R. Cas. 541, 72 Iowa 94, 33 N. W. Rep. 379.

393. What instructions to the jury are proper. — A court may assume as facts a state of things established by uncontradicted evidence, and instruct the jury accordingly. So where uncontradicted evidence showed that a train was moving on a street in a city at a time and place where persons might reasonably be expected to be passing, it was correct for the court to assume that these conditions did exist, and to instruct the jury that it was the duty of those in charge of the train to give necessary warning of its approach. *Louisville & N. R. Co.* v. *Morris*, (*Ky.*) 20 *S. W. Rep.* 539. —APPROVING Kentucky C. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. Rep. 392; Louisville, C. & L. R. Co. *v.* Case, 9 Bush (Ky.) 736.

In an action to recover for injuries sustained through plaintiff's foot catching in the unguarded frog of a switch in a public street in which there are no sidewalks, it is not error for the court to charge that "the primary purpose and design of a public street in a city is for vehicles and persons to pass over and travel upon, and the use of such street for railroad tracks and trains thereon, when permitted, is to a certain extent and in a limited sense subservient to the original design of such streets for travel over and upon them," though the court does not define the words "to a certain extent and in a limited sense." *Gulf, C. & S. F. R. Co.* v. *Walker*, 37 *Am. & Eng. R. Cas.* 342, 70 *Tex.* 126, 7 *S. W. Rep.* 831.

In such an action, an instruction that "a railroad company using a public street in the city for its track and trains thereon must use all the care and precaution that it reasonably could and should to prevent accidents to any persons using such streets" properly instructs the jury as to the degree of care required of the company. *Gulf, C. & S. F. R. Co.* v. *Walker*, 37 *Am. & Eng. R. Cas.* 342, 70 *Tex.* 126, 7 *S. W. Rep.* 831.

394. What instructions are improper. — Plaintiff sued to recover damages for personal injuries caused through the alleged negligence of defendant's servants while cutting off the battered end of a rail with a cold chisel. While plaintiff was standing on the street watching the operation, a piece of iron or steel from the rail, or from the hammer used in cutting it, struck his eye, causing injuries which resulted in the loss of that member. There was no evidence in the record to show that the act of cutting off the battered end of a rail with a cold chisel in the manner adopted by the company would result in throwing pieces or chips of iron through the air with such velocity as to injure a bystander. *Held*, that, as there was no evidence to sustain such an instruction, it was error to charge the jury that if defendant's servants were cutting an iron rail with a cold chisel, and were doing this in such a manner as to throw pieces or chips of iron through the air with great velocity, so as to endanger the safety of persons on the street, and that if the jury believed, from the evidence, that this was negligence, and that plaintiff was injured thereby, the jury must return a verdict for plaintiff. *Chicago, M. & St. P. R. Co.* v. *Harper*, (*Ill.*) 37 *Am. & Eng. R. Cas.* 549, 19 *N. E. Rep.* 31.

Miss. Code of 1880, § 1047, provides that "any railroad company having the right of way may run locomotives and cars by steam through towns, cities, and villages at the rate of six miles an hour and no more; and if, in passing through any town, city, or village, any locomotive or car should be run at a greater rate of speed, the company shall pay one hundred dollars, to be recovered by suit in the name of such town, city, or village, and for its use; and the company shall, moreover, be liable for any damages or injury which may be sustained by any one from such locomotive or cars while they are running at a greater speed than six miles an hour through any city, town, or village." In an action by an individual for damages for an injury inflicted by a company while violating this statute, it is error for the court to give for plaintiff, without restriction, qualification, or explanation, an

instruction in the language of the statute (omitting the clause prescribing a penalty recoverable by a city, town, or village), because such instruction is calculated to mislead the jury and deprive the defendant, contrary to the purpose of the statute, of the defense of contributory negligence on the part of plaintiff. *Vicksburg & M. R. Co.* v. *McGowan*, 62 *Miss.* 682.—APPROVED IN Illinois C. R. Co. *v.* Jordan, 63 Miss. 458. FOLLOWED IN Mobile & O. R. Co. *v.* Stroud, 31 Am. & Eng. R. Cas. 443, 64 Miss. 784, 2 So. Rep. 171. QUOTED IN Troy *v.* Cape Fear & Y. V. R. Co., 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521.

395. Instructions on question of contributory negligence. — Plaintiff sued for injuries to his stage caused by colliding with defendant's horse-car. The company claimed that the collision occurred through the negligence of the driver of the stage, but there was evidence tending to show negligence on the part of both parties. *Held*, that there could be no recovery, and the jury should have been so instructed. *Owen* v. *Hudson River R. Co.*, 2 *Bosw.* (*N. Y.*) 374. — QUOTING Johnson *v.* Hudson River R. Co., 5 Duer (N. Y.) 27.

In such case, it is error to instruct the jury that if they "believe that the brakes of the car were not in good or sufficient working order, so that they were insufficient for the purpose of checking the progress of the car," and if they "shall be satisfied that the driver of the car had time, after he discovered the dangerous position of the stage, to have avoided the collision by the application of the brakes, if they had been in order, then plaintiff will be entitled to recover, notwithstanding plaintiff's driver was guilty of imprudence or careiessness in getting into such a position." *Owen* v. *Hudson River R. Co.*, 2 *Bosw.* (*N. Y.*) 374.

3. *Recovery Over by City or Town.**

396. Right of action over, generally.† — A municipal corporation is liable to one injured by defects in the street, or by obstructions placed therein by individuals, but may maintain an action over against the individual who wrongfully obstructed the street. *Chicago* v. *Robbins*, 2 *Black* (*U. S.*) 418.—DISAPPROVED IN Bidd *v.* Norfolk & W. R. Co., 87 Va. 711. FOLLOWED IN Howard *v.* Delaware & H. Canal Co., 40 Fed. Rep. 195. REVIEWED IN District of Columbia *v.* Baltimore & P. R. Co., 4 Am. & Eng. R. Cas. 179, 1 Mackey (D. C.) 314.

Where a municipality is mulcted in damages for injuries received by a party in falling into an excavation made by a railroad company in one of its streets, the latter is liable over for the amount paid; and it seems that this would be so even if the company had been employed by the municipality to excavate the work, or even if the contractor for the work had agreed with the company, either by stipulation or effect of law, to become answerable if an accident occurred. *District of Columbia* v. *Baltimore & P. R. Co.*, 4 *Am. & Eng. R. Cas.* 179, 1 *Mackey* (*D. C.*) 314.—REVIEWING Chicago *v.* Robbins, 2 Black (U. S.) 427; Robbins *v.* Chicago, 4 Wall. (U. S.) 672.

The fact that a municipality grants to a private person the right to engage in extraordinary work upon its streets does not deprive the municipality of the right to recover over against such person the amount which it (the municipality) has been compelled to pay to a citizen injured by reason of such work. *District of Columbia* v. *Baltimore & P. R. Co.*, 4 *Am. & Eng. R. Cas.* 179, 1 *Mackey* (*D. C.*) 314. — APPROVING Baltimore & P. R. Co. *v.* Reaney, 42 Md. 131.

Nor will the fact that the action was brought by the injured party against the municipality instead of directly against the person engaged in such work enable the latter, in an action over against it, to set up absence of negligence as a defense on the ground that the municipality granted permission to do the work. The effect of such a grant is only to prevent the grantee from being a trespasser in the bare act of breaking up the street; but it gives no exemption from liability for injury resulting to others in the execution of the work. *District of Columbia* v. *Baltimore & P. R. Co.*, 4 *Am. & Eng. R. Cas.* 179, 1 *Mackey* (*D. C.*) 314.

When a municipality is obliged to respond in damages to a person injured by a defect in a public street, which defect is at a point where the street is used as the right of way of a railroad and is caused by the

* See also *ante*, **193, 206.**

† Municipality liable for defect in street may sue party through whose fault defect occurred. See note, 19 AM. & ENG. R. CAS. 235.

negligent conduct of the agents of the railroad company, which is bound to keep the street in repair, the municipality has a right to recover from the company the amount paid out by it. *Western & A. R. Co.* v. *Atlanta*, 19 *Am. & Eng. R. Cas.* 233, 74 *Ga.* 774.

And for the costs and expenses reasonably and fairly incurred in a suit against it by the person injured. *Veazie* v. *Penobscot R. Co.*, 49 *Me.* 119.

Where a company removes a post without filling the hole, and a traveler on a highway is injured by falling into it, and recovers damages against the town, the company will be liable over to the town. *Woburn* v. *Boston & L. R. Corp.*, 109 *Mass.* 283, 6 *Am. Ry. Rep.* 270.—FOLLOWING Lowell *v.* Boston & L. R. Corp., 23 Pick. (Mass.) 24.

There is no necessary privity between the traveler and any one but the towns, as to the sufficiency of the highways. The towns must look for redress to those who obstruct their highways. *Batty* v. *Duxbury*, 24 *Vt.* 155.—QUOTING Willard *v.* Newbury, 22 Vt. 460.

397. Effect of notice to company and request to defend. — In a suit brought by a municipal corporation to recover damages, which it has been compelled by suit to pay to one who has been injured by a defect in the streets, and which injury occurred on a railroad crossing, the record of the former suit is admissible if the railroad company had notice of the former suit and was requested by the municipal corporation to come forward and defend the same. *Western & A. R. Co.* v. *Atlanta*, 19 *Am. & Eng. R. Cas.* 233, 74 *Ga.* 774.

When in such case the municipality has given notice to the railroad company to appear and defend, but it has failed to do so, the judgment obtained against the municipality is conclusive as to the right of the injured party to recover from the municipality, and as to the amount which the municipality is entitled to recover from the company. *Western & A. R. Co.* v. *Atlanta*, 19 *Am. & Eng. R. Cas.* 233, 74 *Ga.* 774.

In a suit of the municipality against the company to recover damages in such case, the judgment against the municipality and the notice given by it to the company may be offered in evidence. *Western & A. R. Co.* v. *Atlanta*, 19 *Am. & Eng. R. Cas.* 233, 74 *Ga.* 774.

A company cannot avoid the effect of such a judgment on the ground that it did not receive the notice until the day before the trial, it appearing that one of its directors was present at the trial and took notes, and that it made no request for a continuance or postponement of the trial. *Veazie v. Penobscot R. Co.*, 49 *Me.* 119.

Where a company has been notified of the pendency of a suit against a town, for an injury occasioned by an alteration of the highway as a railroad crossing, and requested by the town to defend it, the company is bound by the judgment, which is conclusive against it, as to the cause of the injury and extent of the damage, whether it appeared in the case or not. *Veazie* v. *Penobscot R. Co.*, 49 *Me.* 119.

398. Successive suits for same neglect.—A town is not precluded, by one recovery against a railroad company for failing to restore a highway, from all future recovery against it for damages sustained by reason of the same neglect, if the damage is several. *Newbury* v. *Connecticut & P. R. R. Co.*, 25 *Vt.* 377.

Defendant company failed to restore a highway, and a husband and wife who were driving on the highway were both injured. The husband recovered against the town for injuries to himself and carriage, and the town in turn recovered from the company the amount paid. Subsequently the husband brought an action against the town for the injury to his wife, and recovered. *Held*, that the first recovery by the town against the company would not prevent a second for damages to the wife. *Newbury* v. *Connecticut & P. R. R. Co.*, 25 *Vt.* 377.

Each successive recovery against the town constitutes a perfect cause of action against the company, and the fact that the injury was at the same time, in the same carriage, and under the same circumstances, makes no difference. *Newbury* v. *Connecticut & P. R. R. Co.*, 25 *Vt.* 377.

399. Action on company's promise to repay damages recovered against town. — Where a municipality has been compelled to pay damages for a person injured through a defective highway, it may maintain an action of debt against a railroad company which caused the defect, upon its promise to repay the damages. *Portland* v. *Atlantic & St. L. R. Co.*, 66 *Me.* 485.

400. Pleading. — Where a city was sued and judgment recovered against it for injuries resulting from a defect in a sidewalk, and it appeared that the sidewalk was

within the right of way of a railroad company, which sidewalk the company was bound to maintain under the statute, and the declaration failed to show a neglect of duty on the part of the company as to the maintenance of the sidewalk, a demurrer to it is properly sustained. *Bloomington* v. *Illinois C. R. Co.*, 49 *Ill. App.* 129.

401. Limits of recovery over. — Under Mass. Act of 1786, ch. 81, a traveler recovered double damages against a town for an injury sustained by reason of defendant company failing to protect a cut made in a highway in constructing its track. *Held*, that the town was only entitled to recover of defendant single damages, and could not recover the costs and expenses of the action against the town, it not appearing that such action was defended at the request of defendant, or for its benefit. *Lowell* v. *Boston & L. R. Corp.*, 23 *Pick.* (*Mass.*) 24. — CRITICISED IN Duxbury *v.* Vermont C. R. Co., 26 Vt. 751. FOLLOWED IN Woburn *v.* Boston & L. R. Corp., 109 Mass. 283.

402. Canadian rule. — Plaintiff sued a municipal corporation and a railway company for damages; the corporation in its defense claimed indemnity or relief over against the company, but the company did not answer the pleading, and no order was made or applied for before or at the trial to have the question determined; judgment was given for plaintiff against the corporation, but nothing was decided either in favor of or against the company. After the judgment had been affirmed by a divisional court, the corporation applied to the trial judge for an order under rule 328 to have the question between it and the company determined. *Quære*, whether there was power under the rules to make the order. *Mead* v. *Etobicoke Tp.*, 13 *Ont. Pr.* 341.

VII. OBSTRUCTIONS AND ENCROACHMENTS.

1. *Liability for.*

403. In general.* — Where a railroad passes along instead of across a highway, it must be so constructed as not to destroy or obstruct the latter, or prevent its use by the public. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

A company, relying upon a resolution of the common council of a city vacating, or allowing the closing of, a portion of a public street, must see that such resolution or order has been adopted by the required vote, and entered upon the record of the proceedings of such council. If such company closes up or obstructs a street not legally vacated, it may be held liable for the obstruction. *St. Louis, A. & T. H. R. Co.* v. *Belleville*, 32 *Am. & Eng. R. Cas.* 278, 122 *Ill.* 376, 12 *N. E. Rep.* 680, 10 *West. Rep.* 605.

A permanent or temporary occupancy of a highway by cars is *prima facie* unlawful. Accordingly, the act of a company in placing a hand-car on a highway is unlawful. *Ohio & M. R. Co.* v. *Trowbridge*, 45 *Am. & Eng. R. Cas.* 200, 126 *Ind.* 391, 26 *N. E. Rep.* 64.

Statutory authority to construct a railroad, and permission from the municipal authorities to use certain streets, only give to the company authority so to manage and control the streets as not unlawfully to prevent their use as highways. It cannot use them in such a manner as to injure or destroy private property abutting on the streets without condemnation or recompense. *Riedinger* v. *Marquette & W. R. Co.*, 29 *Am. & Eng. R. Cas.* 611, 62 *Mich.* 29, 28 *N. W. Rep.* 775.

The grant to a company of a mere right of way over a public street in a city or town will not authorize the placing of any obstructions in the street, such as will render it useless as a street. For the purpose of establishing depots, depot yards, or other structures, for the convenience or business of the company, ground must be procured not already dedicated to uses inconsistent with such purposes. *Lackland* v. *North Mo. R. Co.*, 31 *Mo.* 180.—REVIEWING Tate *v.* Ohio & M. R. Co., 7 Ind. 479.—DISTINGUISHED IN Porter *v.* North Mo. R. Co., 33 Mo. 128.

Where plaintiff has a right to use a road over a right of way of a railroad corporation, the corporation has no right to obstruct it when not necessary. *Willey* v. *Norfolk Southern R. Co.*, 96 *N. Car.* 408, 1 *S. E. Rep.* 446.

Where a railroad charter gives to a company the right to construct its track on a

* Action for the obstruction of a public highway, see note, 23 AM. & ENG. R. CAS. 82.
Obstructing highways by railroads. Rights and duties of companies, see 56 AM. & ENG. R. CAS. 646, *abstr.*
Company may be authorized to obstruct highway, see note, 12 L. R. A. 115.

street so as to cause as little obstruction as possible, it has the implied power to use the track when built, and no obstruction is unlawful unless it might have been avoided by a different construction of the track. If the company negligently obstructs a street it is liable in damages or subject to indictment. *Com.* v. *Erie & N. E. R. Co.*, 27 *Pa. St.* 339. —FOLLOWED IN Girard College Pass. R. Co. *v.* Thirteenth & F. St. R. Co., 7 Phila. (Pa.) 620. QUOTED IN Portland & W. V. R. Co. *v.* Portland, 27 Am. & Eng. R. Cas. 353, 14 Oreg. 188; Pittsburgh, Ft. W. & C. R. Co. *v.* Pittsburgh, 1 Pittsb. (Pa.) 392. REVIEWED IN Junction Pass. R. Co. *v.* Williamsport Pass. R. Co., 154 Pa. St. 116.

Obstruction of streets by a company, unless the train is standing to load or unload passengers, and unless a passway is left open, is unlawful, under Va. Acts 1883–84, p. 499; and the company is liable to fine and for such damages as may be caused thereby to any person. (Va. Code, § 2900.) But these damages must be proved, not inferred. *Richmond & D. R. Co.* v. *Noell*, 86 *Va.* 19, 13 *Va. L. J.* 320, 9 *S. E. Rep.* 473.

A company cannot monopolize a street, in derogation of the public and private uses to which it has been applied, by allowing cars to stand on crossings. *Janesville* v. *Milwaukee & M. R. Co.*, 7 *Wis.* 484.

404. Construction of statutes.— The Florida statute does not give to railroad companies the power to construct their roads across or along highways in such a manner as to block up and permanently obstruct them, so that they cannot be used by the public while the trains are neither passing over them nor otherwise properly using the tracks. *Palatka & I. R. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

The word "wilful," in statutes similar to the one to prevent the obstruction of highways, implies legal malice, evil intent, or the absence of reasonable ground for the accused to believe that the act charged was lawful. *Savannah, F. & W. R. Co.* v. *State*, 32 *Am. & Eng. R. Cas.* 182, 23 *Fla.* 579, 3 *So. Rep.* 204.

The intention of Ill. Rev. St. 1874, p. 810, §§ 52, 53, is to subject the engineer, conductor, and railway corporation, indifferently, to the prescribed fine of not less than $10 nor more than $100 for obstructing highways by stopping trains or leaving cars standing on any crossing, and not that the corporation shall be liable for the like sum for which the engineer or conductor shall have been convicted. *Toledo, W. & W. R. Co.* v. *People*, 81 *Ill.* 141.—REVIEWED IN Indianapolis & St. L. R. Co. *v.* People, 32 Ill. App. 286.

The term "highways," as used in Ill. Rev. St. ch. 114, §§ 77, 78, is a generic term, and includes all kinds of public highways and streets. *Ohio, I. & W. R. Co.* v. *People*, 39 *Ill. App.* 473.

A street or highway is not obstructed within the meaning of Ill. Rev. St. ch. 174, § 77, unless travel across the track is actually impeded by the presence of the locomotive, engine, or train of cars. *Illinois C. R. Co.* v. *People*, 49 *Ill. App.* 538.

Ill. Rev. St. ch. 174, § 77, providing a penalty for the obstruction of a highway by cars, is a penal statute and must be strictly construed. *Illinois C. R. Co.* v. *People*, 49 *Ill. App.* 540.

Indiana Act of March 2, 1888, § 23, imposing a penalty of five dollars per day for the unnecessary obstruction of a highway, does not apply to a company which lawfully crosses a highway with its track, although it fails to restore it to its former state as nearly as possible as required by statute. *Cummins ex rel.* v. *Evansville & T. H. R. Co.*, 36 *Am. & Eng. R. Cas.* 147, 115 *Ind.* 417, 15 *West. Rep.* 456, 18 *N. E. Rep.* 6.

Under N. H. Act of July 1, 1853, no railroad is liable for not constructing a pass, for the accommodation of the public travel, under any way, unless such way has been laid out agreeably to statute law, or has been used by the public for at least twenty years. *Northumberland* v. *Atlantic & St. L. R. Co.*, 35 *N. H.* 574.

N. H. Gen. St. ch. 148, § 7, is directed to the object of protecting travelers against delay from the obstruction of cars, etc., at railroad crossings; its violation, therefore, does not create an absolute liability for damage which is not caused directly by such delay. *Hall* v. *Brown*, 54 *N. H.* 495, 11 *Am. Ry. Rep.* 231.

Ohio Act of March 7, 1873, providing a new remedy against persons who place obstructions in public highways, applies to existing obstructions, as well as to those subsequently placed in the highways. *Lawrence R. Co.* v. *Mahoning County Com'rs*, 35 *Ohio St.* 1.— DISTINGUISHED IN Perry County *v.* Newark, S. & S. R. Co., 43 Ohio St. 451.

Pa. Act of March 20, 1845, forbidding the obstruction of the crossings of public streets, is a general law, and applicable to a railroad company subsequently incorporated. *Pennsylvania R. Co.* v. *Kelly*, 31 *Pa. St.* 372.

The Railways Clauses Consolidation Act, 1845, § 16, authorizes the permanent diversion of public roads for the purpose of constructing a railway, and not merely a temporary diversion. *Phillipps* v. *London, B. & S. C. R. Co.*, 4 *Giff.* 46, 9 *Jur. N. S.* 348, 7 *L. T.* 663.

Only a person clothed with some duty in respect to the public is "a person having management of the road" within the meaning of the Railways Clauses Consolidation Act, 1845, § 57, authorizing proceedings against railway companies for penalties for interfering with an existing public road. *Reg.* v. *Wilson*, 16 *Jur.* 973, 21 *L. J. Q. B.* 281, 18 *Q. B.* 348.

The Railways Clauses Consolidation Act, 1845, § 53, applies to a permanent diversion as well as to a temporary diversion of a road. *Attorney-General* v. *Barry D. & R. Co.*, 35 *Ch. D.* 573.—REVIEWING Attorney-General *v.* Great Northern R. Co., 4 De G. & Sm. 75.

405. What is an unlawful encroachment or obstruction.*—If teams could not cross a track on the usual crossing without the whiffletrees or wheels coming in contact with the bumper of the car, then the leaving of such car there was an obstruction of the highway. *Peterson* v. *Chicago & W. M. R. Co.*, 64 *Mich.* 621, 31 *N. W. Rep.* 548.—APPROVING Young *v.* Detroit, G. H. & M. R. Co., 56 Mich. 439; Macauley *v.* Mayor, etc., of N. Y., 67 N. Y. 602. DISTINGUISHING Titus *v.* Northbridge, 97 Mass. 258; Gilbert *v.* Flint & P. M. R. Co., 51 Mich. 488.

An express company erected, in front of its place of business, a structure about 110 feet in length, with a roof constructed of corrugated iron, supported by iron columns about three and a half inches in diameter, and placed from twelve to twelve and a half feet apart next to and along the inside of the curbstone, the lowest point of the roof being about ten feet above the sidewalk, and covering it for the entire distance of 110 feet, and so imbedded in the soil as to be a permanent structure. *Held*, that this was an encroachment upon the street, and might be removed by the municipal authorities. *Hoey* v. *Gilroy*, 14 *N. Y. Supp.* 159, 37 *N. Y. S. R.* 754; *reversed in* 129 *N. Y.* 132, 41 *N. Y. S. R.* 181, 29 *N. E. Rep.* 85.

No privilege to maintain such an awning can be claimed on the ground that the owner is a common carrier, and that the awning is used as a protection to goods carried by it. *Hoey* v. *Gilroy*, 14 *N. Y. Supp.* 159, 37 *N. Y. S. R.* 754; *reversed in* 129 *N. Y.* 132, 41 *N. Y. S. R.* 181, 29 *N. E. Rep.* 85.

406. Duty of town towards travelers where highway is obstructed.—Where a company appropriates the entire width of a public road for its track, but actually uses only a portion thereof, leaving the remainder open for travel but in a dangerous condition, it is the duty of the township supervisors either to fence off the dangerous portion so that the public cannot travel thereon, or else to erect and maintain such guards as may render the road safe for travel. *Aston Tp.* v. *McClure*, 102 *Pa. St.* 322.—DISTINGUISHED IN Pittsburg, C. & Y. R. Co. *v.* Moses, (Pa.) 24 Am. & Eng. R. Cas. 295, 2 Atl. Rep. 188.

When railroads obstruct highways, the town must provide suitable byways for the public to pass around the obstruction, and must use reasonable precaution to divert the travel from such highways while they remain unsafe. *Batty* v. *Duxbury*, 24 *Vt.* 155.—FOLLOWED IN Mathews *v.* Winooski Turnpike Co., 24 Vt. 480.

Towns are bound, after having reasonable notice of the existence of obstructions in their highways, to remove them, or make safe byways to pass around them, or to see that they are properly made by others. *Batty* v. *Duxbury*, 24 *Vt.* 155.

Where an individual is only interested in a highway as one of the public, he cannot maintain an action against a railroad company for constructing its road so as to obstruct the highway. The liability of the company is to the town, and the remedy of the individual is against the town for neglect to keep the highway in repair. *Buck* v. *Connecticut & P. R. R. Co.*, 42 *Vt.* 370.

407. Proximate cause. — Where the starting of a train did not directly contribute to the accident, one injured by it cannot recover on the ground that no signal for starting was given. *Barkley* v. *Missouri Pac. R. Co.*, 96 *Mo.* 367, 9 *S. W. Rep.* 793.

* Liability of corporation for unlawfully obstructing highway, see note, 4 L. R. A. 299.
Liability of company for personal injury caused by leaving loaded truck on sidewalk, see 56 AM. & ENG. R. CAS. 272, *abstr.*

A standing freight train was extended, in violation of city ordinances, for several blocks along a public street, and so as to obstruct a cross street used by plaintiff, and in passing he found it necessary to cross over the cars; and while he was in the act of so doing, the train suddenly backed, inflicting a permanent injury on plaintiff. *Held*, that these facts do not fail to show an actionable causal connection between defendant's unlawful blocking of the street and the injury suffered by plaintiff while attempting a lawful use of the highway. *Hudson* v. *Wabash & W. R. Co.*, 32 *Mo. App.* 667; *reversed in* 101 *Mo.* 13.—APPLYING Keim *v.* Union R. & T. Co., 90 Mo. 314. DISTINGUISHING Stillson *v.* Hannibal & St. J. R. Co., 67 Mo. 671. QUOTING Henry *v.* St. Louis, K. C. & N. R. Co., 76 Mo. 293. REVIEWING Dunn *v.* Cass Ave. R. Co., 21 Mo. App. 198.—REVIEWED IN Mauerman *v.* St. Louis, I. M. & S. R. Co., 41 Mo. App. 348.

A company, by its train, unlawfully obstructed a village street. S. walked around the rear of the train, entered another street, and there having selected one of several routes to her home, slipped on ice, fell, and sustained serious injury. The same company had placed the ice there in the process of clearing its track, which occupied part of the street. The street was laid out after the railway was in use, and the rights of the public in said street were subject to the rights of the company. *Held:* (1) that the proximate cause of the injury was the placing of the ice in the street; (2) if the company was not in fault in so placing the ice, it was not liable for the injury caused by the fall. *Pittsburg, C. & St. L. R. Co.* v. *Staley*, 19 *Am. & Eng. R. Cas.* 381, 41 *Ohio St.* 118, 52 *Am. Rep.* 74.

408. Liability for delaying travelers by obstructions in highway.*—One traveler has no more legal ground of complaint on account of an obstruction in the public highway than others, unless he be entitled to use the highway at the point of such obstruction for a different purpose than other people, or has suffered some special injury therefrom. The fact that he may be more frequently inconvenienced thereby does not give a cause of action. *Gilbert* v. *Greeley, S. L. & P. R. Co.*, 40 *Am. & Eng. R. Cas.* 300, 13 *Colo.* 501, 22 *Pac. Rep.* 814.

Where an excavation has been made for the construction of a railway, which prevents travel on a certain street, and it appears that a suitable crossing would be of great advantage to people living near the street and to the general public, and that the only available crossing in the vicinity is particularly dangerous, the construction of such a crossing is a public necessity, and it will not avail to object that the street would not be in a condition for the passage of loaded vehicles even if the crossing were built, on account of a steep hill in one part of it, where it appears that certain improvements, which include the grading of the hill, were discontinued on account of the excavation. *Ft. Dodge* v. *Minneapolis & St. L. R. Co.*, 55 *Am. & Eng. R. Cas.* 58, 87 *Iowa* 389, 54 *N. W. Rep.* 243.

A railroad corporation whose track is located on a highway may load and unload a car which is temporarily standing for that purpose in the street, provided it be done in such a prudent manner as not unreasonably to interfere with the rights of those having occasion to use the way for the ordinary purpose of travel. *Mathews* v. *Kelsey*, 58 *Me.* 56.

And for the purpose of unloading a car of flour, a merchant, whose store is on the street, may use skids, temporarily elevated above the ground and extending from the car door fifty feet to the store, provided there is ample room between the car and the opposite side of the street to accommodate the travel. *Mathews* v. *Kelsey*, 58 *Me.* 56.

A company and a city are not liable for obstructing the passage of a bridge while repairing it, which, under the law, they have a right to do, on mere proof that plaintiff was deprived of the use of the bridge an unreasonable length of time, there being nothing to show that his person or property was injured by reason of the negligence of those engaged in doing the work, except as to such injury as was connected with the use of the bridge. *Shaw* v. *Boston & A. R. Co.*, 159 *Mass.* 597, 35 *N. E. Rep.* 92.

One detained by a train at a highway crossing is justified in momentarily expecting that the obstruction will be removed, as the law requires; and if, as the result of being detained unreasonably in inclement weather, he is made sick, he may recover

* Damages for the obstruction of a private way, see note, 30 AM. & ENG. R. CAS. 395.

damages of the company. It does not lie with defendant to say that plaintiff should have yielded to its unlawful conduct and sought shelter. *Louisville, N. O. & T. R. Co.* v. *Durfree*, 69 *Miss.* 439, 13 *So. Rep.* 697.

A railroad company is necessarily compelled, in the transaction of its business, to permit crossings at its depots to be obstructed at times by its trains. *Barkley* v. *Missouri Pac. R. Co.*, 96 *Mo.* 367, 9 *S. W. Rep.* 793.

Plaintiff was traveling on a public highway or street where a railroad crossed it, and sued the company for damages caused by the delay of himself, his family, and drivers for half an hour, by reason of a train that obstructed the street, claiming actual damages for loss of time and for injury to his wife and child from exposure to the weather, and for expenses for medical attendance and medicines in curing them from sickness brought on by such exposure. *Held*, that it was a question for the jury to say whether the train stopped an unreasonable length of time, there being no evidence to show the cause of stopping; and the burden devolved upon the company to show that the obstruction for half an hour was necessary and reasonable. *Texas & P. R. Co.* v. *Self*, 23 *Am. & Eng. R. Cas.* 310, 2 *Tex. App.* (*Civ. Cas.*) 387.

If a company has the right to extend a switch track into the highway, it is bound to use such track in such a manner as not unnecessarily to interfere with public travel over such highway. *Bussian* v. *Milwaukee, L. S. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 716, 56 *Wis.* 325, 14 *N. W. Rep.* 452.

409. Liability to persons injured by reason of obstructions.*—Whether a company is not responsible for wrongfully or negligently delaying a traveler on the highway at a public road crossing, by allowing a train to remain on the track at the crossing, is not decided; but, if such liability exists, it extends only to the damages which are the natural consequences of the delay, and does not extend to damages caused by another train coming up, blowing off steam, frightening the traveler's horse, and causing him to run away. *Stanton* v. *Louisville & N. R. Co.*, 91 *Ala.* 382, 8 *So. Rep.* 798.

Conn. Gen. St. § 10, making a company liable for an injury caused by a structure legally placed by it on a public highway, applies whether the highway was established after or before the railroad was built. The expression "it, and not the party bound to keep the road in repair," means "the party otherwise bound," etc. *Allen* v. *New Haven & N. Co.*, 14 *Am. & Eng. R. Cas.* 615, 50 *Conn.* 215.

A company has no authority to change the course of a public road, and where it has made such change, and a person following the old road has been injured by an obstruction carelessly left there by it, the company will be liable, unless it appears that the old road was not the legal road, and the burden is upon the company to show this. *Atlanta & R. A. L. R. Co.* v. *Wood*, 48 *Ga.* 565.

A company is liable for an injury sustained by a traveler on a highway in colliding, with his team, with a hand-car negligently left thereon at night by a section foreman. *Pittsburgh, C. & St. L. R. Co.* v. *Sponier*, 8 *Am. & Eng. R. Cas.* 453, 85 *Ind.* 165.

Where the negligence charged is permitting freight cars to stand upon a side track so as partially to obstruct a street eighty feet wide, leaving a space of only twenty-four or twenty-five feet for crossing, plaintiff is entitled to an instruction that defendant company had no legal right to block up the view of its track at the crossing by leaving freight cars standing upon a side track which is adjacent thereto, and it could not, if such freight cars obstructed the view and rendered the crossing more dangerous to travelers, excuse any want of extra care to guard against accidents, of which it may have been guilty, by any claim that no statute law is violated by so doing which required any additional warning because of such cars being so left in the way of the traveler's sight. (Campbell and Champlin, JJ., dissenting.) *Close* v. *Lake Shore & M. S. R. Co.*, 37 *Am. & Eng. R. Cas.* 522, 73 *Mich.* 647, 41 *N. W. Rep.* 828.

A company having the legal right to lay its track through a public street is liable to persons injured by the obstruction of the street only for an illegal use of the street in the manner of operating the road. *Lackland* v. *North Mo. R. Co.*, 34 *Mo.* 259.—FOLLOWING Lackland *v.* North Mo. R. Co., 31 Mo. 181; Porter *v.* North Mo. R. Co., 33 Mo. 128.

A company has a right to stop its train at a public crossing for a reasonable time

* Liability of company for obstructing streets and highways, see notes, 4 L. R. A. 213; 18 *Id.* 154.

for proper purposes, but passengers are not obliged to wait until the train is removed; and if the passengers are obliged to cross at other points than the public crossing on account of such obstruction, the company is bound to use ordinary care and diligence to prevent injuries to them; and when persons are in the habit of crossing the track at another than the public crossing, the agents and servants of the company are bound to take notice of the fact and use a precaution commensurate with it. *Brown* v. *Hannibal & St. J. R. Co.*, 50 *Mo.* 461, 3 *Am. Ry. Rep.* 540.

A person injured at such crossing by one of the trains cannot recover because of such obstruction unless the crossing was kept closed for an unreasonable length of time and the injury was the proximate result of the company's unreasonable delay in removing the train from the crossing. *Barkley* v. *Missouri Pac. R. Co.*, 96 *Mo.* 367, 9 *S. W. Rep.* 793.

He who continues a nuisance which obstructs a public highway is responsible for injuries resulting from such obstruction, without proof of notice to him of its existence. *Matthews* v. *Missouri Pac. R. Co.*, 26 *Mo. App.* 75.

Defendant company left a car standing in the street so as to obstruct the view of the track in one direction, and plaintiff, who was crossing the track, could not see an approaching train, and was run over. *Held*, that the company was guilty of negligence. *McGuire* v. *Hudson River R. Co.*, 2 *Daly* (*N. Y.*) 76.

It is the duty of a company not to obstruct public roads where they cross the track, either by stopping trains thereon or otherwise; and a company must take the consequences of all such obstructions. *Murray* v. *South Carolina R. Co.*, 10 *Rich.* (*So. Car.*) 227.

Where a company blocks a highway crossing by allowing its trains to remain an unreasonable length of time standing across it, it is liable in damages to any traveler on the highway thereby injured. *Texas & P. R. Co.* v. *Self*, 23 *Am. & Eng. R. Cas.* 310, 2 *Tex. App.* (*Civ. Cas.*) 387.

A highway by dedication may have a margin. So where a railroad company runs its track along the margin of a highway which has never been surveyed, and leaves obstructions on the margin so that travel is crowded from the original path used for more than twenty years, it is liable to a traveler injured by striking such obstructions. *Brownell* v. *Troy & B. R. Co.*, 15 *Am. & Eng. R. Cas.* 498, 55 *Vt.* 218.

410. Obstruction by cars and engines in violation of ordinance is negligence.—The obstruction of a street crossing by railroad engines in violation of an ordinance constitutes negligence *per se* on the part of the company. *Denver, T. & G. R. Co.* v. *Robbins*, 2 *Colo. App.* 313, 30 *Pac. Rep.* 261.—APPROVING Dodge *v.* Burlington, C. R. & M. R. Co., 34 Iowa 276. QUOTING Young *v.* Detroit, G. H. & M. R. Co., 56 Mich. 430; Correll *v.* Burlington, C. R. & M. R. Co., 38 Iowa 120.

It is negligence in a company to leave a box car standing on its track over a street crossing from ten o'clock at night to five o'clock the next morning. *McCoy* v. *Philadelphia, W. & B. R. Co.*, 5 *Houst.* (*Del.*) 599.

It is negligence *per se* for a company, in violation of a valid municipal ordinance, to obstruct with standing cars or locomotives a public street or space in actual daily use by the public; and that the municipality may have acquiesced passively in violations of the ordinance will not excuse such negligence. *Central R. Co.* v. *Curtis*, 87 *Ga.* 416, 13 *S. E. Rep.* 757.

Where the joint use of a public street with the public is granted to a company, and its right is not exclusive in any portion thereof, the company may be properly convicted of a breach of an ordinance against obstructing streets and their crossings by locomotives and cars. *St. Louis, A. & T. H. R. Co.* v. *Belleville*, 32 *Am. & Eng. R. Cas.* 278, 122 *Ill.* 376, 12 *N. E. Rep.* 680, 10 *West. Rep.* 605.

Where defendant company has the right to use the track of another company for certain purposes only, defendant is not liable for an injury caused by the other company obstructing a crossing with its own cars. *Lake Shore & M. S. R. Co.* v. *Kaste*, 11 *Ill. App.* 536.

If an injury results from the neglect of a company to observe the statutory rule that it shall not leave cars standing across a highway more than five minutes at a time, the company is guilty of negligence and liable for the injury, if the person who suffered was not in fault. *Young* v. *Detroit, G. H. & M. R. Co.*, 19 *Am. & Eng. R. Cas.* 417, 56 *Mich.* 430, 23 *N. W. Rep.* 67. — DISTINGUISHING Gilbert *v.* Flint & P. M. R. Co., 51

Mich. 488.—DISTINGUISHED IN O'Donnell *v.* Chicago, M. & St. P. R. Co., 69 Iowa 102.

Leaving a car upon a switch track within the limits of a highway, and near to the traveled part thereof, for several days, if not negligence in law, at least tends to prove negligence on the part of the company which constructed and owns such track; and it is immaterial that such car belonged to, and was placed there by the direction of, another company. *Bussian* v. *Milwaukee, L. S. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 716, 56 *Wis.* 325, 14 *N. W. Rep.* 452.

411. Storage of empty cars on highway. — A company which leaves its cars standing in a public highway is guilty of an unlawful obstruction thereof, under Ind. Rev. St. 1881, §§ 1964, 2170, notwithstanding it may leave a portion of the centre of the roadway open for the passage of vehicles. *Pittsburgh, C. & St. L. R. Co.* v. *Kitley*, 37 *Am. & Eng. R. Cas.* 511, 118 *Ind.* 152, 20 *N. E. Rep.* 727.

A company has no right to use a highway for the storage of cars, or as a place for their temporary deposit. The permanent or temporary occupancy of a highway by cars is *prima facie* unlawful. *Ohio & M. R. Co.* v. *Trowbridge*, 126 *Ind.* 391, 26 *N. E. Rep.* 64. — FOLLOWED IN Leavitt *v.* Terre Haute & I. R. Co., 5 Ind. App. 513.

It is negligence in a company to allow its box cars to stand for several days on a highway crossing, so that the view of the track is obstructed, even if there is space for persons to cross. *Reed* v. *Chicago, St. P., M. & O. R. Co.*, 74 *Iowa* 188, 37 *N. W. Rep.* 149.

There is no provision of law forbidding the "staking of cars" across highways in a company's yard or elsewhere. *Kelly* v. *Michigan C. R. Co.*, 28 *Am. & Eng. R. Cas.* 633, 65 *Mich.* 186, 31 *N. W. Rep.* 904.

A company cannot block up the view of its tracks by leaving its cars standing thereon, and then excuse its want of any extra care to guard against accident, on the plea that there is no statute law against so leaving its cars, or requiring any additional warnings. The law imposes the duty of extra watchfulness upon both the company and the traveler in the highway, in such cases. *Guggenheim* v. *Lake Shore & M. S. R. Co.*, 32 *Am. & Eng. R. Cas.* 89, 66 *Mich.* 150, 9 *West. Rep.* 903, 33 *N. W. Rep.* 161.

A company has no right to make storage ground of the highway for its freight cars, and thereby increase the danger upon the crossing, without in some manner giving notice thereof, and furnishing additional warnings. *Close* v. *Lake Shore & M. S. R. Co.*, 37 *Am. & Eng. R. Cas.* 522, 73 *Mich.* 647, 41 *N. W. Rep.* 828.

412. Suddenly and without warning starting cars obstructing crossing.*—Where a train stops on a crossing, and is suddenly backed, without warning, whereby one passing behind the train is knocked down and injured, the employés of the company are guilty of gross negligence, and the company is liable. *Robinson* v. *Western Pac. R. Co.*, 48 *Cal.* 409, 7 *Am. Ry. Rep.* 244.

Inasmuch as such person is exercising an undoubted right in crossing the track, he is not chargeable, in respect of his crossing, merely, with want of care, and the company is not released from liability on the ground of contributory negligence. He has a right to presume that he will be notified if the train is about to move, and is not bound to wait because the train is on the street, or to assume that it may move suddenly backward without notice. *Robinson* v. *Western Pac. R. Co.*, 48 *Cal.* 409, 7 *Am. Ry. Rep.* 244. —QUOTED IN Solen *v.* Virginia & T. R. Co., 13 Nev. 106.

Even if the bell of the train was rung, this does not of itself establish proper care by the employés of the company; for, although the bell is intended to give notice to all, it is the duty of the engineer to see that all have acted on the notice. The railroad company should provide a lookout, upon whose signal that the track is clear the engineer may act. *Robinson* v. *Western Pac. R. Co.*, 48 *Cal.* 409, 7 *Am. Ry. Rep.* 244.

Plaintiff found a crossing obstructed by a freight train and attempted to pass between two of the cars, and while so crossing the train was started without any signal or warning, throwing plaintiff so that his foot was caught between the bull-noses and crushed. The avenue was impassable except at the street crossings, and plaintiff could not have passed to the opposite side without going out of his way a distance of two squares. *Held:* (1) that it was the duty of defendant to give notice of some kind before putting the train in motion; (2) that it was correct to submit to the jury whether defendant had been in the habit of obstructing the street, and whether persons had

* See also *ante*, **387.**

been in the habit of passing under or over the cars in the presence of defendant's employés, and with their acquiescence, when the trains were in this condition; (3) that defendant is not relieved from the exercise of ordinary care when its negligence is the direct and proximate cause of the injury. *Grant* v. *Baltimore & P. R. Co.*, 2 *MacArth.* (*D. C.*) 277.—APPROVING Isbell *v.* New York & N. H. R. Co., 27 Conn. 393.

Where a company is in the habit of making an opening in its trains at a point on its track, to enable the public to cross, and a traveler on coming to said crossing finds the cars so separated as to induce him and the public to believe that the company intends the space to be used for a crossing, and he does so believe, then he is justified in acting on such implied invitation, and the company owes the duty, under the circumstances, of giving him some reasonable or suitable warning of its intention to close the opening, and will be liable if it neglects to do so and because of such neglect he is injured while passing through. *Gurley* v. *Missouri Pac. R. Co.*, 104 *Mo.* 211, 16 *S. W. Rep.* 11.—QUOTING Stillson *v.* Hannibal & St. J. R. Co., 67 Mo. 671; Hudson *v.* Wabash Western R. Co., 101 Mo. 13.—REVIEWED AND DISTINGUISHED IN Schmitz *v.* St. Louis, I. M. & S. R. Co., 46 Mo. App. 380.

A company, whose tracks cross a public highway, and whose cars stand disconnected upon the highway with a space between them sufficiently large to permit persons to pass through it, is guilty of negligence if it closes this space suddenly and without warning to the traveling public; and in case of such negligence it is liable for the injury thereby caused to a person who, without contributory negligence on his part, climbs over the drawhead of a car instead of passing through the open space. *Schmitz* v. *St. Louis, I. M. & S. R. Co.*, 46 *Mo. App.* 380.—REVIEWING AND DISTINGUISHING Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211, 16 S. W. Rep. 11; Stillson *v.* Hannibal & St. J. R. Co., 67 Mo. 671.

2. *Remedies. Procedure.*

413. Pleading. — Negligence is sufficiently charged in a complaint which states that defendant was unlawfully and negligently occupying a street crossing with its engines in violation of a city ordinance, and that by reason of that fact, and without negligence on the part of plaintiff, the injury complained of resulted. *Denver, T. & G. R. Co.* v. *Robbins*, 2 *Colo. App.* 313, 30 *Pac. Rep.* 261.—QUOTING Billman *v.* Indianapolis, C. & L. R. Co., 76 Ind. 166.

A complaint alleging that a company in constructing its track along a street has obstructed the same by raising an embankment therein eighteen inches above the grade; that it is impracticable to drive over the track between one end of a long block and another; and that it is impossible to turn with an ordinary team and vehicle upon the street, or to drive in or out of the lots and premises along the street with teams and heavy loads, shows facts entitling the city to an injunction. *Oshkosh* v. *Milwaukee & L. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 681, 74 *Wis.* 534, 43 *N. W. Rep.* 489.

414. Matters of defense.—To excuse a company in obstructing a highway crossing longer than ten minutes, the legal limit, it must have been done by an unavoidable accident, and such necessity not appearing, judgment against the company should be affirmed. *Chicago & E. I. R. Co.* v. *People*, 44 *Ill. App.* 632.

A company which, in violation of an express statutory duty, obstructs a public highway cannot be heard to say that it did not anticipate an injury which is the direct result of the unlawful act. *Evansville & T. H. R. Co.* v. *Carvener*, 32 *Am. & Eng. R. Cas.* 134, 113 *Ind.* 51, 14 *N. E. Rep.* 738, 12 *West. Rep.* 203.

Although the whole of a plank crossing is left clear of freight cars, a company cannot urge that it did not wrongfully obstruct the crossing when by statute it is prohibited from permitting freight cars to stand across a highway without leaving a space of sixty feet for crossing, and such space has not in fact been left. *Pittsburgh, C. & St. L. R. Co.* v. *Kitley*, 37 *Am. & Eng. R. Cas.* 511, 118 *Ind.* 152, 20 *N. E. Rep.* 727.

A corporation owning and operating a railroad which crosses a common highway is under no obligation to remove from the highway obstructions placed on the crossing by a stranger, if the material constituting the obstruction is neither the property, nor under the care and control, of the corporation, although the existence of the obstruction is brought to the knowledge of its agents; nor does such obligation exist, although the person so placing the obstruc-

tions be a brakeman on the company's road, and the material constituting the obstructions be waste manure from the stock cars of the company, if the brakeman so placed the manure for his own use, without the authority of the company, and at the time was not acting within the scope of his employment and duty as brakeman. *Pittsburg, Ft. W. & C. R. Co.* v. *Maurer*, 21 *Ohio St.* 421.—DISTINGUISHED IN Tinker *v.* New York, O. & W. R. Co., 71 Hun (N. Y.) 431; Dyer County *v.* Chesapeake, O. & S. W. R. Co., 38 Am. & Eng. R. Cas. 676, 87 Tenn. 712, 11 S. W. Rep. 943.

415. What amounts to contributory negligence on part of person injured.—A train stopped for an hour at a station, and its locomotive extended three and a half feet over a public highway. Plaintiff, who was a physician, was anxious to make a professional call, and after waiting some twenty minutes attempted to lead his horse around the locomotive, but when in front of it the horse became frightened and broke away, injuring the carriage. *Held*, that the attempt to pass was not such contributory negligence as to deprive him of a right of action. His conduct was for the jury. *Vicksburg & M. R. Co.* v. *Alexander*, 62 *Miss.* 496.

On approaching a railroad track, plaintiff found the street crossing entirely obstructed by two trains, the rear cars of which stood but a few feet from each other. In attempting to pass over he was injured by the backward movement of one of the trains. *Held*, that the fact that the street was obstructed did not justify plaintiff's attempt, and he was negligent. *Stillson* v. *Hannibal & St. J. R. Co.*, 67 *Mo.* 671. — DISTINGUISHED IN Hudson *v.* Wabash & W. R. Co., 32 Mo. App. 667. QUOTED IN Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211. REVIEWED IN Frick *v.* St. Louis, K. C. & N. R. Co., 8 Am. & Eng. R. Cas. 280, 75 Mo. 595; Schmitz *v.* St. Louis, I. M. & S. R. Co., 46 Mo. App. 380.

The act of climbing over stationary cars without knowing whether or not they are attached to an engine is such negligence as to prevent recovery for injuries received in the attempt, and this is true although the cars were obstructing the street crossing in violation of the city ordinance. This rule is applicable to the act, in climbing over a car, of a police officer whose duties require him to cross the track, it not appearing that the company's servants knew of his perilous situation, and they not being required to look for him where he had no right to be. *Corcoran* v. *St. Louis, I. M. & S. R. Co.*, 105 *Mo.* 399, 16 *S. W. Rep.* 411. —FOLLOWING Hudson *v.* Wabash Western R. Co., 101 Mo. 31.

Plaintiff found a crossing obstructed by a long train, which had been standing for some time, and he attempted to pass by climbing over the bumper of one of the cars, but while doing so the train moved and he was injured. *Held*, that a nonsuit was properly allowed on the ground of his contributory negligence. *O'Mara* v. *Delaware & H. Canal Co.*, 18 *Hun* (*N. Y.*) 192. —APPLYING Massoth *v.* Delaware & H. Canal Co., 64 N. Y. 529, 6 Hun 314. FOLLOWING Van Schaick *v.* Hudson River R. Co., 43 N. Y. 528. QUOTING Lewis *v.* Baltimore & O. R. Co., 38 Md. 588, 10 Am. Ry. Cas. 521. REVIEWING Reynolds *v.* New York C. & H. R. R. Co., 58 N. Y. 248.

A long freight train was stopped on a street where there were several tracks, but was broken in two, so as to leave a few feet between the cars. Plaintiff was picking his way along as best he could, and using his eyes steadily to avoid cars on the other tracks, and was injured by a car which was suddenly "kicked" along one of the tracks in such a manner as to escape his attention. *Held*, that the question of his contributory negligence was for the jury. *Mahar* v. *Grand Trunk R. Co.*, 19 *Hun* (*N. Y.*) 32.

416. Evidence.—Where an innkeeper sues a company for obstructing the road leading to his inn and thereby injuring his business, witnesses should be allowed to testify as to the number of guests entertained at the inn, and as to the expedition and care with which the work was prosecuted; but it is not proper to ask a witness whether the company prosecuted its work as diligently as such work is usually prosecuted. It was the duty of the company to prosecute the work as carefully and expeditiously as could reasonably be done. *Illinois C. R. Co.* v. *White*, 18 *Ill.* 164.

A company employed a contractor to lay a track in a street. The evidence showed that he erected a temporary barrier, but left the ends of rails projecting beyond it; and that a person at night fell over the ends of the rails and was injured. *Held*, that the company was liable. *Woodman* v. *Metropolitan R. Co.*, 38 *Am. & Eng. R. Cas.* 484.

149 *Mass.* 335, 4 *L. R. A.* 213, 21 *N. E. Rep.* 482.

417. Instructions to the jury. — The rule prescribed by the Illinois statutes, that trains must not obstruct crossings for more than ten minutes, does not apply where boys move cars onto a crossing without the knowledge of the company or its employés; and it is error to instruct the jury that the company is liable if the obstruction continued more than ten minutes. *Peoria, D. & E. R. Co.* v. *Lyons*, 9 *Ill. App.* 350.

There is no error in refusing to instruct the jury that defendant "had the right to leave its cars standing upon the track of its branch railroad at any point or place," because such instruction was calculated to mislead the jury; and an instruction to the effect that defendant's liability only arose when it negligently permitted the car to remain on the highway an unreasonable length of time sufficiently covered a requested instruction to the effect that defendant had knowledge, or ought to have known by the exercise of reasonable care, of the existence of the car on its track in the highway. *Cleveland, C., C. & I. R. Co.* v. *Wynant*, 55 *Am. & Eng. R. Cas.* 80, 134 *Ind.* 681, 34 *N. E. Rep.* 569.

Where a person seeks to charge a company with negligence in not seasonably removing a car which incumbered a highway crossing, in consequence of which an accident occurred to plaintiff, an instruction that if the jury should find that the servants of the company honestly believed that they could not move the car without help, and that they exercised ordinary care and prudence in that judgment, they are not guilty, is sufficiently favorable to the company, and furnishes no ground of exception. *Paine* v. *Grand Trunk R. Co.*, 58 *N. H.* 611.

Where a company kept cars standing on side tracks near a street crossing where plaintiff was injured, an instruction to the jury, in an action for damages, that "defendant had the right to leave its cars standing on the track, provided it kept open a sufficient passway," was as favorable as defendant was entitled to. *Alexander* v. *Richmond & D. R. Co.*, 112 *N. Car.* 720, 16 *S. E. Rep.* 896.

418. Questions for the jury. — It cannot be said as matter of law that a highway crossing is not obstructed by cars when a space of only sixteen feet is left open; it is a question of fact for a jury, depending on the circumstances. *Young* v. *Detroit, G. H. & M. R. Co.*, 19 *Am. & Eng. R. Cas.* 417, 56 *Mich.* 430, 23 *N. W. Rep.* 67. — APPROVED IN Peterson *v.* Chicago & W. M. R. Co., 64 Mich. 621. QUOTED IN Denver, T. & G. R. Co. *v.* Robbins, 2 Colo. App. 313.

In a suit against a company to recover for personal injuries sustained, as alleged, by defendant leaving a car standing so as to encroach upon a highway crossing, the testimony tended to show that the planked portion of such crossing was encroached upon by the draw-bar of one of said cars. *Held*, that it was for the jury to say whether or not it was a negligent obstruction of the passage, and error for the court to decide such question. *Lewless* v. *Detroit, G. H. & M. R. Co.*, 65 *Mich.* 292, 32 *N. W. Rep.* 790.

Where a freight train is stopped across a public street and is permitted to stand there longer than the city ordinance allows, and people have congregated there to pass, and are passing, between the cars, it becomes a question for the jury whether or not the company's servants may move the train without giving timely warning of their intention to do so. *Burger* v. *Missouri Pac. R. Co.*, 112 *Mo.* 238, 20 *S. W. Rep.* 439.

419. Measure of damages. — Under Ohio Act of 1873, relating to obstructions in highways, the measure of damages recoverable for a violation of the act, ordinarily, is the cost of removing the obstructions and restoring the highway to its former condition. *Lawrence R. Co.* v. *Mahoning County Com'rs*, 35 *Ohio St.* 1.

A company, by the negligent construction of its road, deluged a highway along which plaintiff's children were accustomed to go afoot to school, and thereby so obstructed it for two months as to compel his children either to remain at home or to attend school by some other means than on foot. He employed two horses, as long as the obstruction continued, in carrying his children to school, at a cost of twenty-four dollars for horse feed. *Held*, that he was entitled to recover of the company an amount equal to his children's share of the school fund for two months, if that share was less than the value of the horse feed; if greater, then to recover the value of the horse feed. *Sabine & E. T. R. Co.* v. *Johnson*, 65 *Tex.* 389.

420. Action at law by town for damages or for removal of obstruction. — Towns have a qualified interest in the roadways and bridges they have erected, and may maintain an action on the case for the destruction or obstruction of the road, or the conversion of the materials. *Troy* v. *Cheshire R. Co.*, 23 *N. H.* 83.—APPROVED IN Laconia *v.* Gilman, 55 N. H. 127; Rosenthal *v.* Taylor, B. & H. R. Co., 79 Tex. 325. FOLLOWED IN Baltimore & P. R. Co. *v.* Fifth Baptist Church, 137 U. S. 568. NOT FOLLOWED IN Carl *v.* Sheboygan & F. du L. R. Co., 46 Wis. 625. QUOTED IN Chicago & E. I. R. Co. *v.* McAuley, 121 Ill. 160. REVIEWED IN St. Louis, V. & T. H. R. Co. *v.* Summit, 3 Ill. App. 155; Henderson *v.* New York C. R. Co., 78 N. Y. 423.

An injury from obstructing streets is to the general public rather than to the city, but when the control of the streets has been conferred upon the city, it may institute proceedings to remove obstructions. *Rio Grande R. Co.* v. *Brownsville*, 45 *Tex.* 88, 13 *Am. Ry. Rep.* 223.

421. Proceeding in equity by town to test right of company to occupy highway.—Where a company, under a general grant of power, lays out and constructs its road over and along a public highway, the town within which such highway is situated may proceed in equity against the company in the supreme court, under its general jurisdiction in matters of nuisance, in order to ascertain whether such laying out and construction is or is not within the power granted to the corporation; and it is immaterial, in this respect, whether the way in question is a highway, properly so called, or a town way. *Springfield* v. *Connecticut River R. Co.*, 4 *Cush.* (*Mass.*) 63.—EXPLAINED IN Easton & A. R. Co. *v.* Greenwich, 25 N. J. Eq. 565. REVIEWED IN Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225; Hannibal *v.* Hannibal & St. J. R. Co., 49 Mo. 480.

The town was divided and a part of it established as a new town, after the commencement of such suit. Upon the division the highway fell within the limits of the new town, and the act for the division provided that such suit should be assumed, and might be prosecuted to final judgment, by the new town, at its expense and for its benefit, but in the name of the old town. *Held*, that the division did not operate to vacate or otherwise affect the suit. *Springfield* v. *Connecticut River R. Co.*, 4 *Cush.* (*Mass.*) 63.

422. Enjoining obstructions.—(1) *In general.* — Where a city, under express legislative authority, fairly enters into a contract with a company, whereby the use of certain parts of streets is granted to the latter for its main and side tracks, switches, frogs, etc., with the right in the company to grade and improve such parts of the streets as it may desire, subject to the restriction that the improvement of the streets shall be so made that wagons, drays, and other vehicles may cross over the same conveniently, the courts will enforce such contract; and if the company, or its successor, afterwards attempts to erect obstructions on the parts of such streets so as to interfere materially with the passage of vehicles over the same, a court of equity will enjoin such attempted acts, but will not enjoin acts permitted by the contract. *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 *Ill.* 489, 27 *N. E. Rep.* 232; *reversing* 32 *Ill. App.* 377.

On allowing an injunction against a company from any further work on or obstruction of a highway, the court may, on final hearing, require the removal of the obstructions already placed thereon, in case the company refuses to restore such highway to its former usefulness. *State ex rel.* v. *Dayton & S. E. R. Co.*, 5 *Am. & Eng. R. Cas.* 312, 36 *Ohio St.* 434.

A casual and temporary obstruction made in laying down rails through the streets of a city, unless wantonly made, will form no ground for an action at law, much less for an injunction. *Sargent* v. *Ohio & M. R. Co.*, 1 *Handy* (*Ohio*) 52.

A company authorized to stop up any streets required for its works, and by subsequent act empowered to make its railway on a level according to which it would pass eighteen feet below the level of a certain street, was enjoined from permanently stopping up such street until the hearing of the cause. *Attorney-General* v. *Great Eastern R. Co.*, 25 *L. T.* 867.

(2) *At suit of the public.*—Township authorities who are liable to indictment for failing to keep highways in good order and repair have such a special interest as to entitle them to file a bill in their own name to restrain a company from obstructing a highway. *Easton & A. R. Co.* v. *Greenwich*, 25 *N. J. Eq.* 565.

All public streets and highways are for the use of the people of the whole state, whether located in town or country. The interest in such case or the ownership thereof is *publici juris;* and the appropriation of such streets to private or corporate use without authority of law, and the consequent obstruction of them and impediments to travel occasioned thereby, constitute a nuisance, and justify an injunction, the people of the state being the appropriate parties to seek and enforce the necessary remedy. *People* v. *New York & H. R. Co.*, 45 *Barb.* (*N. Y.*) 73.

In actions to restrain defendant from laying tracks and erecting buildings upon land claimed by plaintiff to be one of its streets, it appeared, and the court found, that prior to 1853 the land had become a highway by dedication. In that year a railroad company, to whose rights defendant succeeded without the consent, so far as appeared, of the owner of the land or of plaintiff, laid down tracks along the easterly side of the street, occupying all but thirty feet of its width, and also built a freight house at one end of the street, entirely obstructing the street at that end. After the tracks were laid teams and vehicles passed along the street west of the tracks, and after the freight house was built they passed to the west of it over a vacant lot outside the line of the street, still continuing to use the unobstructed portion of the street. In 1883 defendant obtained from the original owner of the premises a quit-claim deed of the rights and interests it had in 1853, "if any, in the land covered by said alleged * * * street." In 1885 defendant commenced laying an additional track in the street. About 1887 the freight house was torn down and defendant began the construction of a new one occupying more of the street. *Held*, that the actions were maintainable. *Cohoes* v. *Delaware & H. Canal Co.*, 134 *N. Y.* 397, 31 *N. E. Rep.* 887, 47 *N. Y. S. R.* 612; *reversing* 54 *Hun* 558, 27 *N. Y. S. R.* 613, 7 *N. Y. Supp.* 885.

It was claimed by defendant that the actions were not maintainable because plaintiff's mayor and common council had not determined the width of the street according to the use that had been made of it, as required by the provision of the statute making it the duty of highway commissioners to cause roads laid out, but not sufficiently described, and those used for twenty years but not recorded, to be ascertained, described, and entered on record. (1 Rev. St. 501, § 1, subd. 3.) There was no finding or evidence that the provisions of the statute had not been complied with. *Held*, that conceding the application of the statute to incorporated cities (as to which, *quære*), it was to be presumed that the city officials had performed their duty. *Cohoes* v. *Delaware & H. Canal Co.*, 134 *N. Y.* 397, 31 *N. E. Rep.* 887, 47 *N. Y. S. R.* 612; *reversing* 54 *Hun* 558, 27 *N. Y. S. R.* 613, 7 *N. Y. Supp.* 885.

It is not necessary that a bill to enjoin an obstruction of a township public road should be instituted in the name of the commonwealth at the instance of the attorney-general, but such bill is maintainable in the name of the township. *Appeal of North Manheim Tp.*, 36 *Am. & Eng. R. Cas.* 194, 22 *W. N. C.* (*Pa.*) 149, 14 *Atl. Rep.* 137.

(3) *At suit of individuals.* — The unauthorized obstruction of a street or landing by a railroad track is such a special injury to the owner as will entitle him to an injunction to restrain it. *Schurmeier* v. *St. Paul & P. R. Co.*, 10 *Minn.* 82 (*Gil.* 59).

Where a company has threatened and begun to erect a permanent obstruction in a street, and the highway commissioners, though requested so to do, refused to interfere officially, a resident taxpayer owning land upon such street may join the commissioners with the company in an application for an injunction to restrain the erection of the obstruction. *Overton* v. *Olean*, 37 *Hun* (*N. Y.*) 47.

The occupiers of houses upon lands sold by the crown, and through which, while owned by the crown, a railway was constructed and level crossings made, are entitled to use such crossings, and an injunction will be granted against their obstruction, but not so as to prevent the company from using the railway for the reasonable working of traffic. *United Land Co.* v. *Great Eastern R. Co.*, *L. R.* 10 *Ch.* 586, 23 *W. R.* 896, 33 *L. T.* 292; *affirming L. R.* 17 *Eq.* 158, 43 *L. J. Ch.* 363, 29 *L. T.* 498, 22 *W. R.* 126.

423. Removal by surveyors of highways. — The fact that the rails of a private railroad were placed on a highway by permission of the town authorities, who permitted them to remain there for a series of years, does not prevent the surveyors of highways from removing them if they deem them an obstruction to public travel. *Bay State Brick Co.* v. *Foster*, 115 *Mass.* 431.

424. Action by county commissioners.—Where an obstruction is created by a railroad in a state or county road, and the corporation limits of a municipal corporation are extended over a part of the road so obstructed, the county commissioners cannot maintain an action for the obstruction of that part of the highway which is within the limits of the corporation. *Lawrence R. Co.* v. *Mahoning County Com'rs*, 35 *Ohio St.* 1.

An action by county commissioners for the obstruction of a county road by a railroad was pending at the passage of Ohio Act of March 7, 1873; and on May 31, 1873, the court, by consent of parties, made an order that the cause should stand as though commenced on that day. *Held*, that the action must be regarded as one prosecuted under the act of 1873. *Lawrence R. Co.* v. *Mahoning County Com'rs*, 35 *Ohio St.* 1.

The remedy given to the county commissioners by Ohio Act of March 7, 1873 (70 Ohio L. 53), for the obstruction of a state or county road is cumulative, and does not affect the right of the state to petition equity to compel a railroad to perform the condition on which its franchise was granted. *State ex rel.* v. *Dayton & S. E. R. Co.*, 5 *Am. & Eng. R. Cas.* 312, 36 *Ohio St.* 434.

425. Actions for statutory penalties.—In an action under the Illinois statute to recover a penalty from a company for obstructing a highway crossing, it is not necessary to allege that the defendant is the owner of the road. It is liable for the penalty provided for each offense alleged and proved, the same as in case of an engineer or conductor. *Indianapolis & St. L. R. Co.* v. *People*, 32 *Ill. App.* 286.—REVIEWING Illinois C. R. Co. *v.* Kanouse, 39 Ill. 272; Toledo, W. & W. R. Co. *v.* People, 81 Ill. 141.

A suit to recover a penalty provided for by 1 Ind. Rev. St. 1852, ch. 102, § 25, is a civil suit and is no bar to a criminal prosecution. *Indiana C. R. Co.* v. *Potts*, 7 *Ind.* 681.

In actions prosecuted under the Ohio statutes, for a penalty for obstructing a public road, where the obstruction is alleged to have been caused by a car, or cars, or locomotive, it must be averred in the petition that the public road or highway was obstructed unnecessarily, by permitting such car, or cars, or locomotive, to remain upon or across the highway for a longer period than five minutes, to the hindrance, etc. In actions for obstructions to public roads caused by agencies other than railroad cars and locomotives, in describing the manner of the obstruction, the word "unnecessarily" forms no essential part of the description of the cause of action. *Burton Tp.* v. *Tuttle*, 30 *Ohio St.* 62.

STRICT CONSTRUCTION.

Of bill of lading as against the carrier, see BILLS OF LADING, 35.
— charters, in favor of the public, see CHARTERS, 57.
— condemnation laws in favor of landowner, see EMINENT DOMAIN, 47.
— contracts limiting liability against company, see LIMITATION OF LIABILITY, 43.
— — when proper, see CONTRACTS, 23.
— delegated power to condemn land, see EMINENT DOMAIN, 88.
— grant of power to condemn private property, see EMINENT DOMAIN, 63.
— land grants, see LAND GRANTS, 4.
— municipal grant to run steam railroad in street, see STREETS AND HIGHWAYS, 89.
— power of city to grant right of way in streets, see STREETS AND HIGHWAYS, 72.
— statutes, see STATUTES, 45, 46.
— — as to donations to railways, see MUNICIPAL AND LOCAL AID, 249.
— — — — mode of assessing land damages, see EMINENT DOMAIN, 449, 450.
— — relative to municipal aid to railways, see MUNICIPAL AND LOCAL AID, 55.
— statutory liability of stockholders to creditors, see STOCKHOLDERS, 39.
— — power to mortgage, see MORTGAGES, 8.
— — provisions as to eminent domain proceedings, see EMINENT DOMAIN, 235, 236.

STRIKES.

Delays caused by, see CARRIAGE OF MERCHANDISE, 143.
Liability for cars destroyed by strikers, see COUNTIES, 3.
When excuse delay on part of carrier, see CARRIAGE OF MERCHANDISE, 48.
— excuse the carrier for loss or delay, see CARRIAGE OF MERCHANDISE, 18.

1. When an excuse for delay in forwarding goods.* — Where a carrier is sued for a delay in the transportation and delivery of live stock, if the delay is caused, not by the negligence or wrongful act of the

* See also CARRIAGE OF MERCHANDISE, 18, 48, 143.
Delay caused by strikes and mobs; liability of carrier for, see note, 45 AM. & ENG. R. CAS. 339.

carrier or its employés, but solely by the violence and riotous conduct of a lawless mob, which the carrier and the civil authorities are unable to resist or control, the carrier is not liable for the delay. *Lake Shore & M. S. R. Co.* v. *Bennett*, 6 *Am. & Eng. R. Cas.* 391, 89 *Ind.* 457.—FOLLOWING Pittsburgh, C. & St. L. R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.—FOLLOWED IN Geismer *v.* Lake Shore & M. S. R. Co., 26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514.—*Pittsburgh, C. & St. L. R. Co.* v. *Hollowell*, 65 *Ind.* 188.—FOLLOWED IN Geismer *v.* Lake Shore & M. S. R. Co., 26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514.—*Pittsburgh, Ft. W. & C. R. Co.* v. *Hazen*, 84 *Ill.* 36, 16 *Am. Ry. Rep.* 422. *Indianapolis & St. L. R. Co.* v. *Juntgen*, 10 *Ill. App.* 295.—FOLLOWED IN Geismer *v.* Lake Shore & M. S. R. Co., 26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514.—*International & G. N. R. Co.* v. *Tisdale*, 74 *Tex.* 8, 11 *S. W. Rep.* 900. *Gulf, C. & S. F. R. Co.* v. *Gatewood*, 79 *Tex.* 89, 14 *S. W. Rep.* 913. *Southern Pac. R. Co.* v. *Johnson*, 45 *Am. & Eng. R. Cas.* 338, 4 *Tex. App.* (*Civ. Cas.*) 69, 15 *S. W. Rep.* 121.

The carrier is only required to take due care of the freight. *Gulf, C. & S. F. R. Co.* v. *Levi*, 42 *Am. & Eng. R. Cas.* 439, 76 *Tex.* 337, 13 *S. W. Rep.* 191, 8 *L. R. A.* 323; *reversing* 40 *Am. & Eng. R. Cas.* 115, 12 *S. W. Rep.* 677.

A common carrier may be held liable for a delay caused by a mere refusal of its employés to do their duty, but it is not liable where the delay is the result solely of the violence of men not in its employ. *Indianapolis & St. L. R. Co.* v. *Juntgen*, 10 *Ill. App.* 295.—QUOTING Pittsburgh, Ft. W. & C. R. Co. *v.* Hazen, 84 Ill. 36.—*Pittsburgh, Ft. W. & C. R. Co.* v. *Hazen*, 84 *Ill.* 36, 16 *Am. Ry. Rep.* 422.—FOLLOWED IN Geismer *v.* Lake Shore & M. S. R. Co., 26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514. QUOTED IN Indianapolis & St. L. R. Co. *v.* Juntgen, 10 Ill. App. 295. REVIEWED IN Gulf, C. & S. F. R. Co. *v.* Levi, 42 Am. & Eng. R. Cas. 439, 76 Tex. 337, 13 S. W. Rep. 191, 8 L. R. A. 323.

The fact that a company has reduced the wages of its employés cannot be held to justify or excuse a mob composed of indiscriminate persons in stopping trains and delaying the transportation of goods, nor can the company be held responsible for the consequences of such unlawful proceedings when they cause such delay. *Lake Shore & M. S. R. Co.* v. *Bennett*, 6 *Am. & Eng. R. Cas.* 391, 89 *Ind.* 457.—FOLLOWING Pittsburgh, C. & St. L. R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.—*Pittsburgh, C. & St. L. R. Co.* v. *Hollowell*, 65 *Ind.* 188.—FOLLOWED IN Lake Shore & M. S. R. Co. *v.* Bennett, 89 Ind. 457.

When misconduct of men acting unlawfully, such as incendiaries, mobs, etc., delays the running of trains, the only duty resting upon the carrier, if not otherwise in fault, is to use reasonable diligence to overcome the obstacles interposed and to forward the goods. *Geismer* v. *Lake Shore & M. S. R. Co.*, 26 *Am. & Eng. R. Cas.* 287, 102 *N. Y.* 563, 7 *N. E. Rep.* 828, 2 *N. Y. S. R.* 514; *reversing* 34 *Hun* 50.—FOLLOWING Pittsburgh, Ft. W. & C. R. Co. *v.* Hazen, 84 Ill. 36; Pittsburgh, C. & St. L. R. Co. *v.* Hollowell, 65 Ind. 188; Lake Shore & M. S. R. Co. *v.* Bennett, 6 Am. & Eng. R. Cas. 391, 89 Ind. 457; Indianapolis & St. L. R. Co. *v.* Juntgen, 10 Ill. App. 295.

The facts that persons who formed themselves into a mob and organized arrangements to hinder the running of trains were employés of the company, engaged by it to render the various services needful in operating the road, that they united in a "strike," and engaged in lawless acts of violence, injurious to the property and discipline of the company, and which for a time prevented the running of trains, as a means of coercing the company in yielding to their demands upon it, relative to hours of labor, rate of wages, and like matters, and that the company might have put an end to the strike and the detention by yielding to such demands, but did not do so, do not prevent the company from interposing the detention as a defense to a demand of shippers of goods over the road, for damages for delay in transportation, especially if it had, throughout the detention, employés at hand who were able and willing to move the trains required for carriage of plaintiff's goods, but who were forbidden and prevented by the violent, lawless acts of the strikers. *Geismer* v. *Lake Shore & M. S. R. Co.*, 26 *Am. & Eng. R. Cas.* 287, 102 *N. Y.* 563, 7 *N. E. Rep.* 828, 2 *N. Y. S. R.* 514; *reversing* 34 *Hun* 50. — DISTINGUISHING Weed *v.* Panama R. Co., 17 N. Y. 362; Blackstock *v.* New York & E. R. Co., 1

Bosw. 77, 20 N. Y. 48.—FOLLOWED IN Little *v.* Fargo, 43 Hun 233, 5 N. Y. S. R. 462. REVIEWED IN Gulf, C. & S. F. R. Co. *v.* Levi, 42 Am. & Eng. R. Cas. 439, 76 Tex. 337, 13 S. W. Rep. 191, 8 L. R. A. 323.

Lawless acts of employés, adverse to the interests and contrary to the orders of the employer, cannot be imputed to it as having been done by its agents and servants. *Geismer v. Lake Shore & M. S. R. Co.*, 26 *Am. & Eng. R. Cas.* 287, 102 *N. Y.* 563, 7 *N. E. Rep.* 828, 2 *N. Y. S. R.* 514; *reversing* 34 *Hun* 150.

2. —— **and when not.** — Where the employés of a company suddenly refuse to work, and are discharged, and delay results from the failure of the company promptly to supply their places, the company is responsible for any damage caused by such delay; but where the places of the recusant employés are promptly supplied by other competent men, and the "strikers" then prevent the new employés, by lawless and irresistible violence, from doing duty, the company is not responsible for delay caused solely by such lawless violence. *Pittsburgh, Ft. W. & C. R. Co.* v. *Hazen*, 84 *Ill.* 36, 16 *Am. Ry. Rep.* 422.

The sudden and wrongful refusal of its employés to work will not excuse a railroad company for failure to transport freight in the usual time. *Read* v. *St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 199, 9 *Am. Ry. Rep.* 209. —FOLLOWING Blackstock *v.* New York & E. R. Co., 20 N. Y. 48; Weed *v.* Panama R. Co., 17 N. Y. 362.—QUOTED IN Schwab *v.* Union Line, 13 Mo. App. 159.

When a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. *White* v. *Missouri Pac. R. Co.*, 19 *Mo. App.* 400.—QUOTING Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364.

A carrier is liable for a delay in the transportation of freight beyond the usual time, which is caused by a large number of its employés suddenly and wrongfully refusing to work. *Blackstock* v. *New York & E. R. Co.*, 20 *N. Y.* 48; *affirming* 1 *Bosw.* 77.—FOLLOWING Weed *v.* Panama R. Co., 17 N. Y. 362.—DISTINGUISHED IN Geismer *v.* Lake Shore & M. S. R. Co., 26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514; Gulf, C. & S. F. R. Co. *v.* Levi, 42 Am. & Eng. R. Cas. 439, 76 Tex. 337, 13 S. W. Rep. 191, 8 L. R. A. 323. FOLLOWED IN Read *v.* St. Louis, K. C. & N. R. Co., 60 Mo. 199. See Geismer *v.* Lake Shore & M. S. R. Co., 26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514.

Out of a total of 168 engineers 140 suddenly quit work, for the purpose of compelling the company to rescind a certain reasonable regulation. *Held*, that the company was liable for a delay in transporting property, though no fault could be charged against the superior officers. *Blackstock* v. *New York & E. R. Co.*, 20 *N. Y.* 48; *affirming* 1 *Bosw.* 77.

3. —— **Rule as to perishable freight.**—The rule that a common carrier is an insurer of the goods transported, and can only avoid liability for their loss by showing that it happened by the act of God or the public enemy, does not apply where the damage to the goods resulted from delay in their delivery by accident or misfortune, although not inevitable or produced by the act of God. Where, therefore, the delivery of perishable freight was delayed by the seizure of the cars by a mob of rioters, the carrier is not liable for the depreciation in its value caused thereby under Tex. Rev. St. art. 277, which declares that "the duties and liabilities of carriers shall be the same as are prescribed by the common law except when otherwise provided." *Gulf, C. & S. F. R. Co.* v. *Levi*, 42 *Am. & Eng. R. Cas.* 439, 76 *Tex.* 337, 13 *S. W. Rep.* 191, 8 *L. R. A.* 323; *reversing* 40 *Am. & Eng. R. Cas.* 115, 12 *S. W. Rep.* 677.—DISTINGUISHING Weed *v.* Panama R. Co., 17 N. Y. 362; Blackstock *v.* New York & E. R. Co., 20 N. Y. 48. REVIEWING Haas *v.* Kansas City, Ft. S. & G. R. Co., 35 Am. & Eng. R. Cas. 572, 81 Ga. 792; Geismer *v.* Lake Shore & M. S. R. Co., 102 N. Y. 563.

4. **Liability for injury to passengers by strikers.***—Where, by the exercise of ordinary care, danger to passengers may be anticipated from the attack of a mob of striking laborers upon laborers of another class, taken on board the train, it will be negligence to stop the train at a place not a regular station for stopping, and there take on such objectionable laborers, and thus expose other passengers to a great peril from a threatened attack, without taking the utmost care and vigilance to prevent in-

*See also CARRIAGE OF PASSENGERS, 328.

jury to passengers. In such case the offensive persons, against whom an attack was reasonably to be expected, should at least be placed in a car to themselves, where they might protect themselves without danger to the regular passengers, having no notice of the danger, or extraordinary precautionary measures should be taken to prevent the assault of the mob. *Chicago & A. R. Co.* v. *Pillsbury*, 31 *Am. & Eng. R. Cas.* 24, 123 *Ill.* 9, 14 *N. E. Rep.* 22, 11 *West. Rep.* 757.

In an action by a passenger to recover for an injury caused by a wound from a pistol-shot fired by some of the mob attacking the car, which attack might reasonably have been expected, the court, on behalf of the plaintiff, instructed the jury that it was the duty of defendant, as a common carrier of passengers, "to exercise the utmost care, skill, and vigilance to carry plaintiff safely and to protect him from any and all danger, from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably foreseen and prevented." *Held*, that, as applicable to the facts of the case, the instruction stated the law with sufficient accuracy. *Chicago & A. R. Co.* v. *Pillsbury*, 31 *Am. & Eng. R. Cas.* 24, 123 *Ill.* 9, 14 *N. E. Rep.* 22, 11 *West. Rep.* 757.

It is not the duty of a company to provide a police force sufficient to quell a large wayside mob. Passengers must take the risk of injury in such cases. *Pittsburgh, Ft. W. & C. R. Co.* v. *Hinds*, 53 *Pa. St.* 512. —REVIEWED IN Batton *v.* South & N. Ala. R. Co., 23 Am. & Eng. R. Cas. 514, 77 Ala. 591, 54 Am. Rep. 80.

A train having stopped at a regular station, a riotous crowd rushed upon the cars in such numbers as to defy the power of the conductor to resist. They commenced a fight in the cars, in which plaintiff was injured. *Held*, that the fact that the conductor knew the crowd to consist of improper persons was immaterial. *Pittsburgh, Ft. W. & C. R. Co.* v. *Hinds*, 53 *Pa. St.* 512. —EXPLAINED IN Putnam *v.* Broadway & S. A. R. Co., 15 Abb. Pr. N. S. (N. Y.) 383. QUOTED IN Chicago & A. R. Co. *v.* Pillsbury, (Ill.) 26 Am. & Eng. R. Cas. 241, 8 N. E. Rep. 803.

5. Interference with receiver — Contempt.* — Where a railroad is in the hands of a receiver, employés who go on a strike and unlawfully obstruct the operation of engines or cars are guilty of contempt of court. *In re Doolittle*, 23 *Fed. Rep.* 544.

And where such employés go armed and overawe other employés and induce them to quit work, they are guilty of contempt though they only prefer a simple request to quit work, without any threats of violence. *In re Doolittle*, 23 *Fed. Rep.* 544.

And they are likewise guilty of contempt where they interfere with the receiver's management by simply notifying the men to quit work, though they qualify it by saying that the notification is not to be taken as an intimidation. *In re Doolittle*, 23 *Fed. Rep.* 544.

Where a road is in the hands of a receiver, employés who are dissatisfied with their wages may quit work, and by fair persuasion induce others to do so; but if they resort to threats or violence, or overawe others by demonstrations of force, without actual violence, they are guilty of contempt. *United States* v. *Kane*, 25 *Am. & Eng. R. Cas.* 608, 23 *Fed. Rep.* 748.

Receivers are sworn officers of the court, and their agents and employés in operating the railway are, *pro hac vice*, the officers of the court. As such officers, they are responsible to the court for their conduct; and, if they wilfully injure the property or endanger it, or seek to cripple its operation in the hands of the receivers, they can and will be made to answer therefor. At the same time, these officers, and the property of the company in the custody of the court, are entitled to and must have the full protection that the court can give, under the laws of the land; and this whether the grievance comes from within or without. *In re Higgins*, 27 *Fed. Rep.* 443.

Locomotive engineers cannot be compelled to remain in service after a road has gone into the hands of a receiver, but if they, or an organization to which they belong, interfere with the possession of the receiver or the operation of the road, they may be punished. *Beers* v. *Wabash, St. L. & P. R. Co.*, 35 *Am. & Eng. R. Cas.* 646, 34 *Fed. Rep.* 244.

6. Restraining strikes and boycotts in equity.* — The employés of a company assume the implied obligation that

* Relation of strikers and receivers, see note, 25 AM. & ENG. R. CAS. 618.

* Criminal and civil liability for conspiracies known as "boycotts," see note, 59 AM. REP. 720. Strikes and boycotts, see note, 53 AM. & ENG. R. CAS. 325.

they will not leave the service nor refuse to perform their duties under circumstances when such conduct on their part would imperil lives committed to the company's control, or destroy property involving irreparable loss and injury, or visit upon it severe penalties. The right of the employé in ordinary conditions to quit the master's service at his option does not apply where he is employed by a railroad company. *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 293, 54 *Fed. Rep.* 746.

If ruin to the business of railroads and disasters to the public are the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employés, the courts have power to grant relief by restraining employés from acts of commission, violence, or intimidation, or from enforcing rules and regulations of organizations which result in irremediable injuries to their employers and to the public. *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 293, 54 *Fed. Rep.* 746.

Locomotive engineers and firemen in the employ of a company which is enjoined from refusing to handle the cars of a connecting line, which cars its employés have boycotted, having knowledge of such injunction, are not guilty of contempt of court, if, on being ordered by their employer to take out a train containing some of such boycotted cars, they refuse, and immediately, unconditionally, and in good faith quit their employment. But an engineer cannot be permitted to pretend to quit the service of his company for the evident purpose of evading the order of the court by any trick or evasion. If he remains in the company's service and refuses to handle the boycotted cars, he is guilty of contempt of court. *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 293, 54 *Fed. Rep.* 746.

While one or more employés may be free to quit their employer's service at will, a combination of a number of them to do so for the purpose of injuring the public and oppressing employers, by unjustly subjecting them to the power of confederates for extortion or mischief, is criminal. *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 293, 54 *Fed. Rep.* 746.

A court may award a preliminary injunction to prevent the chief member of an organization of engineers from issuing an order in the nature of a boycott against another road, which will have the effect of doing irreparable injury to its business; and if such order has already been made, the court by mandatory injunction may compel him to rescind it, especially where it is in violation of a previous injunction. *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 307, 54 *Fed. Rep.* 730. —APPLYING Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. Rep. 307; Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551; Casey *v.* Cincinnati Typographical Union, 45 Fed. Rep. 135; Emack *v.* Kane, 34 Fed. Rep. 47; Cœur D'Alene C. & M. Co. *v.* Miners' Union, 51 Fed. Rep. 260.

7. Liability of company to sheriff for protection of property. — A company is liable for money paid by a sheriff personally to men employed by him, and sworn in as deputy sheriffs to protect the property of the company from damage apprehended from strikers, upon its express promise to pay for such services, after having been informed by the sheriff that he was able to command the peace without the aid of the *posse comitatus*, and that if the men were employed the county would not pay them, there being at the time no riotous or unlawful assembly. In such case section 856, fifth division of Mont. Comp. St., in substance empowering a sheriff to call to his aid such persons as may be necessary to suppress unlawful assemblies, and section 864, prohibiting a sheriff from demanding for official services any greater fees than are allowed by law, are not available as a defense. *Sullivan* v. *Utah & N. R. Co.*, 11 *Mont.* 236, 28 *Pac. Rep.* 307.—FOLLOWING St. Louis, I. M. & S. R. Co. *v.* Grafton, 51 Ark. 504, 14 Am. St. Rep. 66.

8. Liability of county for property destroyed.—Where goods in the hands of a carrier are destroyed by a mob brought on by a strike of railroad men, the owner has no remedy at common law against the county; but under Pennsylvania Act of May 31, 1841, certain counties in that state are liable. The act is both remedial and penal, and must be liberally construed, and is not repealed by the adoption of the new Constitution of 1877. *Allegheny* v. *Gibson*, 90 *Pa. St.* 397.

The fact that the county authorities are unable to quell such a riot does not limit the liability of the county for damage done thereby; and the fact that the property is *in*

transitu at the time of its destruction does not exempt the county from liability, and it applies as well to the property of non-residents as to the property of citizens of the state. *Allegheny* v. *Gibson*, 90 *Pa. St.* 397.

It is not necessary that a property owner should give notice to the county authorities, unless he has knowledge of an intention on the part of the mob to destroy his property, and sufficient time intervenes to enable him to give the notice. Such notice is not necessary where the authorities have knowledge of the intention or attempt to destroy the property. *Allegheny* v. *Gibson*, 90 *Pa. St.* 397.

The fact that the state when called upon rendered assistance and sent a portion of its military to the scene of the disturbance does not absolve the county from its obligation to keep the peace, nor from its liability for a neglect of this duty. *Allegheny* v. *Gibson*, 90 *Pa. St.* 397.

Under N. Y. Act of 1855, ch. 428, a company may recover from a county the value of property destroyed by a mob of strikers, where it has made the proper appeal to the sheriff for protection, which has not been given. *Lake Shore & M. S. R. Co.* v. *Erie County Sup'rs*, 2 *N. Y. S. R.* 317, 41 *Hun* 637, *mem.*

STRIKING OUT.

Allegation as surplusage, see ANIMALS, INJURIES TO, **365.**
Evidence, see TRIAL, **51.**
Irrelevant testimony, see WITNESSES, **61.**
Pleadings or allegations therein, see PLEADING, **167–171.**
Plea on appeal from justice's court, see JUSTICE OF THE PEACE, **18.**
— or answer in condemnation proceedings, see EMINENT DOMAIN, **352**

SUBAGENTS.

Liability of agent for misconduct of, see AGENCY, **32.**
Right of agent to employ, see AGENCY, **26.**

SUBCONTRACTOR.

Filing of lien claim by, see LIENS, **32.**
Notice by, to owner, of claim for lien, see LIENS, **33.**
Rights, duties, and liabilities of, see CONSTRUCTION OF RAILWAYS, **74–87.**
— of, to claim lien, see LIENS, **18.**

SUBJECT.

Of act to be expressed in title, see CHARTERS, **3.**

SUBLETTING.

By lessee, see LEASES, ETC., **85–89.**

SUBMISSION.

To arbitration, see ARBITRATION AND AWARD, **1–6.**
— — as a defense to action for damages, see EMINENT DOMAIN, **999.**
— — in condemnation proceedings, validity of, see EMINENT DOMAIN, **487.**
— — of question of compensation, see EMINENT DOMAIN, **1253.**
— engineer as arbitrator, what is covered by, see CONSTRUCTION OF RAILWAYS, **68.**

SUBPŒNA.

Failure to obey as a contempt, see CONTEMPT, **7, 8.**
Issued by the interstate commerce commission, see INTERSTATE COMMERCE, **157, 168.**
Non-compliance with, as ground for continuance, see TRIAL, **22.**
To testify, see WITNESSES, **1.**

SUBPŒNA DUCES TECUM.

Failure to obey as a contempt, see CONTEMPT, **8.**
See also WITNESSES, **2.**

SUBROGATION.

Of bondholders to security held by state, see STATE AID, **11, 12.**
— carrier or insurer to rights of insured, see FIRE INSURANCE, **11–13.**
— insurer to owner's right to sue for damages caused by fire, see FIRES, **138.**
To laborer's lien, see LIENS, **55.**

1. Conventional—Necessity of express agreement. — Conventional subrogation can only result from an express agreement, either with the debtor or creditor. It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. *New Jersey Midland R. Co.* v. *Wortendyke*, 27 *N. J. Eq.* 658; *reversing* 27 *N. J. Eq.* 110.—EXPLAINED IN Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

The right of subrogation cannot be enforced until the whole debt is paid. And

until the creditor be wholly satisfied, there can be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim. *New Jersey Midland R. Co.* v. *Wortendyke*, 27 *N. J. Eq.* 658; *reversing* 27 *N. J. Eq.* 110.

2. Of surety in condemnation proceedings.—Where a surety, who was subrogated to the rights of a landowner to whom the former had been compelled to pay the debt of his principal for land taken by the principal (a railroad company) under the exercise of the right of eminent domain, applied to the court to enjoin the use of the company's road over the land — *held*, that it was not necessary to his protection to prevent such use, there being nothing to be gained by him through such injunction; the company being insolvent and its affairs in the hands of a receiver, and the road being operated for the accommodation of the public, merely by a trustee of holders of bonds of the company, with a view to a more advantageous sale of the property on foreclosure. *In re Hewitt*, 25 *N. J. Eq.* 210.

3. Of surety or trustee in deed of trust.—Trustees in a railroad deed of trust paid off a judgment against the company that drew eight per cent. interest, and then asked to be subrogated to the rights of the original holders. The law of the state provided that where no rate of interest was agreed upon the legal rate should be six per cent. *Held*, that the subrogated parties were only entitled to the amount paid on the judgment with six per cent. interest, the remedy being purely equitable, independent of any contractual relations. *Memphis & L. R. R. Co.* v. *Dow*, 120 *U. S.* 287, 7 *Sup. Ct. Rep.* 482.

A railroad executed a deed of trust to secure a debt to Beal of $1000, in which A was surety, and to indemnify A and B as sureties of the company to C and D for the sum of $2000, and A, as such surety, was compelled to pay and did pay such sums. *Held*, that A was entitled to be subrogated to the rights of Beal under the deed of trust, and to have the deed of trust foreclosed. *Jacques* v. *Fackney*, 64 *Ill.* 87.

A railroad placed certain bonds in the hands of its president, to be held by him in trust to secure debts. These bonds were subsequently withdrawn by the company, after the acceptance of the trust, and a deed of trust executed to secure the same indebtedness. The president was compelled to pay the debts. *Held*, that the president, having paid a debt secured by the deed of trust, and there being no fraud in surrendering the bonds and their application in paying other debts of the company, the president was not estopped from seeking such remedy. *Jacques* v. *Fackney*, 64 *Ill.* 87.

And when a part of the creditors whose debts were secured by the deed of trust, and which had been paid by those seeking subrogation, recovered judgments against the company on other indebtedness, having notice of the deed of trust, and purchased part of the lands included in the trust deed, at sale under executions issued on their judgments — *held*, that the equities of parties seeking such subrogation were superior to their equity. *Jacques* v. *Fackney*, 64 *Ill.* 87.

4. Of insurance company after payment of loss.*— The principle upon which in any case an insurer is permitted to recover against a party, whose wrongful act has caused the loss which the insurer has been compelled to pay, is not based upon the idea of a direct legal right of the insurer against the wrongdoer, but upon the equitable doctrine of subrogation, under which such insurer succeeds to, and is entitled to, a cession of all the means of redress held by the party indemnified against the party whose act has occasioned the loss. And the insurer can enforce this right only in the name of the insured. *Connecticut Mut. L. Ins. Co.* v. *New York & N. H. R. Co.*, 25 *Conn.* 265. — APPROVED IN Palfrey *v.* Portland, S. & P. R. Co., 4 Allen (Mass.) 55.

Where a railroad company negligently causes the death of a passenger whose life is insured, the life insurance company, after paying the insurance, cannot maintain an action at law against the railroad company. The principle upon which in any case the insurer is permitted to recover against the wrongdoer is not based upon the idea of a direct legal right of the insurer against the wrongdoer, but upon the equitable doctrine of subrogation. The insurer can enforce this right only in the name of the insured. *Connecticut Mut. L. Ins. Co.* v. *New York &*

*See also FIRES, **138.**

Subrogation of carrier to rights of insured in goods lost or damaged, see notes, 3 L. R. A. 426; 16 AM. & ENG. R. CAS. 141; 21 *Id.* 120; 42 *Id.* 340; 42 *Id.* 344, *abstr.*

N. H. R. Co., 25 *Conn.* 265.—APPROVING Rockingham Mut. F. Ins. Co. *v.* Bosher, 39 Me. 253.

Conn. Gen. St., § 3581, provides that when an injury is done to the property of any person by fire from the locomotive engine of any railroad company, without contributory negligence on his part, the company shall be held responsible in damages to the extent of such injury. *Held*, that where a company was liable under this statute for the destruction of plaintiff's property, it could not in any form secure the benefit of the insurance held by him upon the property. *Regan* v. *New York & N. E. R. Co.*, 49 *Am. & Eng. R. Cas.* 590, 60 *Conn.* 124, 22 *Atl. Rep.* 503.

Where the law subrogates one who has discharged the obligation of a third person, in the place of the person to whom the obligation was due, the obligation must have rested primarily on such third person. Here the duty to pay for the destruction of plaintiff's property rested primarily on the railroad company. *Regan* v. *New York & N. E. R. Co.*, 49 *Am. & Eng. R. Cas.* 590, 60 *Conn.* 124, 22 *Atl. Rep.* 503.

For the general right of an insurer to be subrogated to the right of action of the insured, which arises in case of loss of goods through the negligent or wilful act of a third person, see *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 37 *Am. & Eng. R. Cas.* 681, 129 *U. S.* 397, 9 *Sup. Ct. Rep.* 469. *Mobile & M. R. Co.* v. *Jurey*, 16 *Am. & Eng. R. Cas.* 132, 111 *U. S.* 584, 4 *Sup. Ct. Rep.* 566. *The Potomac*, 105 *U. S.* 630. *Mercantile Marine Ins. Co.* v. *Clark*, 118 *Mass.* 288. *Connecticut Fire Ins. Co.* v. *Erie R. Co.*, 73 *N. Y.* 399. *Kentucky M. & F. Ins. Co.* v. *Western & A. R. Co.*, 8 *Baxt.* (*Tenn.*) 268.

5. Of party paying laborers' claims.—A superintendent of the work of constructing a railroad, without any obligation on his part, voluntarily, and supposing that the company was solvent, and merely to befriend the workmen employed, advanced his own money to pay them for their work. There was no assignment of their claims to him, and no agreement that he was to have the benefit of their lien. Afterwards the company became insolvent. *Held*, that he was not, by subrogation, entitled to the workmen's statutory lien for those payments. *In re North River Constr. Co.*, 38 *N. J. Eq.* 433; *affirmed in* 40 *N. J. Eq.* 340. — APPLYING Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105

6. Municipal bonds. — The purchase of bonds issued to a railroad by a town, by a third person from the railroad, is not a payment of the town's subscription to the railroad, so that the purchasers have no rights of subrogation therein. *Ætna Life Ins. Co.* v. *Middleport*, 124 *U. S.* 534, 8 *Sup. Ct. Rep.* 625.—DISTINGUISHED IN Illinois G. T. R. Co. *v.* Wade, 140 U. S. 65.

Where a company receives of a county its subscription bonds on conditions, to perform which the company gives bond, secured by mortgage, and the conditions are broken, and the interest coupons held by a purchaser for value without notice remain unpaid, the company becomes principal debtor, the county the surety, and the coupon holder is entitled to be substituted to the benefit of the mortgage. *Washington, O. & W. R. Co.* v. *Cazenove*, 83 *Va.* 744, 3 *S. E. Rep.* 433.

SUBSCRIPTIONS TO STOCK.

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I. THE CONTRACT OF SUBSCRIPTION.

1. *Formal Requisites.*

1. In general.*—Where no formalities are prescribed, any agreement by which a person shows an intention to become a shareholder is sufficient to constitute a contract of subscription. *Wemple* v. *St. Louis, J. & S. R. Co.*, 30 *Am. & Eng. R. Cas.* 246, 120 *Ill.* 196, 11 *N. E. Rep.* 906, 9 *West. Rep.* 165.

The heading of a subscription was as follows: "Railroad stock taken at Catlettsburg, Ky., in L. & B. S. R. R. Company, May 12th, 1852." Underneath were written the names of the subscribers, and the number of shares subscribed by each. One of them who acted as a stockholder in the election of directors, and made partial payments on his stock after the company organized, was sued for the unpaid balance of his subscription. *Held*, that he was legally

* General form of subscriptions to stock, and how made, see note, 81 AM. DEC. 395.

a stockholder. *Fry* v. *Lexington & B. S. R. Co.*, 2 *Metc.* (*Ky.*) 314.

A promise in writing to take and fill a certain number of shares in a chartered company becomes a binding contract by a subsequent organization of the company and an acceptance of the subscription. *Penobscot R. Co.* v. *Dummer*, 40 *Me.* 172.

Under Michigan Railroad Law of 1871, subscriptions to capital stock can only be made "in the manner to be provided by its [the company's] by-laws," therefore a subscription made before any by-laws are adopted gives no rights to either party; and when there is nothing to create an estoppel, a subscriber is not bound by a by-law adopted after his subscription. *Carlisle* v. *Saginaw Valley & St. L. R. Co.*, 27 *Mich.* 315, 10 *Am. Ry. Rep.* 283.

A subscription for stock in a railroad corporation is a contract between the subscriber and the corporation. *Melvin* v. *Hoitt*, 52 *N. H.* 61, 2 *Am. Ry. Rep.* 195.

Defendant signed a paper which recited that the subscribers associated themselves under a statute providing for organization of corporations, and gave the name of the proposed company, the amount of the capital stock, and the number of shares. *Held*, that this imported a promise to take and pay for the number of shares set opposite each subscriber's name, and an action might be maintained thereon. *Lake Ontario, A. & N. Y. R. Co.* v. *Mason*, 16 *N. Y.* 451.

Under the statute there are but two ways prescribed for becoming a stockholder in a railroad corporation, one by subscribing to the articles of incorporation before they are filed, and the other by subscribing to stock after books are opened. *Troy & B. R. Co.* v. *Tibbits*, 18 *Barb.* (*N. Y.*) 297.—DISTINGUISHED IN Erie & N. Y. C. R. Co. *v.* Owen, 32 Barb. 616. FOLLOWED IN Dutchess & C. County R. Co. *v.* Mabbett, 58 N. Y. 397.

A subscription made in the name of an estate to which there are several heirs, but only signed by one of them, is not binding on any of the heirs, not even on the one signing. *Troy & B. R. Co.* v. *Warren*, 18 *Barb.* (*N. Y.*) 310.

The provision of the statute that a subscriber to the articles of association of a railroad company shall subscribe "his name, place of residence, and amount by him subscribed" does not apply to the individuals composing a partnership. A subscription in the partnership name is sufficient. *Ogdensburgh, R. & C. R. Co.* v. *Frost*, 21 *Barb.* (*N. Y.*) 541.—DISTINGUISHED IN Erie & N. Y. C. R. Co. *v.* Owen, 32 Barb. 616.

A subscription to stock in the name of a third person, without precedent authority, is an act capable of ratification. A letter of attorney, executed by a person in whose name the subscription was made, constituting the attorney his proxy to vote at a meeting of the company is evidence of ratification to go to the jury. *McCully* v. *Pittsburgh & C. R. Co.*, 32 *Pa. St.* 25.

Under 19 & 20 Vict. c. 47, one who has been allotted shares and whose name has been entered in the register, but who has not signed the written form of acceptance of shares sent him by the company for that purpose, cannot be said to have accepted the shares and is not liable for calls. *New Brunswick & C. R. & L. Co.* v. *Muggeridge*, 4 *H. & N.* 160, 5 *Jur. N. S.* 1131, 28 *L. J. Ex.* 365.

A party signed his name in a stock book, the number of shares subscribed for being filled in by another person, who, being called as a witness, swore that he did it with the sanction of the subscriber, and the jury found the subscription sufficient. *Held*, that it was a point for their decision, and could not be made a ground of nonsuit afterwards. *Smith* v. *Spencer*, 12 *U. C. C. P.* 277.

2. Necessity of a writing.*—A contract of subscription to the stock of a railroad must be in writing and cannot be established by parol evidence, and in order to let in secondary evidence there must be some proof of an original subscription, and of the loss of the book or paper containing it. *Pittsburgh & S. R. Co.* v. *Gazzam*, 32 *Pa. St.* 340. *Pittsburgh & C. R. Co.* v. *Clarke*, 29 *Pa. St.* 146.

3. Subscription distinguished from agreement to subscribe.†—An agreement to subscribe a certain amount to the capital stock of a corporation when its subscription books shall be opened does not make the subscriber a stockholder, and as such liable to calls. *Thrasher* v. *Pike County R. Co.*, 25 *Ill.* 393.—QUOTED AND

*Subscriptions to capital stock must be in writing. Parol evidence to vary, see note, 81 AM. DEC. 396.

† Distinction between subscriptions and offers or agreements to subscribe, see very full note, 81 AM. DEC. 392.

FOLLOWED IN Mt. Sterling Coalroad Co. *v.* Little, 14 Bush (Ky.) 429.

And for a breach of such agreement the obligor is only liable in an action for damages. *Mt. Sterling Coalroad Co.* v. *Little*, 14 *Bush* (*Ky.*) 429. — QUOTING AND FOLLOWING Thrasher *v.* Pike County R. Co., 25 Ill. 393.

An individual does not become a subscriber so as to make him liable to a company by subscribing a preliminary paper before the company is organized, by which he agrees to take a certain amount of stock, unless he subsequently subscribes the articles of association, or signs the stock books after the corporation is organized. *Troy & B. R. Co.* v. *Warren*, 18 *Barb.* (*N. Y.*) 310. —FOLLOWING Troy & B. R. Co. *v.* Tibbits, 18 Barb. 297. — FOLLOWED IN Dutchess & C. County R. Co. *v.* Mabbett, 58 N. Y. 397.— *Troy & B. R. Co.* v. *Tibbits*, 18 *Barb.* (*N. Y.*) 297.—DISTINGUISHING Lexington & W. C. R. Co. *v.* Chandler, 13 Metc. (Mass.) 311.— APPLIED IN Re Rochester, H. & L. R. Co., 50 Hun 29, 18 N. Y. S. R. 654, 2 N. Y. Supp. 457. APPROVED IN Sedalia, W. & S. R. Co. *v.* Wilkerson, 25 Am. & Eng. R. Cas. 78, 83 Mo. 235. FOLLOWED IN Troy & B. R. Co. *v.* Warren, 18 Barb. 310.

Defendant and others signed the following instrument: "We, the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore railroad to the amount set opposite our names, respectively, on condition said road be located and built through or north of the village of Unionville, in Parma." *Held*, that it was not a subscription to plaintiff's capital stock; that plaintiff was in no sense a party to the agreement, and could not maintain an action thereon. *Lake Ontario Shore R. Co.* v. *Curtiss*, 1 *Am. & Eng. R. Cas.* 362, 80 *N. Y.* 219.

It seems that an action by a party to the instrument could not be maintained, in the absence of evidence that the contract was entered into for his benefit, and not until after the condition stated therein had been performed; also, that any recovery would be, not for the amount of the promised subscription, but only for the damages which such party had sustained. *Lake Ontario Shore R. Co.* v. *Curtiss*, 1 *Am. & Eng. R. Cas.* 362, 80 *N. Y.* 219.

It appeared that plaintiff's road and property of every kind, with its rights and franchises, were sold under a mortgage, that a new company was organized, which became the owner thereof, and that the road was thereafter built by the new company; plaintiff did not offer to furnish defendant with stock in the new road. *Held*, that these facts did not aid plaintiff; that plaintiff, although not formally dissolved, had in fact ceased to exist for any practical purpose; that its certificate of stock, if now issued, would not represent the road, or anything else of value, and so that defendant would receive no consideration for his subscription, if made, or for his money, if paid. *Lake Ontario Shore R. Co.* v. *Curtiss*, 1 *Am. & Eng. R. Cas.* 362, 80 *N. Y.* 219. — DISTINGUISHED IN Buffalo & J. R. Co. *v.* Gifford, 4 Am. & Eng. R. Cas. 387, 87 N. Y. 294; Paducah & M. R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. Rep. 842.

It is not competent for the legislature to provide that a promise to subscribe a certain amount for a specified object shall be deemed a subscription to the capital stock of a particular company. *Pittsburgh & S. R. Co.* v. *Gazzam*, 32 *Pa. St.* 340.

Defendants signed a subscription paper by which they agreed to take stock to the amounts attached to their names, provided the road should be built to a certain place. They did not sign their names in the subscription book, afterwards opened, nor comply with any other requisition of the charter, but refused to pay their subscription. The corporation brought action against each defendant for the first two instalments, which were demanded of each, in the first count, as a subscriber to the stock of the company, and in the second, on an agreement to subscribe to the capital stock. *Held*, that the action could not be maintained on either count. *Charlotte & S. C. R. Co.* v. *Blakely*, 3 *Strobh.* (*So. Car.*) 245.— DISTINGUISHED IN Minneapolis & St. L. R. Co. *v.* Bassett, 20 Minn. 535 (Gil. 478). QUOTED IN Spartanberg & A. R. Co. *v.* Ezell, 14 So. Car. 281. RECONCILED IN Greenville & C. R. Co. *v.* Smith, 6 Rich. (So. Car.) 91.

4. Offer to subscribe is not enough. —An offer to subscribe and pay an instalment of five dollars on a large number of shares gives to the one making it no right which equity will enforce. *Brower* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 161.

Whether subscriptions to stock were properly taken cannot be inquired into in

a proceeding by a subscriber. *Brower* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 161.

5. Subscription distinguished from sale of stock.*—By an obligation payable to a certain person or bearer, the maker, in consideration of one dollar, the receipt of which was therein confessed, and of the delivery to be made to him by a certain company of a specified number of shares of its capital stock, acknowledged himself to be indebted in a certain sum which he promised to pay in instalments as the construction of the roadbed progressed, in proportion to monthly estimates thereof, and that the whole should be paid on the completion of such roadbed. *Held*, that such obligation was not a subscription to the capital stock of such company. *Clark* v. *Continental Imp. Co.*, 57 *Ind.* 135, 18 *Am. Ry. Rep.* 505.

6. Subscriptions prior to organization.†—There can be no recovery upon a subscription to the capital stock of a street-railroad company, made before its organization, where it is not shown that the defendant, after the subscription of the requisite amount of stock, subscribed articles of association in which were set forth, besides other requisites, the number of directors to manage the company and their names, as required by 3 Ind. St. 422, § 1, and it does not appear that he ever assented to the number or names of the directors. *Reed* v. *Richmond St. R. Co.*, 50 *Ind.* 342.—DISTINGUISHING Eakright *v.* Logansport & N. I. R. Co., 13 Ind. 404.

The distinction between subscriptions prior and subsequent to organization is clearly recognized in Maryland. *Taggart* v. *Western Md. R. Co.*, 24 *Md.* 563.

A preliminary subscription to the capital stock of a proposed railroad company, by one who died before the incorporation of the company, and without having signed the articles of association, does not bind his estate. *Sedalia, W. & S. R. Co.* v. *Wilkerson*, 25 *Am. & Eng. R. Cas.* 78, 83 *Mo.* 235.—DISTINGUISHING Peninsular R. Co. *v.* Duncan, 28 Mich. 130.

Preliminary negotiations for subscription to the capital stock of a railroad corporation, before its organization, are not binding upon a subscriber nor upon the company after such organization. *In re Rochester H. & L. R. Co.*, 50 *Hun* 29, 18 *N. Y. S. R.* 654, 2 *N. Y. Supp.* 457.—APPLYING Buffalo & J. R. Co. *v.* Gifford, 87 N. Y. 294; Buffalo & J. R. Co. *v.* Clark, 22 Hun 359; Troy & B. R. Co. *v.* Tibbits, 18 Barb. 297.

A corporation may receive subscriptions to stock, and may sue thereon, before being fully organized. *Oregon C. R. Co.* v. *Scoggin*, 3 *Oreg.* 161, 7 *Am. Ry. Rep.* 413.

A corporation cannot sustain an action against one who, before it was chartered, signed, with others, a paper agreeing to take a certain quantity of its stock and afterwards refused to do so. Such a paper signed by a party is not a contract, but a mere expression of the subscriber's intention. But, supposing it be a contract, it is not to be enforced by a bill in equity, but at law. *Strasburg R. Co.* v. *Echternacht*, 21 *Pa. St.* 220.

An act of assembly appointed commissioners and authorized them to receive subscriptions for the purpose of constructing a railroad, and provided that no subscription should be valid unless five dollars was paid on every share at the time of subscribing, and that when a certain number of shares should have been subscribed, and five dollars paid upon each share, and the same should be certified to the governor, he should thereupon issue letters incorporating the subscribers and subsequent subscribers, all of which was done, and the company duly organized. *Held:* (1) that the act of the assembly imposed no restriction upon the corporation after it was organized in regard to the payment of the sum of five dollars on each share of stock at the time of subscribing; (2) that the commissioners were only invested with a special authority, but the president and managers, after the organization of the company, acted under the general corporate powers granted, which must be so construed as to carry out the objects of the charter; (3) that a condition annexed to a subscription, that it should be binding only in the event of a certain amount of stock being subscribed, was a valid one, and one for which the parties to the contract had a right to stipulate. *Philadelphia & W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

Defendant was one of the commissioners for receiving subscriptions to the capital stock of plaintiff company. On Jan. 19,

* Difference between sales of shares and subscriptions, see note, 30 AM. & ENG. R. CAS. 254.
† Subscription to stock of corporations not in existence, see note, 9 AM. & ENG. R. CAS. 701.

1869, he subscribed for 100 shares. On Dec. 20, 1869, with the consent of the other commissioners, he attached a certain condition to his subscription, to be complied with within one year. On Jan. 4, 1870, plaintiff organized under its act of incorporation, at which time the book containing defendant's subscription was in his hands as commissioner, and was retained by him till Jan. 18, 1870, when the condition was complied with, and he delivered his book to the directors of the company. From Jan. 4 to 18 the company had been acting under its charter as an organized company. *Held*, that these facts constituted defendant's subscription a subscription made to plaintiff directly, while acting as a corporation *de facto*. *Montpelier & W. R. R. Co.* v. *Langdon*, 46 *Vt.* 284.

A company was about organizing, and defendant was asked to take stock in it, and subscribed his name to a paper prepared for that purpose, agreeing to take ten shares. *Held:* (1) that this was an offer made by the company on the one side, and accepted by defendant on the other, and that a complete contract was formed, which made him liable as a stockholder to assessments; (2) that it was not necessary that certain shares designated by numbers should be assigned to defendant, to make him liable. *European & N. A. R. Co.* v. *McLeod*, 16 *New Brun.* 3. —DISTINGUISHING Newry & E. R. Co. *v.* Edmunds, 2 Ex. 118; Wolverhampton New Waterworks Co. *v.* Hawksford, 7 C. B. N. S. 795; Irish Peat Co. *v.* Phillips, 1 B. & S. 629.

7. Powers and duties of the commissioners. — The commissioners provided by statute for opening books of a corporation to receive subscriptions to capital stock act as a statutory board, and derive their powers from the law and not from the corporation. They are required to give notice of the times and places fixed for receiving subscriptions, and to keep the subscription books open. The design of the law is to enable all persons to subscribe on equal terms. *Shurtz* v. *Schoolcraft & T. R. R. Co.*, 9 *Mich.* 269.

Where such commissioners never open subscription books, but an agent of the directors is employed to circulate a paper which divers persons subscribe to, such subscriptions are not binding; and they will not prevent other parties from taking the entire amount of stock whenever the commissioners open books and proceed regularly. *Shurtz* v. *Schoolcraft & T. R. R. Co.*, 9 *Mich.* 269.

One of the commissioners, appointed with five others, at a given place, to take subscriptions, under the charter of a company, has no right, in doing so, to give any assurances as to the line of location that would be adopted for the road. *North Carolina R. Co.* v. *Leach*, 4 *Jones* (*N. Car.*) 340.

When the organization of a company takes place, which organization is usually formed by the instrumentality of commissioners appointed for that purpose, the authority of the commissioners ceases; and in the absence of any special provisions to the contrary, all power as to any further subscriptions to the capital stock vests in the corporate body. Its dealing with third persons, as to its stock, must stand upon the footing of ordinary contracts. *James* v. *Cincinnati, H. & D. R. Co.*, 2 *Disney* (*Ohio*) 261.

Commissioners named in an act of incorporation have discretionary power, and a resolution to restrict subscriptions to stock to a certain number of shares is lawful. *Brower* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 161.

The act of assembly gives to the commissioners no priority of right over others, and no subscriptions can lawfully be taken with closed doors; the law requires the books to be opened and the public to have an opportunity to subscribe. *Brower* v. *Second & T. St. Pass. R. Co.*, 3 *Phila.* (*Pa.*) 161.

Commissioners appointed under Pa. General Railroad Law of February 19, 1849, to receive subscriptions to the capital stock of a projected company, are thus far the agents of the commonwealth and have no right to receive any subscriptions to which conditions are appended. *Pittsburgh & S. R. Co.* v. *Woodrow*, 1 *Pittsb.* (*Pa.*) 450, 3 *Phila.* 271.

Defendant, intending to take stock in a company, authorized one of the commissioners, appointed to receive subscriptions, to subscribe for him, and his name was entered by another commissioner, who acted as clerk. The entries were certified by all the commissioners, and defendant afterwards voted by proxy as a stockholder. *Held*, that he was liable as a stockholder. *Greenville & C. R. Co.* v. *Coleman*, 5 *Rich.* (*So. Car.*) 118.

8. Subscription books. — Subscriptions to the capital stock of a corporation

were made on a loose sheet of paper which was put in a bound book used as a record of the company, and the contents of the paper with the names of the subscribers and the amounts subscribed were entered in the book by the commissioners appointed to open books of subscription. *Held*, that this was a sufficient subscription to the stock of the company. *Woodruff* v. *McDonald*, 33 *Ark.* 97.

Where a subscription is made in a small blank book and is afterward accepted by the corporation, it is not necessary that the same should be transferred to the stock books of the company; and its acceptance would seem to make the book a stock book of the company to that extent, and make the contract of subscription complete, without notice of acceptance before suit. *Brownlee* v. *Ohio, I. & I. R. Co.*, 18 *Ind.* 68.

It is not absolutely necessary to its validity that the subscription be made in a book provided by the directors for that purpose. If the directors adopt a book provided by some one else, every purpose of the statute is satisfied. *Buffalo & J. R. Co.* v. *Gifford*, 4 *Am. & Eng. R. Cas.* 387, 87 *N. Y.* 294; *affirming* 22 *Hun* 359.

Where the charter of a corporation, after providing for a subscription to the capital stock on public notice, authorizes the directors, if the whole were not then taken, from time to time to cause the books for the subscriptions of stock to be opened until a sufficient sum was subscribed, the further subscriptions so authorized may be made without any public notice of opening the books, and the power to receive the same may be delegated to officers or agents of the corporation. *Lohman* v. *New York & E. R. Co.*, 2 *Sandf.* (*N. Y.*) 39.

A subscription, unexceptionable in other respects, is not invalid by reason of not being made in a book opened by the company for the purpose. *Ashtabula & N. L. R. Co.* v. *Smith*, 15 *Ohio St.* 328.

Defendant was active in soliciting subscriptions for the building of a railroad. He took a book from the agent of the company, subscribed therein himself and persuaded others to subscribe, and kept the book about six months. Because of some difference with the agent of company about the payment for his services he cut his name out of the book and returned it to the company. *Held*, that he had perfected a contract with the company, and was as much bound as if he had left his name in the book. *Greer* v. *Charfters R. Co.*, 96 *Pa. St.* 391, 42 *Am. Rep.* 548.

To make a subscription to the stock of a contemplated company, it is not necessary that the subscription shall be made upon the books of subscription opened by the commissioners named in the charter; and a subscription paper by which the signers bind themselves to pay for the shares of stock in the company opposite to their names is competent evidence against a subscriber of the paper, plaintiff company stating that it intended to show that the amount so subscribed was duly entered on the stock lists and stock ledger of the company. *Stuart* v. *Valley R. Co.*, 32 *Gratt.* (*Va.*) 146.

A stockholder who pays in full for his stock when he gets it is not bound to sign a stock subscription book, merely because the company's charter provides for such book. *Clark* v. *Farrington*, 11 *Wis.* 306.

The naming of a railway "railroad," at the heading of the page of a stock book, does not vitiate the subscription. *Smith* v. *Spencer*, 12 *U. C. C. P.* 277.

After a stock book had been opened and signed, a new one was substituted therefor, with a provision that any subscriber to the old one might withdraw by giving notice to the president of the company. *Held*, that a subscriber who omitted to give such notice was not relieved of responsibility upon his original subscription. *Smith* v. *Spencer*, 12 *U. C. C. P.* 277.

9. Acceptance by company.—Suit was brought upon a subscription to stock payable by the conveyance of a specific tract of land, and conditioned that, in case the company should decline to take the land at the price named, the subscription should be void. *Held:* (1) that the subscription was a simple proposition to put in the land at the price named, and until accepted by the company there was no binding obligation upon the subscriber; (2) that the acceptance of the proposition could only be made through the board of directors, or, perhaps, through an authorized agent; (3) that the consent of several members of the board, acting separately and not shown to constitute a quorum, did not constitute a valid acceptance of the proposition. *Junction R. Co.* v. *Reeve*, 15 *Ind.* 236.—FOLLOWING Boston & M. R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224.

A company cannot recover on a subscription to stock without proof that the same has been accepted and acted upon. Demand of payment and suit for its recovery are not evidence of acceptance where a subscription is otherwise invalid. *Northern C. M. R. Co.* v. *Eslow*, 40 *Mich.* 222.—DISTINGUISHING Richmondville U. S. & F. C. Inst. *v.* McDonald, 34 N. Y. 379. FOLLOWING Parker *v.* Northern C. M. R. Co., 33 Mich. 23.

If one soliciting subscriptions to stock, and in whose hands a subscription is placed, is not an authorized agent of the company, he must be regarded as the agent of the subscriber for the purpose of delivering it to the company, and upon such delivery and acceptance by the company a binding contract results. *Mansfield, C. & L. M. R. Co.* v. *Brown*, 26 *Ohio St.* 223, 13 *Am. Ry. Rep.* 341.

A subscription for stock in a chartered railroad enterprise, which by its charter states the amount and price of its shares, by signing a written instrument in these words: "We, the undersigned, agree to take the following number of shares in the Mobile & Ohio railroad," and designating the number thereof opposite the subscriber's name, though taken in a public meeting by persons unauthorized by the company, becomes a valid contract to pay the amount subscribed, by being transferred to the books of the company, and thus accepted by it. *Mobile & O. R. Co.* v. *Yandal*, 5 *Sneed* (*Tenn.*) 294.

10. Filing articles and subscription papers with secretary of state.—Under New York General Railroad Act a certain number of subscribers and a certain amount of stock must be secured before the articles of association can be filed with the secretary of state and the company organized. Where duplicate sets of articles are used, but only one is filed, persons subscribing the other one do not become stockholders. *Erie & N. Y. C. R. Co.* v. *Owen*, 32 *Barb.* (*N. Y.*) 616.—DISTINGUISHING Lake Ontario, A. & N. Y. R. Co. *v.* Mason, 16 N. Y. 451; Troy & B. R. Co. *v.* Tibbits, 18 Barb. 298; Schenectady & S. Plank-road Co. *v.* Thatcher, 11 N. Y. 102; Ogdensburgh, R. & C. R. Co. *v.* Frost, 21 Barb. 541.—DISTINGUISHED IN Sodus Bay & C. R. Co. *v.* Hamlin, 24 Hun (N. Y.) 390.

Various parties, including defendant, subscribed to stock in a proposed corporation on separate printed blanks, and afterwards the signatures were cut off and pasted on one of the papers, and the proper affidavit was affixed and the articles filed in the office of the secretary of state, and the company organized. *Held*, that the transfer of defendant's signature constituted no defense to an action on the subscription, and he was estopped from claiming that the corporation was not duly organized. *Sodus Bay & C. R. Co.* v. *Hamlin*, 24 *Hun* (*N. Y.*) 390.—DISTINGUISHING Erie & N. Y. C. R. Co. *v.* Owen, 32 Barb. (N. Y.) 616.—FOLLOWED IN Sodus Bay & C. R. Co. *v.* Lapham, 6 N. Y. S. R. 159.

11. Necessity of allotment and notice thereof.—Where the whole amount of stock subscribed for does not exceed the capital to be raised, and the commissioners receive a subscription to the stock from defendant, and assent to his acting as a stockholder in the meetings of the corporation, a formal assignment by the commissioners of shares subscribed for by defendant is not necessary. *Danbury & N. R. Co.* v. *Wilson*, 22 *Conn.* 435.

One who, prior to the passing of an act incorporating a company, signs a document agreeing on the formation of the company to subscribe for a certain number of shares, which are ultimately allotted to him, and whose name is placed on the register, although no notice of such allotment and registration was given to him, is a shareholder within the meaning of the Companies Clauses Consolidation Act, § 8, and liable to pay calls. *Burke* v. *Lechmere, L. R.* 6 *Q. B.* 297, 40 *L. J. Q. B.* 98, 19 *W. R.* 565.

Respondent signed the stock book of a company, which was headed by an agreement by the subscribers to become shareholders of the stock for the amounts set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay ten per cent. of the amount of the shares and all future calls. Allotment certificates were issued and handed to the company's broker to deliver to the shareholders, who published a notice, signed by the secretary, in a daily paper, notifying subscribers that the first call of ten per cent. on the stock was required to be paid immediately to them. Respondent never called for or received his certificate of allotment, and never paid the ten per cent., and swore that he had never had any notice of

the allotment having been made to him. *Held*, that the document signed by respondent was only an application for shares, and that it was necessary for appellant to have shown notice within a reasonable time of the allotment of shares to respondent, and that no notice whatever of such allotment had been proved. *Nasmith* v. *Manning*, 5 *Can. Sup. Ct.* 417; *affirming* 5 *Ont. App.* 126; *reversing* 29 *U. C. C. P.* 34.

12. Stamp duty.—Several subscriptions to the stock of a company were entered upon the same page of a subscription book, upon which was placed, by the agents of the company (under the authority to stamp conferred by the contract of subscription), a revenue stamp sufficient in amount to cover the aggregate of the stamp duties on all of the subscriptions entered upon that page, and the stamp thus affixed was marked "canceled." *Held*, that the manner of the cancellation did not affect the validity of the contract, and that no valid objection could be urged to the aggregation of the several stamp duties into one stamp. *St. Louis & C. R. R. Co.* v. *Eakins*, 30 *Iowa* 279.

13. Revocation of subscription.—In an action to recover the sum subscribed by defendant to the capital stock of a corporation, testimony that a certain person was appointed to receive subscriptions to the stock at a meeting of the corporators, that he had assumed to act under such authority, and had taken his own and others' subscriptions, is competent to go to the jury, tending to show that he was bound by his subscription, he having afterwards erased his name from the paper before delivering it to the company. *Cheraw & C. R. Co.* v. *White*, 10 *So. Car.* 155.

The power and authority of the agent of a company to receive subscriptions for stock cease when the subscription is complete. When made, the subscription instantly inures to the benefit of the company, and creates, in law, a contract directly between the subscriber and the company. The agent has no power to abrogate or annul the subscription; and, consequently, notice of an intention to revoke it must be given to the company, and not to the agent. *Lowe* v. *Edgefield & K. R. Co.*, 1 *Head* (*Tenn.*) 659.

A party who makes a conditional subscription to stock, by agreement with a person who is not the authorized agent of the company, may withdraw or revoke his subscription at pleasure, without notice to the company, at any time while the subscription book remains in the hands of such person, and before the company has acquired any right to or interest in it. *Lowe* v. *Edgefield & K. R. Co.*, 1 *Head* (*Tenn.*) 659.

If a party who has subscribed to stock can abandon his subscription, it can be done only by notice to the agent or to the company in proper time. *Cunningham* v. *Edgefield & K. R. Co.*, 2 *Head* (*Tenn.*) 23.

2. *Consideration and Payment.*

14. Necessity of a consideration.—The consideration of a subscription to corporate stock is the shares of stock to which the subscriber becomes entitled, and not those incidental advantages which he may have anticipated from the completion of the railroad. So a failure to complete the road will not enable him to set up a failure of consideration. *Bish* v. *Bradford*, 17 *Ind.* 490.

Subscriptions to stock are only binding upon the subscribers when they are so made as to bind the company; and as the statute creates no obligation on the corporation, except upon subscriptions regularly made, no others can be enforced unless they were made upon some actual consideration or agreement binding the company. *Parker* v. *Northern C. M. R. Co.*, 33 *Mich.* 23.—FOLLOWED IN Northern C. M. R. Co. *v.* Eslow, 40 Mich. 222.

15. Sufficiency of the consideration.—(1) *In general.*—A regular subscription for shares in the stock of a company, whether made previous to its organization or not, if it organizes as provided by the charter, imports in itself a sufficient consideration and may be declared on as the foundation of an action. *Selma & T. R. Co.* v. *Tipton*, 5 *Ala.* 787.—EXPLAINING Carlisle *v.* Cahawba & M. R. Co., 4 Ala. 70.

The right acquired by a subscriber to stock in a corporation, to become the owner of the shares subscribed for, is a sufficient consideration for his promise to pay for them. *Kennebec & P. R. Co.* v. *Jarvis*, 34 *Me.* 360.

The defendant, with others, subscribed an agreement to take shares in a corporation not then organized. After its organization he paid in part for his shares. *Held*, that this was a sufficient renewal of his promise to the corporation to enable it to maintain assumpsit for the balance, and the partial execution of the purpose designed

by the charter forms a sufficient consideration for such promise. *Kennebec & P. R. Co.* v. *Palmer*, 34 *Me.* 366.

Voluntary subscriptions in aid of a proposed railroad, when accepted and the road completed in accordance with the conditions of the promise, become valid and binding contracts. *Michigan Midland & C. R. Co.* v. *Bacon*, 33 *Mich.* 466.—FOLLOWING Stevens *v.* Corbitt, 33 Mich. 458.

In an action upon a subscription for stock, made according to the charter, the franchises granted by the charter furnish a valuable consideration for the subscription, and a plea setting up want of consideration is bad. *Thigpen* v. *Mississippi C. R. Co.*, 32 *Miss.* 347.

Labor performed and money spent to secure the location of a depot are sufficient consideration to support a promise contained in a subscription to pay money for that object. *Workman* v. *Campbell*, 46 *Mo.* 305.

The interest acquired by a subscriber to corporate stock is a good consideration to support his implied promise to pay for such stock, and raises a sufficient mutuality of contract between him and the company to render the contract a binding one. *Buffalo & N. Y. C. R. Co.* v. *Dudley*, 14 *N. Y.* 336. *East Tenn. & V. R. Co.* v. *Gammon*, 5 *Sneed* (*Tenn.*) 567.

A subscription to capital stock is not necessarily invalid because made before the corporation is organized, and no cash payment is made. The right of membership is a sufficient consideration to bind a subscriber, and he cannot revoke the subscription. *Lake Ontario, A. & N. Y. R. Co.* v. *Mason*, 16 *N. Y.* 451.

A number of taxpayers who were interested in defeating a town subscription to railroad stock appointed a committee to further their interests, and after a decision had been procured from the court of appeals adverse to the subscription, defendant executed a paper by which he and others agreed to pay to the committee certain sums of money in consideration that it take such other steps as might be necessary to render the decision of the court of benefit to the town, and if necessary to take further legal proceedings. On the faith of such undertaking further services were performed. *Held*, that the considerations named were adequate to uphold the subscription. *Bort* v. *Snell*, 39 *Hun* (*N. Y.*) 388.

(2) *Imposing conditions.*—If certain subscribers promise and undertake to pay to a company a certain sum or sums, if it will build its road to a designated place, the subsequent completion of the road according to the terms of the promise furnishes in itself a consideration, removes the objection of want of mutuality, and renders the promise binding upon the subscribers. *Des Moines Valley R. Co.* v. *Graff*, 27 *Iowa* 99. *First Nat. Bank* v. *Hurford*, 29 *Iowa* 579.

A stipulation in an agreement to subscribe for shares in the capital stock of a corporation to the effect that the instalments, when collected, are to be applied in a certain way, constitutes no condition to their payment. The stock itself is the only consideration of the agreement, and the subscription is absolute. *New Albany & S. R. Co.* v. *Fields*, 10 *Ind.* 187.

Where a party promises to contribute in aid of a proposed railroad, it will be implied as a condition, in the absence of express conditions, that the road be constructed and operated; and upon this being done within a reasonable time, where no time is fixed, the promise becomes operative and binding, and the party making it cannot thereafter repudiate it. *Stevens* v. *Corbitt*, 33 *Mich.* 458.—FOLLOWED IN Michigan Midland & C. R. Co. *v.* Bacon, 33 Mich. 466.

The fact that a company was organized to build the road at the time the promise was made, or that even in the absence of such a promise the road would have been built, will not defeat the promise. *Stevens* v. *Corbitt*, 33 *Mich.* 458.

A subscription for stock commenced "We, the undersigned, do hereby subscribe to the preferred capital stock of" a railroad company named, "and promise to pay for the number of shares set opposite our respective names; these subscriptions not to be binding until $65,000 of said stock is subscribed for." Then followed the names of the subscribers, the number of shares subscribed, and their par value. *Held*, that such subscriptions, when the full amount was taken, constituted a valid contract on the part of the company to issue the stock, and on the part of the subscribers to receive and pay for the same. The implied obligation of the company to issue the stock is a sufficient consideration. *St. Paul, S. & T. F. R. Co.* v. *Robbins*, 27 *Minn.* 439, 17 *Am. Ry. Rep.* 81.

Defendant subscribed to railroad stock, agreeing to pay the amount "when the track of the road shall be laid ready for the running

of cars" between certain specified points, with a further condition that it should be payable when the road should be completed "on the within terms," provided the location did not run through defendant's lands, "paid as a donation." The road was completed between the points designated, but was located on defendant's land. *Held:* (1) that the subscription was not a mere promise to make a gift to the company, and was supported by a sufficient consideration; (2) that the subscription became due and payable when the road was completed between the points designated in the subscription. *Lesher* v. *Karshner*, 47 *Ohio St.* 302, 24 *N. E. Rep.* 882.

A statute of incorporation required the payment of five dollars upon every share of stock subscribed for, and declared that one complying with said condition should be a member of the company, and that when 1000 shares had been subscribed for the commissioners designated might call a meeting to elect directors. Defendant subscribed for 50 shares and gave his note payable to the commissioners. *Held:* (1) that there was a sufficient valuable consideration upon which to found an action, and that said action might be maintained in the company's name; (2) that the provision that each subscriber should be a member and the fact that others had subscribed were sufficient to show that the corporation was *in esse* and capable of taking the promise through an agent, notwithstanding the right to organize depended upon conditions not to take effect until after the note was made. *Vermont C. R. Co.* v. *Clayes*, 21 *Vt.* 30.—REVIEWING Union Turnpike Road *v.* Jenkins, 1 Cai. (N. Y.) 381.—DISTINGUISHED IN Pittsburgh, W. & K. R. Co. *v.* Applegate, 16 Am. & Eng. R. Cas. 440, 21 W. Va. 172. FOLLOWED IN Clark *v.* Farrington, 11 Wis. 306.

16. Necessity of preliminary payment at time of subscription.* — A corporation can exercise no powers and make no contracts, except such as are authorized by its charter, and in the mode therein prescribed; and hence a contract of subscription for shares in its capital stock is void unless payment be made by the subscriber of the *per centum* on the amount subscribed by him, in pursuance of the provisions of the charter. *Fiser* v. *Mississippi & T. R. Co.*, 32 *Miss.* 359.

Where a charter requires the payment by a subscriber for stock of a certain amount on each share at the time of subscription, a subsequent payment, but before any calls have been made for the balance of the stock, will be an affirmance of the previous subscription and a substantial compliance with the charter. *Fiser* v. *Mississippi & T. R. Co.*, 32 *Miss.* 359.

No subscription to stock under Pa. Act of 1868 is valid, whether before or after the incorporation, without the payment of ten per cent. on the amount subscribed. *Bucher* v. *Dillsburg & M. R. Co.*, 76 *Pa. St.* 306.

A. agreed to take unallotted shares in a corporation, and the treasurer, who was authorized to accept subscriptions, agreed to let him have them. No allotment was ever made, nor was the price or any part of it paid. On a suit brought more than two years after this to compel the issue of shares—*held*, that the agreement constituted no contract, even assuming that the treasurer was authorized to give a reasonable credit for payment, for there was no proof of authority to issue shares except for payment in cash. *McComb* v. *Credit Mobilier*, 13 *Phila.* (*Pa.*) 463.

A provision in a charter that the commissioners who procure stock subscriptions shall receive no subscription unless five per cent. thereof shall be paid in cash, and making them personally liable if they do not collect the five per cent., is not a condition precedent to the due organization of the corporation but a mere personal liability of the commissioners. *Blair* v. *Rutherford*, 31 *Tex.* 465.

17. When such payment unnecessary.—Section 6 of the Ohio Act for the creation and regulation of incorporated companies (1 S. & C. St. 276) does not prescribe the form of making subscriptions, nor does the want of a stipulation for the payment of five dollars on each share of stock render the subscription invalid. *Chamberlain* v. *Painesville & H. R. Co.*, 15 *Ohio St.* 225.

Vt. Gen. St. ch. 28, § 5, which provides that "every person subscribing for stock in any railroad in this state shall be required to pay to the commissioners at the time of subscribing five *per centum* on the amount of stock for which he shall subscribe" does

* Payment of instalment on subscription, see note, 16 AM. & ENG. R. CAS. 448.

not apply when the subscription is made to the corporation directly after its organization and existence as a corporation *de facto*. *Montpelier & W. R. R. Co.* v. *Langdon*, 46 *Vt.* 284.

18. To whom, when, and where payable.—Where a vote of the directors requiring instalments directs that they shall be paid at the times therein designated, but does not, in terms, make them payable to the treasurer of such corporation, the import of such vote is that said instalments are payable to the treasurer, he being the proper officer to receive and keep the moneys of the corporation. *Danbury & N. R. Co.* v. *Wilson*, 22 *Conn.* 435.

A subscription to stock contained a provision that the stock subscribed should be paid in cash at such times and places as should thereafter be prescribed by the directors of the company, and should be applied to the construction of the road. *Held*, that the subscription could not become payable until the directors, at a regular meeting, had fixed the time and place of payment. *Ross* v. *Lafayette & I. R. Co.*, 6 *Ind.* 297.

Where a charter requires that stock shall be paid for in cash, and that no certificate shall issue until such payment is made, it is a sufficient compliance with the statute prescribing that the charter of such companies shall set forth "the time when and the manner in which" it shall be paid for. *New Orleans & G. R. Co.* v. *Frank*, 30 *Am. & Eng. R. Cas.* 275, 39 *La. Ann.* 707, 2 *So. Rep.* 310

19. Payments other than in money, generally.*—(1) *State and federal decisions.*—After defendant and others had made a subscription to stock, a construction company signed for a large amount of stock which was the same in form as other subscriptions, but there was a private agreement with the directors that they should have the building of the road and should pay for the stock half in cash and half in work and materials. *Held*, that the subscription of the construction company was valid and binding, and could not be affected by the contemporaneous agreement as to the manner of payment; therefore it could not be set up by other stockholders as a defense to an action to recover the amount of their subscriptions, in the absence of actual fraud. *Ridgefield & N. Y. R. Co.* v. *Brush*, 43 *Conn.* 86, 11 *Am. Ry. Rep.* 18.—DISTINGUISHING New York, H. & N. R. Co. *v.* Hunt, 39 Conn. 75. QUOTING Troy & G. R. Co. *v.* Newton, 8 Gray (Mass.) 596; Cabot & W. S. Bridge Prop'rs *v.* Chapin, 6 Cush. (Mass.) 50.

Where the charter of a corporation or the general law of the state under which it is created authorizes capital stock to be paid for in property, and shareholders honestly and in good faith pay their subscriptions in property instead of in money, the payment is valid, and there is no trust in favor of creditors if the corporation becomes insolvent. *Grant* v. *East & W. R. Co.*, 54 *Fed. Rep.* 569, 2 *U. S. App.* 182, 4 *C. C. A.* 511.

Where a subscription to stock is made payable in work and materials, and not in instalments, the company cannot require payment in instalments by resolution of the board of directors. *Ohio, I. & I. R. Co.* v. *Cramer*, 23 *Ind.* 490.—DISTINGUISHING Ross *v.* Lafayette & I. R. Co., 6 Ind. 297.

The charter of a railroad and banking company enacted that the subscribers should pay, at the time of subscription, twenty dollars on each share taken, in specie, or in the notes of specie-paying banks. It was silent as to how or when the residue of the stock should be paid, but conferred all the usual rights, powers, and privileges of banking which were exercised by other banks in the state. *Held*, that the residue of the stock was payable in specie only. *King* v. *Elliott*, 13 *Miss.* 428.

Under New York General Railroad Act of 1850, as amended, payment of subscriptions to stock must be made in money. Therefore payment in patent rights of uncertain value is not a valid payment, within the meaning of the statute. *Tasker* v. *Wallace*, 6 *Daly* (*N. Y.*) 364.—DISTINGUISHING Beach *v.* Smith, 28 Barb. 264; Syracuse, P. & O. R. Co. *v.* Gere, 4 Hun 392; Black River & U. R. Co. *v.* Clarke, 25 N. Y. 208; East N. Y. & J. R. Co. *v.* Lighthall, 6 Robt. 407.

In the absence of any statutory restrictions, a corporation has power to receive payment otherwise than in money for a subscription to its capital stock. *East N. Y. & J. R. Co.* v. *Lighthall*, 5 *Abb. Pr. N. S.* (*N. Y.*) 458, 36 *How. Pr.* 481, 6 *Robt.* 407.

When payment of a subscription to capital stock has been made to one who is author-

* How subscriptions to stock payable, whether in cash or property. Full-paid subscriptions, see note, 3 AM. ST. REP. 817.

ized to collect such subscriptions, the act of such agent in allowing payment to be made otherwise than in money, although beyond his authority, cannot be rejected by the company after the contract is executed, so as to work to the injury of an innocent subscriber. *East N. Y. & J. R. Co.* v. *Lighthall*, 5 *Abb. Pr. N. S.* (*N. Y.*) 458, 36 *How. Pr.* 481, 6 *Robt.* 407.

A company has the right to accept payment of stock in labor or materials, in damages which the company is liable to pay, or in any other liability of the corporation, provided such transactions are entered into and carried out in good faith. *Philadelphia & W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

An agreement attempting to secure to a stockholder the privilege of paying subscriptions in store goods, or otherwise, except in money, will be treated as a fraud upon other stockholders, and payment in money enforced. *Henry* v. *Vermillion & A. R. Co.*, 17 *Ohio* 187.—FOLLOWED IN Noble *v.* Callender, 20 Ohio St. 199. QUOTED IN Clarke *v.* Omaha & S. W. R. Co., 4 Neb. 458.

(2) *Canadian decisions.*—The act (22 Vict. c. 122) incorporating a transit company enacted that it should not be lawful for the company to proceed until £50,000 of the capital stock should have been subscribed and ten per cent. paid in. Subsequently, and before £50,000 had been subscribed or the percentage paid in, a proposition was made by C. to certain stockholders that he should sell a steam vessel to the company for £5000, and that in that event he should become a subscriber to the amount of £50,000, and that the steamer should be paid for by taking her as a payment of ten per cent. on the £50,000, which was acceded to. *Held*, that this was an evasion of the statute, and an injunction was granted restraining the company from proceeding with any of the operations thereof until the conditions pointed out by statute had been complied with. *Howland* v. *McNab*, 8 *Grant's Ch.* (*U. C.*) 47.

Defendants subscribed under seal for certain shares in the capital stock of plaintiff company, promising and agreeing with each other and with plaintiff to pay the full amount of the shares as and when payable. *Held*, that the evidence showed only a collateral agreement or representation by the president of the provisional board that payment would be accepted in goods, and not a subscription conditional on such acceptance. *Kingston St. R. Co.* v. *Foster*, 44 *U. C. Q. B.* 552.

Semble, that if the evidence had shown such a condition made verbally, it could not have varied the unqualified subscription under seal, nor bound the company. *Kingston St. R. Co.* v. *Foster*, 44 *U. C. Q. B.* 552.

Defendants, after such subscription, paid ten per cent. on the stock, being advised, as they alleged, by plaintiff that it was their best course to get rid of the stock by assignment, which could not be permitted until such payment. *Held*, clearly an irrevocable adoption of the stock. *Kingston St. R. Co.* v. *Foster*, 44 *U. C. Q. B.* 552.

20. Taking a check in payment.—Cal. Act of May 20, 1861, § 2, provides that there shall be annexed to articles of incorporation an affidavit "setting forth in substance that said amount of stock has been subscribed, and that ten per cent. in cash has been actually and in good faith paid in." *Held*, that the treasurer of a proposed corporation might receive payment of the ten per cent. by check, where it is payable at once and is drawn against a sufficient fund to be paid on presentation. *People* v. *Stockton & V. R. Co.*, 45 *Cal.* 306, 5 *Am. Ry. Rep.* 1.

Commissioners are not authorized to receive checks of subscribers in payment of the sum required to be paid at the time of subscription; specie, or its equivalent, current bills of specie-paying banks, must be demanded. Whether payments in checks are a compliance with the statute is a question of law, and not of fact. *Crocker* v. *Crane*, 21 *Wend.* (*N. Y.*) 211.

The provision of a New York statute that capital stock shall be paid for in cash is sufficiently complied with by taking a certified check on a national bank in which the subscriber has sufficient funds to meet the check. *In re Staten Island R. T. R. Co.*, 37 *Hun* (*N. Y.*) 422; *affirmed in* 101 *N. Y.* 636.

Defendant subscribed for a certain amount of corporate stock, and gave his check for the ten per cent. that was required by the statute to be paid in cash; but an agreement was entered into between defendant and one at whose solicitation the subscription had been made, and who took the check, that the check was not to be presented, nor the stock paid for. *Held*, that the check was a valid payment, in the absence of proof that such person was author-

ized to enter into such agreement, which authority would not be presumed; and after completing the organization the corporation might maintain an action on the check. *Syracuse, P. & O. R. Co.* v. *Gere*, 4 *Hun* (*N. Y.*) 392, 6 *T. & C.* 636.

21. Taking a note in payment.— A condition in a charter that "five dollars in cash shall be paid on each share, at the time of the subscribing," is not a condition precedent to becoming a "subscriber" in the company. And if, instead of exacting the money, the commissioners appointed to receive the subscriptions take a promissory note for the amount from a subscriber, he cannot, after the company is organized, object that he is not a member of the corporation. The amount may therefore be recovered of him by the corporation, in an action of assumpsit. *Selma & T. R. Co.* v. *Rountree*, 7 *Ala.* 670.

A railroad has inherent authority to take and negotiate a promissory note in the ordinary course of its businesss; so such company may take a promissory note in payment of capital stock. But it cannot, as a branch of its business, deal in notes and bills of exchange. *Goodrich* v. *Reynolds*, 31 *Ill.* 490.—FOLLOWED IN Foy *v.* Blackstone, 31 Ill. 538.

Suit by a company against an administrator to recover a subscription to stock made by his decedent. To the subscription the following stipulation was appended: "Said subscription to be paid in two cash notes, $500 each, due the 25th December, 1853 and 1854, and to have certificate when said notes become due." It was insisted *arguendo* that the company had no power to make such a condition. *Held*, that if any condition was in fact made, it would, perhaps, be void, and leave the subscription absolute. *Fleece* v. *Indiana & I. C. R. Co.*, 8 *Ind.* 460.

A railroad charter made it the duty of the commissioners to require payment of five dollars in cash on each share and declared all subscriptions void if this cash instalment was not paid at the time of the subscription, but a subscriber gave his note for the first instalment to one of the commissioners, instead of paying cash. *Held*, that the subscription was not void, and that the payee could recover on the note. (Pearson, J., dissenting.) *McRae* v. *Russel*, 12 *Ired.* (*N. Car.*) 224.—DISTINGUISHED IN Pittsburgh, W. & K. R. Co. *v.* Applegate, 16 Am. & Eng. R. Cas. 440, 21 W. Va. 172. QUOTED IN Clark *v.* Farrington, 11 Wis. 306.

Defendant gave notes for the ten per cent. of a subscription to stock which was required to be paid in cash, and for several instalments which had been called for. The company disposed of the notes before maturity to a purchaser for value and without notice, who collected the notes from defendant. The General Railroad Act required ten per cent. of subscriptions to be paid in money. *Held*, that the subscription was valid. *Ogdensburgh, C. & R. R. Co.* v. *Wolley*, 3 *Abb. App. Dec.* (*N. Y.*) 398, 1 *Keyes* 118, 34 *How. Pr.* 54.—FOLLOWED IN New York & O. M. R. Co. *v.* Van Horn, 57 N. Y. 473.

Under the above statute, if both the subscription and the actual cash payment of ten per cent. have been made the contract is binding, although the acts were not simultaneous. *Ogdensburgh, C. & R. R. Co.* v. *Wolley*, 3 *Abb. App. Dec.* (*N. Y.*) 398, 1 *Keyes* 118, 34 *How. Pr.* 54.

The validity of the subscription does not depend on whether the payment of the ten per cent. was made willingly or by legal compulsion. *Ogdensburgh, C. & R. R. Co.* v. *Wolley*, 3 *Abb. App. Dec.* (*N. Y.*) 398, 1 *Keyes* 118, 34 *How. Pr.* 54.

A company may take and recover on a promissory note given for the amount of assessments due by a stockholder on his shares. *St. Stephen Branch R. Co.* v. *Black*, 13 *New Brun.* 139.

22. Taking a note secured by mortgage in payment. — Under the usual power of corporations to adopt the most convenient means of carrying out their purpose, a railroad company has authority to receive from a subscriber, as payment for stock, a promissory note secured by mortgage on real estate, instead of cash; and the securities are valid, and will be enforced against the maker. *Clark* v. *Farrington*, 11 *Wis.* 306. *Lyon* v. *Ewings*, 17 *Wis.* 61.—FOLLOWING Clark *v.* Farrington, 11 Wis. 306; Blunt *v.* Walker, 11 Wis. 334; Cornell *v.* Hichens, 11 Wis. 353.—*Andrews* v. *Hart*, 17 *Wis.* 297.—FOLLOWING Clark *v.* Farrington, 11 Wis. 306; Blunt *v.* Walker, 11 Wis. 334; Cornell *v.* Hichens, 11 Wis. 353.

Where a charter makes no provision how stock shall be paid for, but leaves it to the directors to decide the amount to be paid on subscription and the time, manner, and proportions in which subsequent instal-

ments shall be paid, and empowers them to make other contracts "as the execution and management of the work, and the convenience and interest of the company, may require," the company may accept a note, secured by mortgage, in payment for stock. *Clark* v. *Farrington*, 11 *Wis.* 306.

And such mode of payment is no fraud on cash-paying subscribers. *Clark* v. *Farrington*, 11 *Wis.* 306.—FOLLOWING Vermont C. R. Co. *v.* Clayes, 21 Vt. 30. QUOTING McRae *v.* Russel, 12 Ired. (N. Car.) 224.

Even if it was a fraud as to the cash-paying subscribers, the maker of the note and mortgage could not set that fact up as a defense. *Clark* v. *Farrington*, 11 *Wis.* 306.

Notice to a purchaser of a note and mortgage given in payment of stock, before maturity, of the purpose of their execution, does not impair his rights as a *bona fide* holder. *Andrews* v. *Hart*, 17 *Wis.* 297.

The interest on such note was payable annually, and both principal and interest were payable in Wisconsin. The note (which was payable to bearer) and the mortgage were transferred with a bond of the company attached, by which it guaranteed to the holder payment of the interest semi-annually at New York City, and payment of the principal at the same place. The bond also provided that the note and mortgage might be "transferred in connection therewith, but not otherwise, to any party or purchaser whomsoever." *Held*, that this guaranty did not affect the negotiable character of the note and mortgage. *Andrews* v. *Hart*, 17 *Wis.* 297.—FOLLOWING Crosby *v.* Roub, 16 Wis. 616.

23. Taking conveyance of land in payment.—A written subscription to corporate stock, and a deed conveying land to the corporation in payment of such subscription, when accepted, bind the corporation equally with the subscriber, and cannot be taken advantage of by the corporation on the ground that it did not sign them. *Cincinnati, U. & F. W. R. Co.* v. *Pearce*, 28 *Ind.* 502.

Previous to the passage of Ohio General Railroad Act of February 11, 1848, a company was chartered by a special act which empowered the directors to transact all the business of the company, but did not expressly authorize subscriptions to the capital stock in real estate. This privilege was conferred by the Act of 1848, § 14, upon all railroad corporations then existing that might accept the power so conferred. After the passage of that act, the directors entered of record a resolution that subscripsions to the capital stock might be made in real estate. The company then received real-estate subscriptions to its stock, and sold and conveyed the same to *bona fide* purchasers, with the knowledge of such subscribers, and without objection on their part, until many years after, when the stock had become worthless, and the enterprise for which the company was organized had been abandoned. *Held*, that in a suit by a subscriber against a purchaser from the company, to recover back the land conveyed by him to the company on such subscription, proof of the exercise by the company of the privileges conferred by the Act of 1848, under a resolution of the directors, and with the acquiescence of the parties to the suit, was sufficient evidence, as between them, that the company had accepted the powers conferred in that section, and was thereby authorized to take and convey land received on subscription to its capital stock. *Goodin* v. *Evans*, 18 *Ohio St.* 150.

3. *Construction and Validity.*

24. How construed, generally.—The president of a locomotive company subscribed for certain stock in a railroad company, payable in cash upon the delivery of twelve engines. *Held*, in an action to recover the amount of the subscription, that it was competent for the president to put in evidence a contract between his company and the railroad company, of the same date as the subscription, for the delivery of twelve engines, and then to show by parol that that was the contract referred to in his subscription, and that the twelve engines had not all been delivered. *Rutland & B. R. Co.* v. *Crocker*, 4 *Blatchf.* (*U. S.*) 179, 29 *Vt.* 540.

Under Ala. Code 1876, § 1824, requiring subscriptions to stock, payable in labor or property, to be taken at their money value, a railroad company adopted a resolution to sell its property to another company for $750,000, one half payable in stock, and the other half in bonds. It entered a subscription for $375,000 of stock, "to be paid for in railroad property * * * of the value of $375,000." *Held*, that the subscription must be construed in connection with the resolu-

tion, and it was not conclusive in itself that the value of the entire property was not over $375,000, so as to render void the issue of $375,000 in bonds under the constitutional provision forbidding overcapitalization. *Grant* v. *East & W. R. Co.*, 54 *Fed. Rep.* 569, 2 *U. S. App.* 182, 4 *C. C. A.* 511.—FOLLOWED IN Thomson-Houston Elec. Co. *v.* Dallas Con. T. R. Co., 54 Fed. Rep. 1001.

The existence and organization of a corporation are admitted by a writing, whereby the obligor subscribed for stock in the corporation, as follows: "We, the undersigned, agree to subscribe the number of shares of fifty dollars each to the capital stock of Mt. Sterling Coal Road Company," etc., signed by "John Lail, ten shares," etc. *Lail* v. *Mt. Sterling Coal Road Co.*, 13 *Bush* (*Ky.*) 32.

Several parties undertook to subscribe to a certain amount of stock if the company would extend its road to a certain point. *Held*, to amount to a joint contract on the part of all the signers. *New Haven & N. Co.* v. *Hayden*, 119 *Mass.* 361.

By a contract of subscription for stock, it was stipulated that two per cent. should be paid at the time of subscription, and three per cent. in three months from that date, and the remainder when called for and required by the president and directors; and the first two instalments were not to be called for until March 1, 1853. *Held*, that the first two instalments were payable on March 1, 1853, and the latter was payable thereafter, at the discretion of the company, according to the terms of the contract. *Roberts* v. *Mobile & O. R. Co.*, 32 *Miss.* 373.

A company authorized by its charter to collect instalments of stock at such times as may be required by the president and directors may make contracts for the payment of stock, subject to conditions as to the calls for instalments; and if they had not this right, not merely the condition as to the payment, but the whole contract, would be void. *Roberts* v. *Mobile & O. R. Co.*, 32 *Miss.* 373.

Each subscription is an independent undertaking and in no way affected by the terms of other subscriptions. *Connecticut & P. R. R. Co.* v. *Bailey*, 24 *Vt.* 465.

25. —— as respects route, termini, etc.—The terms of a written subscription to stock must be understood in their plain, ordinary sense, unless they have acquired a peculiar sense distinct from the popular one, or unless the context shows that in the particular instance, in order to affect the intention of the parties, they must be understood in some peculiar sense. *Evansville, J. & C. S. L. R. Co.* v. *Meeds*, 11 *Ind.* 273.

Where a subscription for stock in a railroad does not contain a stipulation against a change of *termini* of the road, a subsequent change will not invalidate the subscription. *Greeneville & P. R. N. G. R. Co.* v. *Johnson*, 8 *Baxt.* (*Tenn.*) 332.

26. Need not show how money is to be expended. — If a company is authorized to build its railroad in three sections, and, after the completion of the first section, subscriptions are obtained for the second and third sections together, the same may be collected, although it does not appear whether they are to be expended upon only one of the sections, or, if divided, how much is to be applied to each section. *Agricultural Branch R. Co.* v. *Winchester*, 13 *Allen* (*Mass.*) 29.

27. Validity, generally. — A stipulation by a company to deliver to a shareholder, as soon as fifteen pounds per share shall have been paid up on his twenty-pound shares, debentures to the value of five pounds per share, as soon as the company should be in a position legally to do so, is not illegal. *West Cornwall R. Co.* v. *Mowatt*, 15 *Q. B.* 521, 15 *Jur.* 101, 19 *L. J. Q. B.* 478.

A subscription to railroad stock made in contemplation of a charter is legal and may be enforced. *Tonica & P. R. Co.* v. *McNeely*, 21 *Ill.* 71.

But to be valid such subscription must be recognized after the corporation is organized. *In re Rochester, H. & L. R. Co.*, 50 *Hun* 29, 18 *N. Y. S. R.* 654, 2 *N. Y. Supp.* 457.

The charter of a company prescribed a form in which subscriptions of stock should be taken, and also provided that the company should have all powers incident to a corporation at common law. A subscription, after pursuing the language of the form given, contained also additional stipulations not inconsistent with those prescribed, and which by the common law it would have been competent for the parties to make. *Held*, that the subscription was valid. *Fisher* v. *Evansville & C. R. Co.*, 7 *Ind.* 407.

N. Y. General Railroad Act of 1850, ch. 140, § 4, does not invalidate any contract of

subscription valid at common law. *Buffalo & J. R. Co.* v. *Gifford*, 4 *Am. & Eng. R. Cas.* 387, 87 *N. Y.* 294; *affirming* 22 *Hun* 359.

A subscription to stock may be valid though it is not made on the books of the commissioners named in the charter, though two per cent. on each share of stock is not paid at the time of subscription, and though the subscription was made before the company was organized, and before the commissioners named in the charter had opened books of subscription. *Stuart* v. *Valley R. Co.*, 32 *Gratt.* (*Va.*) 146.

A subscription for stock is a contract with the corporation, and courts of justice will enforce it for or against either party. *Blunt* v. *Walker*, 11 *Wis.* 334.

28. How far subject to statute of frauds.—In an action upon a subscription paper, the complaint set out the contract, which was as follows: "Ten days after the completion of the I. & St. L. railroad from I. H. county, and the running of a train of cars thereon, I promise to pay to the order of said railroad company, at the bank of D., the sum of $100, without any relief whatever from valuation or appraisement laws. The consideration of this note is the construction of said road as aforesaid, within one half mile of the town of D., and the promise and agreement of said company that, by means of said road and its connections, the company will run trains through from I. L., within two years from the first day of January, 1869;" dated November 25, 1868, and signed by the defendant; and averred performance within the time and in the manner mentioned. *Held:* (1) that the contract, being capable of performance within one year, was not within the statute of frauds; (2) that if the contract had originally been within the statute, and therefore not binding on the plaintiff, yet, after performance by the company, the maker could not defend on the ground that he alone had signed the instrument. *Straughan* v. *Indianapolis & St. L. R. Co.*, 38 *Ind.* 185, 10 *Am. Ry. Rep.* 263. — QUOTING Des Moines Valley R. Co. *v.* Graff, 27 Iowa 99.—FOLLOWED IN Curtis *v.* Indianapolis & St. L. R. Co., 38 Ind. 222; Wilson *v.* Indianapolis & St. L. R. Co., 38 Ind. 227; Emmons *v.* Indianapolis & St. L. R. Co., 38 Ind. 247; King *v.* Indianapolis & St. L. R. Co., 38 Ind. 266; Scearce *v.* Indianapolis & St. L. R. Co., 38 Ind. 271; Weaver *v.* Indianapolis & St. L. R. Co., 38 Ind. 277; Nichols *v.* Indianapolis & St. L. R. Co., 38 Ind. 279; Blake *v.* Indianapolis & St. L. R. Co., 38 Ind. 323; Keeney *v.* Indianapolis & St. L. R. Co., 38 Ind. 348; Gregg *v.* Indianapolis & St. L. R. Co., 38 Ind. 372; Hunt *v.* Indianapolis & St. L. R. Co., 38 Ind. 383; Smith *v.* Indianapolis & St. L. R. Co., 38 Ind. 389; Welsham *v.* Indianapolis & St. L. R. Co., 38 Ind. 389; Nave *v.* Indianapolis & St. L. R. Co., 38 Ind. 443; Newman *v.* Indianapolis & St. L. R. Co., 39 Ind. 153.

A subscription for shares of stock in an ordinary corporation is not a contract for the sale of goods, wares, or merchandise, within the statute of frauds. *Webb* v. *Baltimore & E. S. R. Co.*, 54 *Am. & Eng. R. Ca.* 202, 77 *Md.* 92, 26 *Atl. Rep.* 113.

29. Validity of subscriptions prior to incorporation.—Prior to the filing of plaintiff's articles of association defendant subscribed for shares of its capital stock, and thereafter paid two instalments of ten per cent. each upon his subscription, pursuant to calls by the company. *Held*, that the subscription was valid and binding, and became so on the payment of the first instalment. *Buffalo & J. R. Co.* v. *Gifford*, 4 *Am. & Eng. R. Cas.* 387, 87 *N. Y.* 294; *affirming* 22 *Hun* 359.—APPLIED IN RE Rochester, H. & L. R. Co., 50 Hun 29, 18 N. Y. S. R. 654, 2 N. Y. Supp. 457.

Under New York General Railroad Act, § 4, a subscription to stock which is not payable until the railroad is in operation is void. *In re Rochester, H. & L. R. Co.*, 50 *Hun* 29, 18 *N. Y. S. R.* 654, 2 *N. Y. Supp.* 457.—APPLYING Troy & B. R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297; Poughkeepsie & S. P. P. R. Co. *v.* Griffin, 24 N. Y. 150; Butternuts & O. Turnpike Co. *v.* North, 1 Hill (N. Y.) 518.

Where the commissioners appointed to receive subscriptions to stock are empowered to reject such subscriptions before the organization of the company, and do not do so, the contract entered into by subscribing for stock is sufficiently mutual to make it valid. *Connecticut & P. R. R. Co.* v. *Bailey*, 24 *Vt.* 465.

30. Subscription pending consolidation. — Three existing companies were consolidated. A subscription was made after the agreement for consolidation but before it was filed in the office of the secretary of the commonwealth. *Held*, that the filing of the agreement in the office of the secretary was not necessary to validate the

subscription. *McClure* v. *People's Freight R. Co.*, 1 *Am. & Eng. R. Cas.* 371, 90 *Pa. St.* 269.

31. Subscriptions by agent or trustee. — A *bona fide* subscription for stock by one person in his own name, but really as trustee and agent for another who has requested such stock to be subscribed for, is valid. *Davidson* v. *Grange*, 4 *Grant's Ch.* (*U. C.*) 377.

32. Subscriptions by way of donation.—A subscription to a railroad as a donation to induce it to locate the road at a particular place is not void as being against public policy. *Missouri Pac. R. Co.* v. *Tygard*, 22 *Am. & Eng. R. Cas.* 54, 84 *Mo.* 263, 54 *Am. Rep.* 97.—APPROVING Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755; Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458; McClure *v.* Missouri River, Ft. S. & G. R. Co., 9 Kan. 373. DISTINGUISHING Pacific R. Co. *v.* Seely, 45 Mo. 212. REVIEWING Workman *v.* Campbell, 46 Mo. 306.

33. Secret agreements in fraud of other subscribers. — A public corporation cannot receive a subscription to its stock on special terms, at less than the par value of its shares, where so doing will operate a fraud upon creditors and other shareholders. *Mann* v. *Cooke*, 20 *Conn.* 178. —APPROVED IN Putnam *v.* New Albany, 4 Biss. (U. S.) 365.

A secret agreement made with a subscriber to stock, who subscribes with others, that he shall pay only a part of his subscription, is fraudulent as to the other subscribers, and void, and his subscription will be valid and binding for the whole amount thereof. *Galena & S. W. R. Co.* v. *Ennor*, 116 *Ill.* 55, 4 *N. E. Rep.* 762.

34. Instances of valid subscriptions.—Where subscriptions are made upon the condition that seventy-five per cent. of the cost of certain sections of the road shall be subscribed for "by responsible persons," before commencing its construction, the fact that some of the subscriptions turn out to be worthless will not invalidate others, where the worthless ones were obtained in good faith from persons apparently able to pay. *Penobscot R. Co.* v. *Dummer*, 40 *Me.* 172.

A company was chartered simply as a railroad company, and a subscription to its stock contained the true name of the company at its head, but the body of the instrument recited that the signers subscribed for so much stock in "a horse railroad." *Held*, that the introduction of the additional word "horse" in the name of the company could not mislead a subscriber, and that the subscription would have been valid even if the true name of the company had been omitted from the heading. *Oler* v. *Baltimore & R. R. Co.*, 41 *Md.* 583, 7 *Am. Ry. Rep.* 495.

After the grant of a charter providing that the capital stock of the company should not exceed 2,000 shares of $100 each, subscriptions were received as follows: "Providence, June, 1873. We, the subscribers, severally agree to and with the Warwick railroad company that we will take the number of shares of one hundred dollars ($100) each, in the capital stock of said company, set opposite our respective names, under the provisions of its charter, and that we will pay for the same in such manner as the board of directors may, under the charter, direct." *Held:* (1) that the contract was good and the subscriber liable, notwithstanding the whole capital was not subscribed for; (2) that the word "share" did not imply a proportion of a definite capital; (3) that subscribing for a share was equivalent to subscribing for $100. *Warwick R. Co.* v. *Cady*, 11 *R. I.* 131.

Such a case is to be distinguished from those in which a definite capital is fixed, or a definite proportion or sum is required as a condition precedent to organization, or in which conditional subscriptions are made. *Warwick R. Co.* v. *Cady*, 11 *R. I.* 131.

35. Instances of invalid subscriptions.—A charter provided that no instalments of subscriptions to its capital stock, after the first, should be called for until at least $500,000 of the capital stock should be subscribed. After such subscriptions to the amount of $200,000 had been made, a contractor agreed with the company to construct its road, and to accept in part payment, on the completion of the road, $300,000 in its capital stock. The contractor afterwards became insolvent, and failed to fulfil his contract. *Held*, that such agreement was not a subscription to stock within the meaning of the proviso in the charter. *New York, H. & N. R. Co.* v. *Hunt*, 39 *Conn.* 75, 4 *Am. Ry. Rep.* 56.—DISTINGUISHED IN Ridgefield & N. Y. R. Co. *v.* Brush, 43 Conn. 86.

Articles were filed, under Oreg. General Incorporation Law, to incorporate a com-

pany with a capital stock of $7,250,000, divided into 72,500 shares of $100 each. Six different persons subscribed one share each, when one of them, in behalf of the corporation, made a subscription in the following words: "Oregon Central Railroad Company, by G. L. Woods, Chairman, seventy thousand shares, seven million dollars." *Held*, that this subscription for the company was a nullity, and that those who had subscribed the six shares could not lawfully elect a board of directors and organize the corporation, and that a board of directors elected by them could not lawfully transact business for the corporation. *Holladay* v. *Elliott*, 8 *Oreg.* 85.

4. Obligation to Pay.

36. In general.* — A subscriber for stock in an incorporated company, to whom the charter does not accord that privilege, cannot withdraw from the company, and thus avoid liability to pay for his stock. *Selma & T. R. Co. v. Tipton*, 5 *Ala.* 787.

Stock is originally acquired in a corporation by a subscription therefor. This subscription is a contract defined and regulated by the organic law of the corporation. An incorporator is not entitled to stock as a mere gratuity. He can only acquire it by purchase or by subscription therefor, by which he contracts to pay calls and assumes the other liability to creditors and the compar, which such relation imposes. *Brown* v. *Florida Southern R. Co.*, 16 *Am. & Eng. R. Cas.* 463, 19 *Fla.* 472.

Subscribers agreed to take stock and pay for the same "in such instalments and at such times as might be required by the board of directors." The subscriptions contained a further condition that the stock was not to be paid for until the road should be "so located and constructed" as to make a certain town a point thereon. *Held*, that the entire construction of the road was not intended to be a condition precedent to the payment of the stock; and the stock must be paid for as the work progresses. *McMillan* v. *Maysville & L. R. Co.*, 15 *B. Mon.* (*Ky.*) 218.—APPROVED IN Pacific R. Co. *v.* Seely, 45 Mo. 212.

One who agrees to take and fill a share in the capital stock of a corporation is liable to pay all assessments legally made on that share. *Buckfield Branch R. Co.* v. *Irish*, 39 *Me.* 44.

The term "to fill" a share of stock in a corporation, as used in a stock subscription, is equivalent to an express promise to pay legal assessments made upon the share. *Bangor Bridge Co.* v. *McMahon*, 10 *Me.* 478.

Complainants, by subscribing to the shares of stock, promised not only to take the shares, but to pay for them in accordance with the terms and conditions of the subscription. *Busey* v. *Hooper*, 35 *Md.* 15.

One of the original associates for the formation of a company, who signs a subscription agreeing to take a certain number of shares of the capital stock of the proposed company, and to pay therefor "at such times and in such sums as the same shall be assessed, demanded, and required to be paid by the directors of said company," but who afterwards fails to sign the articles of incorporation, or to subscribe for stock on the commissioner's books, is liable upon his preliminary subscription after the company has been formed and assessments made and payment demanded. *Peninsular R. Co.* v. *Duncan*, 28 *Mich.* 130, 12 *Am. Ry. Rep.* 248. —DISTINGUISHED IN Sedalia, W. & S. R. Co. *v.* Wilkerson, 25 Am. & Eng. R. Cas. 78, 83 Mo. 235.

Where a promise to aid a railway enterprise is made to some one necessarily connected with or interested in the work being done, for the benefit of the company that has begun or is about to undertake the work, then, upon completion of the work, or upon the performance of the conditions upon which the promise was made, the liability of the promisor becomes complete; there are also cases where expense is incurred, or an obligation created under the promise, where a like liability would follow. *Stevens* v. *Corbitt*, 33 *Mich.* 458.

The obligation of actual payment is created by a subscription to stock, unless plainly excluded by the terms of the subscription. *Troy & B. R. Co.* v. *Tibbits*, 18 *Barb.* (*N. Y.*) 297. — NOT FOLLOWED IN Belfast & M. L. R. Co. *v.* Moore, 60 Me. 561.

The consideration to sustain a subscription for stock is raised by inference of law from the subscription itself and the privileges thereby conferred; and from the same circumstance the law will infer a duty to pay for the stock, and an implied obligation of equal force with an express contract, where nothing appears repugnant to such a

* Liability of stockholders on subscriptions, see notes, 38 AM. & ENG. R. CAS. 498; 4 *Id.* 384.

construction. *East Tenn. & V. R. Co.* v. *Gammon*, 5 *Sneed* (*Tenn.*) 567.

In order to secure the construction of a railroad over a certain line and the establishment of a depot at a named point, a committee solicited subscriptions to the amount of $2,500; $2,350 of this was paid to the company in cash and the subscription list given to it at the same time. One hundred and fifty dollars of the subscriptions remained unpaid, but the company gave a receipt as for $2,500, and after building the road and locating the depot at the desired points, sued for the $150. *Held*, that the liability of defendant was in no way affected by the fact that the other subscribers paid their subscriptions in advance of the time designated. Defendant did not withdraw his promise to pay the amounts subscribed until after the company had accepted the subscriptions and performed its part of the agreement. When this had been done defendant became bound and the subscription became a valid contract between the parties. *Gulf, C. & S. F. R. Co.* v. *Neely*, 64 *Tex.* 344.

37. Effect of unconditional promise to pay. — Where a subscriber promises unconditionally to take and pay for a certain number of shares at their par value, the promise is binding although the amount of stock has not been fixed and the minimum number of shares named in the charter has not been subscribed for. *Skowhegan & A. R. Co.* v. *Kinsman*, 22 *Am. & Eng. R. Cas.* 13, 77 *Me.* 370.

A promise to pay assessments on stock contained in the book of subscriptions, and signed by the defendant, will bind him, notwithstanding the charter provides for a sale of the stock only, in case of a failure to pay assessments thereon. *Connecticut & P. R. R. Co.* v. *Bailey*, 24 *Vt.* 465. — FOLLOWING Essex Bridge Co. *v.* Tuttle, 2 Vt. 393.

38. Agreement to take amounts to promise to pay. — One who makes a special agreement with a company to take shares and receive debentures, and in consequence thereof has his name entered in the register, which he confirms and ratifies, and who is elected and acts as a director, is liable as a registered shareholder for calls. *West Cornwall R. Co.* v. *Mowatt*, 15 *Q. B.* 521, 15 *Jur.* 101, 19 *L. J. Q. B.* 478. *Ex parte Mowatt*, 1 *Drew.* 247.

Plaintiff company was constituted by seven persons signing the memorandum of association. Afterwards they all were summoned to attend a meeting, but only four attended, and they elected three directors. These three elected three other directors. The three original directors resigned, and afterwards one of the remaining directors sent in his resignation. Defendant then applied for fifty shares. The two remaining directors resolved that fifty shares should be allotted to defendant, that he should be appointed a director, and that the resignation of the retiring director should be accepted. Defendant afterwards attended a meeting of the directors, confirmed the allotment to himself, and joined in passing a resolution that the shares allotted to himself should be paid up in full forthwith. Defendant subsequently withdrew his application and refused to pay the amount of the shares allotted to him. By the articles of association the number of the directors was to be not less than three, and any casual vacancy occurring in the board might be filled up by the board, and the continuing board might act notwithstanding any vacancy in their body. *Held*, that defendant was liable to pay the amount of the shares. *York Tramways Co.* v. *Willows*, 6 *Am. & Eng. R. Cas.* 492, *L. R.* 8 *Q. B. D.* 685.

A subscription to capital stock whereby the subscriber promises to take a stated number of shares, subject to the conditions, requirements, liabilities, and benefits of the act of incorporation, is equivalent to an express promise to pay for the stock as payment shall be called for by the directors. *Northern R. Co.* v. *Miller*, 10 *Barb.* (*N. Y.*) 260. — EXPLAINING Harlem Canal Co. *v.* Seixas, 2 Hall (N. Y.) 505. — DISAPPROVED IN Buffalo & N. Y. C. R. Co. *v.* Dudley, 14 N. Y. 336. DISTINGUISHED IN Seymour *v.* Sturgess, 26 N. Y. 134.

But if it does not amount to such contract, it raises an implied promise which is equally efficacious with one expressed. *Ogdensburgh, R. & C. R. Co.* v. *Frost*, 21 *Barb.* (*N. Y.*) 541.

An agreement previous to incorporation to take a number of shares of capital stock creates, if not an express, certainly an implied, promise to pay for the shares; and this promise will sustain an action by the company, on its complete incorporation, to recover the amount of calls duly made on the stock. *Buffalo & N. Y. C. R. Co.* v. *Dudley*, 14 *N. Y.* 336. — DISAPPROVING Northern R. Co. *v.* Miller, 10 Barb. 260.

DISTINGUISHING Spear *v.* Crawford, 14 Wend. (N. Y.) 20. REVIEWING Hartford & N. H. R. Co. *v.* Kennedy, 12 Conn. 500. —APPLIED IN Farmers' L. & T. Co. *v.* Toledo & S. H. R. Co., 54 Fed. Rep. 759, 6 U. S. App. 469, 4 C. C. A. 561. DISTINGUISHED IN Seymour *v.* Sturgess, 26 N. Y. 134; Babcock *v.* Schuylkill & L. V. R. Co., 39 N. Y. S. R. 506, 60 Hun 583, mem., 15 N. Y. Supp. 193.

39. Agreement to take creates no personal obligation. — Certain parties signed a subscription to stock reciting that "we, the undersigned, agree and bind ourselves to take the amount of shares set against our respective names" in the stock of a certain railroad company "agreeably to the foregoing conditions." *Held*, that the simple agreement "to take" did not impose a personal obligation to pay for the shares; and that "the foregoing conditions" did not change the effect of the agreement, where they contained no words of promise. *Belfast & M. L. R. Co.* v. *Moore*, 60 *Me.* 561.—FOLLOWING Andover & M. Turnpike Corp. *v.* Gould, 6 Mass. 40. NOT FOLLOWING Troy & B. R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297.

And a provision in the company's charter purporting to render subscribers liable for a balance remaining unpaid after a sale of their shares would not affect the binding force of the subscription. *Belfast & M. L. R. Co.* v. *Moore*, 60 *Me.* 561.

40. Obligation is several, not joint. — The obligation of each of several subscribers to stock, where they all sign the same subscription agreement, must be construed to be several and not joint. *Price* v. *Grand Rapids & I. R. Co.*, 18 *Ind.* 137.

Stockholders are in no legal sense joint debtors of the corporation. The obligations of each are several, and entirely unconnected with those of the other stockholders. *Haynes* v. *Kent*, 8 *La. Ann.* 132.

41. Payment a prerequisite to issuance of shares.—A subscriber to capital stock who has failed to pay for the shares subscribed for, as required by the terms of his subscription, is properly chargeable with interest from the time of the default, and cannot compel the company to issue the stock until not only the principal, but the interest, is paid. *Gould* v. *Oneonta*, 71 *N. Y.* 298; *affirming* 3 *Hun* 401, 6 *T. & C.* 43.—DISTINGUISHED IN Scipio *v.* Wright, 101 U. S. 665.

Plaintiff subscribed for certain shares of the capital stock of a railroad company and paid ten per cent. of the amount. Thereafter the company consolidated with defendant company, under an agreement that the stockholders of the former company were to receive consolidated stock in place of its stock. *Held*, that plaintiff was not entitled to receive certificates of consolidated stock until he had paid the balance due upon his subscription, and could produce evidence of the fact. *Babcock* v. *Schuylkill & L. V. R. Co.*, 39 *N. Y. S. R.* 506, 60 *Hun* 583, 15 *N. Y. Supp.* 193; *affirmed in* 133 *N. Y.* 420, 31 *N. E. Rep.* 30, 45 *N. Y. S. R.* 246.—DISTINGUISHING Buffalo & N. Y. C. R. Co. *v.* Dudley, 14 N. Y. 336.

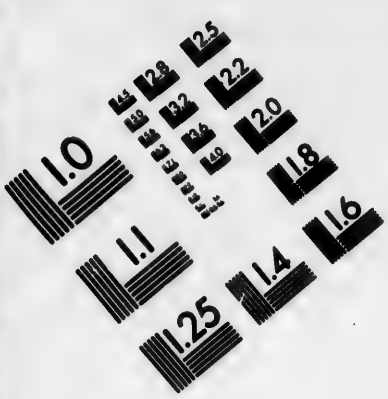
5. *Agreement by Company to Pay Interest.*

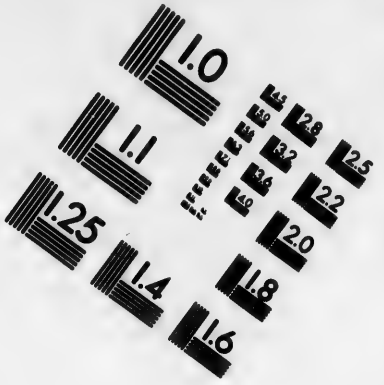
42. Validity of provisions for the payment of interest.—Where contributions are made to secure the building of a street railroad, and the regular running of cars thereon a specified number of daily trips, the company receiving such contributions may stipulate that the damages for a failure to comply with these conditions shall be the sum contributed and interest thereon from the date of failure. *Crown Hill R. Co.* v. *Armstrong*, 39 *Ind.* 418.

Such a stipulation is not void for want of mutuality, or of consideration, though not signed by the party making the subscription; the obligation on his part being evidenced by his promissory note, previously executed, which was paid by him upon the execution by the company of the instrument containing said stipulation; the company having verbally agreed, at the time of the execution of said note, that the maker, who was interested in the maintenance of the road, should have some security for its permanent working; and the instrument containing said stipulation purporting to be made in consummation of said verbal agreement. *Crown Hill R. Co.* v. *Armstrong*, 39 *Ind.* 418.

If, by the terms of subscription to stock, it is recommended that interest be paid to stockholders on payments for stock, a subscriber cannot resist payment of his subscription on the ground that such interest has been paid. *Agricultural Branch R. Co.* v. *Winchester*, 13 *Allen* (*Mass.*) 29.

Where a charter provides that a certain amount of capital stock shall be subscribed





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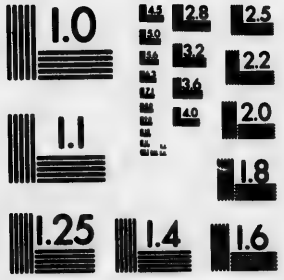

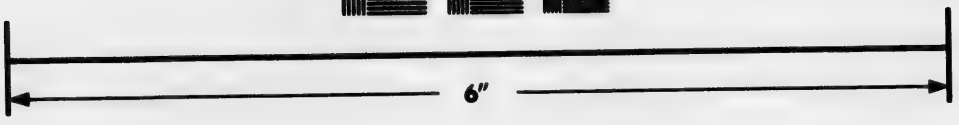

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before any assessments are made, and this number of shares is subscribed, a condition that interest should be paid by the corporation on all sums assessed and paid in, from the time of payment until the railroad should be put in operation, does not avoid the subscription. *Rutland & B. R. Co.* v. *Thrall*, 35 *Vt.* 536.

A corporation has authority to stipulate that each stockholder shall be entitled to interest on sums paid on stock subscriptions while its road is in process of construction, till it is completed and goes into operation, payable whenever the surplus earnings shall enable it properly to do so. Such an arrangement for the payment of "interest dividends" is equitable and just; and such payment, made only out of surplus earnings not needed for the payment of the debts of the corporation or for the prosecution of its business, does not interfere with the rights of creditors, nor contravene any principle of public policy. *Richardson* v. *Vermont & M. R. Co.*, 44 *Vt.* 613.—DISTINGUISHED IN New York, L. E. & W. R. Co. *v* Nickals, 119 U. S. 296.

43. Their effect—When interest payable.—An agreement of a corporation with a subscriber for stock that he "shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation," does not bind the corporation to pay any interest to him until the road goes into operation. *Waterman* v. *Troy & G. R. Co.*, 8 *Gray* (*Mass.*) 433.—REVIEWED IN Painesville & H. R. Co. *v.* King, 17 Ohio St. 534; Richardson *v.* Vermont & M. R. Co., 44 Vt. 613.—*Wright* v. *Vermont & M. R. Co.*, 12 *Cush.* (*Mass.*) 68.—DISTINGUISHED IN Barnard *v.* Vermont & M. R. Co., 7 Allen (Mass.) 512. QUOTED IN Richardson *v.* Vermont & M. R. Co., 44 Vt. 613.

Where a company has received subscriptions on a guaranty that it would pay interest on stock "as soon as paid," until the road is finished, interest will not accrue until the stock is fully paid; and where but a small part of the stock had been paid by defendant, he cannot, in a suit against him for the balance, set up the nonpayment of interest on his stock by the company as a breach of condition. *Miller* v. *Pittsburgh & C. R. Co.*, 40 *Pa. St.* 237.

44. Rights of persons who subscribed previous to resolution to pay interest.—Where directors, under the act "regulating railroad companies," pass and enter on their journal a resolution that "the treasurer is directed to allow interest on instalments as paid, payable in stock, and carry to the account of each stockholder the interest annually, and when the amount is sufficient to issue stock certificates in payment," and actually do pay such interest to persons making payment of their stock subscriptions subsequent to the passage of the resolution, such resolution accrues to the benefit of parties who had paid their stock subscriptions prior to the passage of the resolution, and constitutes a binding obligation to pay such interest. *Ohio* v. *Cleveland & T. R. Co.*, 6 *Ohio St.* 489.

II. ASSESSMENTS. CALLS.

1. *In General. When Necessary or Proper.*

45. Necessity of assessment or call.—In a suit to recover upon a subscription to stock it must be averred and proved that notice of the calls was given, such as the charter of the company requires. *Tomlin* v. *Tonica & P. R. Co.*, 23 *Ill.* 429.

A contract for subscription to stock recited that the signers agreed to take stock in the company "to the amount of the number of shares set opposite to our names respectively, subject always to the by laws, rules, and articles of incorporation" of the company. The articles provided that stock should be paid for after 500 shares had been subscribed, and that ten per cent. should be payable on the fifteenth of each month. *Held*, that this amounted to a promise to pay for the amount of the subscription; and each subscriber became a shareholder of the company; and that the subscription became due as stipulated without assessments being made. *Waukon & M. R. Co.* v. *Dwyer*, 49 *Iowa* 121.

A suit will not lie on a subscription to the stock of a corporation organized by virtue of the General Railroad Law, without a previous call made by the directors for the sums so subscribed. *Braddock* v. *Philadelphia, M. & M. R. Co.*, 16 *Am. & Eng. R. Cas.* 436, 45 *N. J. L.* 363.

Where the rights of creditors are not in question an action will not lie against a subscriber to stock to recover his subscription, or any part thereof, until he is in default after regular calls upon him pursuant to the

charter. *Mann* v. *Pentz*, 3 *N. Y.* 415; *reversing* 2 *Sandf. Ch.* 257.

46. —— where road is in hands of receiver.—Where the property of a corporation has been placed in the hands of a receiver, and the court has ordered him to proceed to collect the outstanding assets of the company, such order dispenses with the necessity of a call upon subscribers to corporate stock for unpaid subscriptions. *Armstrong* v. *Danahy*, 75 *Hun* 405, 27 *N. Y. Supp.* 60, 56 *N. Y. S. R.* 743.

47. No assessment valid prior to organization.—It is a rule of law, too well settled to be now questioned, that subscribers to the capital of a corporation prior to its organization cannot be required to pay assessments upon their shares until the company is authorized by law to begin the prosecution of its enterprise. *Fairview R. Co.* v. *Spillman*, 23 *Oreg.* 587, 32 *Pac. Rep.* 688.

48. Effect of condition in subscription on right to make calls.—Defendant subscribed for stock, payable, when needed for the payment of the contractors for the construction of the road, in such instalments as should be called and required by the president and directors of the company from time to time, the amount to be expended upon the road in a certain county. *Held*, that the president and directors had no right to call for such instalments until it became requisite to pay contractors for the construction of the road at the point stated. *Roberts* v. *Mobile & O. R. Co.*, 32 *Miss.* 373.

49. Necessity that number of shares be definitely fixed.—If the charter of a company does not fix the number of shares of the capital stock, it is to be presumed that the legislature intended that the stockholders or the directors should fix the number; and it is indispensable that the number be so determined before any assessment can be made thereon. *Somerset & K. R. Co.* v. *Cushing*, 45 *Me.* 524.—DISTINGUISHED IN Bucksport & B. R. Co. *v.* Buck, 65 Me. 536.—*Somerset R. Co.* v. *Clarke*, 61 *Me.* 379.—DISTINGUISHED IN Bucksport & B. R. Co. *v.* Buck, 65 Me. 536.

In such case, if the number of shares so fixed exceeds the number actually subscribed for and taken, the stockholders or directors may change the number; but the assessment must be upon the whole number. If the shares are not all taken, an assessment upon the number that have been taken is void. A subscriber who has paid the first assessment is not thereby estopped from setting up this defense to a suit for the second. *Somerset & K. R. Co.* v. *Cushing*, 45 *Me.* 524.—DISTINGUISHING Kennebec & P. R. Co. *v.* Jarvis, 34 Me. 360.

It is not necessary to fix the capital stock to enable a corporation to maintain an action on the subscription agreement. *Bucksport & B. R. Co.* v. *Buck*, 65 *Me.* 536, 9 *Am. Ry. Rep.* 293.

Where a charter prescribes the lowest amount at which the company's stock shall be fixed, the corporation has no power to assess the subscribers to its stock until it has fixed the amount of the stock, and it has been fully taken. *Pike* v. *Bangor & C. S. L. R. Co.*, 68 *Me.* 445, 20 *Am. Ry. Rep.* 407.

Where a charter provides that the capital stock shall consist of not more than a certain number of shares, "the number of which shall be determined from time to time by the directors," the directors have no power to levy assessments upon subscribers for stock before determining the whole number of shares. *Worcester & N. R. Co.* v. *Hinds*, 8 *Cush.* (*Mass.*) 110.

A corporation, authorized by its charter to begin the construction of its road when ever a given number of shares has been subscribed for, can assess the shares when the subscriptions have reached that number, although the whole number of shares has not been determined. *Boston, B. & G. R. Co.* v. *Wellington*, 113 *Mass.* 79.—DISTINGUISHING Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23; Troy & G. R. Co. *v.* Newton, 8 Gray (Mass.) 596.

Where a charter limits the capital stock to not less than 500 nor more than 10,000 shares, of $100 each, and authorizes the directors to assess upon 500 shares as soon as subscribed for, and from time to time to enlarge the capital up to the maximum limit, all the shares to be equally assessed, it is not necessary for the corporation to determine the ultimate amount of its capital within the limit of the 10,000 shares before proceeding to make assessments upon the first 500 subscribed for. *White Mountains R. Co.* v. *Eastman*, 34 *N. H.* 124.

Nor is it necessary, in order to entitle the corporation to recover the assessments so made, that notice of the assessments should have been given to the governor, accord-

ing to the provisions of the third clause of section 2 of N. H. Act of 1846, in amendment of the law relating to corporations. *White Mountains R. Co.* v. *Eastman*, 34 *N. H.* 124.

50. Stock must all be subscribed for before calls are made.*—Where the charter or act of incorporation fixes the amount of capital stock of the corporation, no assessment can be made upon the shares of a stockholder until the full amount of stock is subscribed, unless a contrary intention appears, expressly or by implication, either from the charter or the contract of subscription. *Peoria & R. I. R. Co.* v. *Preston*, 35 *Iowa* 115 — DISAPPROVING Schenectady & S. Plank-road Co. *v.* Thatcher, 11 N. Y. 102. DISTINGUISHING Rensselaer & W. Plank Road Co. *v.* Wetsel, 21 Barb. (N. Y.) 56; Waterford W., W. & D. R. Co. *v.* Dalbiac, 4 Eng. L. & Eq. 455; 6 Ex. 443; Lexington & W. C. R. Co. *v.* Chandler, 13 Metc. (Mass.) 311; Hamilton & D. Plank Road Co. *v.* Rice, 7 Barb. 157; Fry *v.* Lexington & B. S. R. Co., 2 Metc. (Ky.) 314; Kennebec & P. R. Co. *v.* Jarvis, 34 Me. 360; Iowa & M. R. Co. *v.* Perkins, 28 Iowa 281. — REVIEWED IN Johnson *v.* Kessler, 76 Iowa 411.—*Allman* v. *Havana, R. & E. R. Co.*, 88 *Ill.* 521, 21 *Am. Ry. Rep.* 347.—DISTINGUISHED IN Henry *v.* Centralia & C. R. Co., 30 Am. & Eng. R. Cas. 273, 121 Ill. 264. OVERRULED IN Peoria & P. U. R. Co. *v.* Peoria & F. R. Co., 10 Am. & Eng. R. Cas. 129, 105 Ill. 110. REVIEWED AND APPROVED IN People ex rel. *v.* National Sav. Bank, 129 Ill. 618.—*Oldtown & L. R. Co.* v. *Veazie*, 39 *Me.* 571. *Lewey's Island R. Co.* v. *Bolton*, 48 *Me.* 451. *Shurtz* v. *Schoolcraft & T. R. R. Co.*, 9 *Mich.* 269. *Monroe* v. *Ft. Wayne, J. & S. R. Co.*, 28 *Mich.* 272, 12 *Am. Ry. Rep.* 273. *Sedalia, W. & S. R. Co.* v. *Abell*, 17 *Mo. App.* 645. — FOLLOWING Stoneham Branch R. Co. *v.* Gould, 2 Gray (Mass.) 278.—*Contoocook Valley R. Co.* v. *Barker*, 32 *N. H.* 363. *Anderson* v. *Middle & E. T. C. R. Co.*, 52 *Am. & Eng. R. Cas.* 149, 91 *Tenn.* 44, 17 *S. W. Rep.* 803.

Or unless the stockholder in some way waives the provisions of the charter. *New Hampshire C. R. Co.* v. *Johnson*, 30 *N. H.* 390. — REVIEWING Littleton Mfg. Co. *v.* Parker, 14 N. H. 543; Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142.— FOLLOWED IN Contoocook Valley R. Co. *v.* Barker, 32 N. H. 363.—*Contoocook Valley R. Co.* v. *Barker*, 32 *N. H.* 363.—FOLLOWING New Hampshire C. R. Co. *v.* Johnson, 30 N. H. 390.—*Exposition R. & I. Co.* v. *Canal St. Exposition R. Co.*, 42 *La. Ann.* 370, 7 *So. Rep.* 627.

By the charter or articles of incorporation of a company, an organization and the election of directors and officers were provided for, upon $100,000 of stock being subscribed, the capital stock being $1,000,000; and that such directors should thereupon reopen the books and continue to receive subscriptions until the whole amount of the capital stock should be subscribed, and that "all subscriptions to the stock of said company shall be paid at such times, in such amounts, and on such conditions as said directors may prescribe." *Held*, that the latter provision respecting the times and terms of payment had reference to the time when the full amount of the capital stock should have been subscribed, and that an assessment upon the shares of stockholders, ordered by the directors to be made before such period, was unauthorized and invalid. *Peoria & R. I. R. Co.* v. *Preston*, 35 *Iowa* 115, 5 *Am. Ry. Rep.* 7.

When the number of shares of stock is fixed by charter, an assessment made before the whole number of shares is subscribed for is invalid, although the remainder of the shares be subscribed for on the same day, after the dissolution of a meeting of the directors at which the assessment was made. *Stoneham Branch R. Co.* v. *Gould*, 2 *Gray* (*Mass.*) 277.—FOLLOWED IN Sedalia, W. & S. R. Co. *v.* Abell, 17 Mo. App. 645.

51. Stock need not all be subscribed for.—When, by the articles of association or by the provisions of the statute which form a part of the agreement of the parties who sign the articles of association, it is expressly or impliedly provided that upon the subscription to the capital stock of any certain amount, less than the whole amount fixed by the articles of association, the corporation shall have power to enter upon the business for which it was organized, then a valid assessment may be made when the less amount has been subscribed. *Sedalia, W. & S. R. Co.* v. *Abell*, 17 *Mo. App.* 645. *Jewett* v. *Valley R. Co.*, 34 *Ohio St.* 601, 21 *Am. Ry. Rep.* 21. *Willamette Freighting Co.* v. *Stannus*, 4

*Non-liability of stockholder where whole amount of stock is not subscribed, see note, 22 AM. & ENG. R. CAS. 15.

Oreg. 262.—FOLLOWED IN Astoria & S. C. R. Co. *v.* Hill, 20 Oreg. 177.—*Astoria & S. C. R. Co.* v. *Hill*, 20 *Oreg.* 177, 25 *Pac. Rep.* 379.—FOLLOWING Willamette Freighting Co. *v.* Stannus, 4 Oreg. 262; Coyote G. & S. Min. Co. *v.* Ruble, 8 Oreg. 294.—*Hanover Junction & S. R. Co.* v. *Grubb*, 82 *Pa. St.* 36, 15 *Am. Ry. Rep.* 442. *Cheraw & C. R. Co.* v. *Garland*, 14 *So. Car.* 63. *Waterford, W., W. & D. R. Co.* v. *Dalbiac*, 6 *Railw. Cas.* 753, 6 *Ex.* 443, 20 *L. J. Ex.* 227.

Under Ind. Act of 1852, relating to the incorporation of railroad companies, after a subscription of $50,000 a company may make calls without waiting for the subscription of the whole capital stock as a condition precedent to its right to collect. *Hoagland* v. *Cincinnati & Ft. W. R. Co.*, 18 *Ind.* 452.—QUOTING Kennebec & P. R. Co. *v.* Jarvis, 34 Me. 360.

To entitle a railroad company to recover under a special subscription to aid in the construction of its road through a certain county, payable in instalments as the work progresses, it is not necessary that the whole amount of the capital stock, as fixed by the articles of incorporation, should have been subscribed. *Iowa & M. R. Co.* v. *Perkins*, 28 *Iowa* 281.

The liability of subscribers is governed by the terms of the subscription, and not by the articles of incorporation, and their subscriptions become due upon the survey, location, and progress of the road, payable in instalments as provided by the terms of subscription. *Iowa & M. R. Co.* v. *Perkins*, 28 *Iowa* 281.

A failure on the part of plaintiff to show that assessments were made upon the stock by the board of directors of the company, and the publication of notice of such assessments as provided by the articles of incorporation, would not prevent a recovery. The same rule was held respecting the fact that the assessments under which payment was sought of the defendant were not made upon all the stock subscribed, but were confined to the stock of the subscribers of the county, to aid the construction of the road through which the subscriptions were made. *Iowa & M. R. Co.* v. *Perkins*, 28 *Iowa* 281.

By an amended charter the capital stock of a company was to consist of not less than 4000 shares. Defendant subscribed for two shares, and paid three assessments thereon, but afterwards refused to pay further assessments, and his shares were sold for less than the amount of the unpaid assessments. *Held*, that he was liable for the balance although the minimum number of shares had not been subscribed for. *York & C. R. Co.* v. *Pratt*, 40 *Me.* 447.

A charter provided that the capital stock should consist of not less than 4000 nor more than 10,000 shares, and that the company might organize when 4000 shares were subscribed, but that no contract for building the road should be entered into until 7000 shares were subscribed. *Held*, that a subscriber was liable after 4000 shares had been subscribed, and the company was organized, and had voted to dispose of the remainder of the stock, although no vote had been passed fixing the amount of the stock, and the full 10,000 shares had not been taken. *Penobscot & K. R. Co.* v. *Bartlett*, 12 *Gray* (*Mass.*) 244.—APPROVING Bangor Bridge Co. *v.* McMahon, 10 Me. 478.

A company is authorized by the general law, as amended by Mich. Act of 1867, to proceed in the construction of a division of its line of not less than fifteen consecutive miles, and to collect the subscriptions made along the same, so soon as the requisite $6000 per mile is obtained of subscriptions which are assessable for the construction of such division, and officers are duly chosen and the division designated; and such municipal aid as should be voted was intended by said act to be reckoned as a part of the $6000 per mile; and the fact that such aid has since been held void by the supreme court cannot affect the construction of that act. *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.—DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170. FOLLOWED IN Stowell *v.* Stowell, 9 Am. & Eng. R. Cas. 598, 45 Mich. 364.

Where an act of incorporation in no part of it declares that the parties named as incorporators shall not have power to act as a corporation until a certain amount of stock is subscribed for, and a certain amount of capital is paid in, subscribers to their stock can be compelled to pay their subscriptions, in the absence of an agreement to the contrary, notwithstanding the whole of the stock authorized to be issued has not been subscribed for. *Lynch* v. *Eastern, L. F. & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 652, 57 *Wis.* 430, 15 *N. W. Rep.* 743, 825.

52. Waiver of condition that stock must all be subscribed.*—The implied condition that all the stock shall be taken before calls are made may be waived, or expressly provided against. It is waived, although it had originally attached, where subscribers consent to pay their subscriptions before the entire capital stock is taken in order that a portion of the proposed road may be put in course of construction, and this is accordingly done upon the faith of their unconditional promise to pay. *Anderson* v. *Middle & E. T. C. R. Co.*, 52 *Am. & Eng. R. Cas.* 149, 91 *Tenn.* 44, 17 *S. W. Rep.* 803.

Subscribers thus waiving this implied condition and consenting to pay their subscriptions unconditionally are estopped, after the work has been contracted for and performed upon the faith of their promise, to contest their liability on the ground that the enterprise as a whole has failed for want of adequate funds, and that their expectations have thus been wholly disappointed. *Anderson* v. *Middle & E. T. C. R. Co.*, 52 *Am. & Eng. R. Cas.* 149, 91 *Tenn.* 44, 17 *S. W. Rep.* 803.

53. Assessments on stock fully paid up.—Corporations formed and existing under the laws of California may levy and collect assessments for corporate purposes on shares of stock upon which the subscriptions have been fully paid. *Santa Cruz R. Co.* v. *Spreckles*, 9 *Am. & Eng. R. Cas.* 679, 65 *Cal.* 193, 3 *Pac. Rep.* 661, 802.

2. *By Whom Made or Levied.*

54. Directors—Majority rule.—Directors authorized to exercise all the powers of the company, except as to matters directed to be transacted by a general meeting, have power to make calls. *Ambergate N. & B. & E. J. R. Co.* v. *Mitchell*, 4 *Ex.* 5.)0, 6 *Railw. Cas.* 235, 19 *L. J. Ex.* 89.

The number and qualifications of directors fixed by the charter must be adhered to, in order to make calls valid; but if payments are made by any stockholder on calls issued by such or similar directors, such payments will be construed to show acquiescence in their conduct and authority, past and future, and the stockholder so acquiescing cannot afterwards object. *Macon & A. R. Co.* v. *Vason*, 57 *Ga.* 314.

Where the action is to recover an assessment upon stock, the defendant may prove that the call purporting to have been made by the board of directors was made at a meeting at which a majority was not present, and that the order has not subsequently been ratified by the whole board. *Price* v. *Grand Rapids & I. R. Co.*, 13 *Ind.* 58.—FOLLOWED IN Cowley *v.* Grand Rapids & I. R. Co., 13 Ind. 61; Hamilton *v.* Grand Rapids & I. R. Co., 13 Ind. 347.

Assessments on capital stock must be made by the directors; and an assessment made by an individual appointed by the directors to do so is void, where it does not appear that it was afterwards ratified by the directors. *Pike* v. *Bangor & C. S. L. R. Co.*, 68 *Me.* 445, 20 *Am. Ry. Rep.* 407.

Oregon Code, § 3225, provides that "from the first meeting of the directors the powers vested in the corporation are exercised by them, or by their officers or agents under their direction, except as otherwise provided in this chapter." *Held*, that it is the duty of the board of directors to make calls upon stock from and after their first meeting. *Budd* v. *Multnomah St. R. Co.*, 15 *Oreg.* 413, 15 *Pac. Rep.* 659.

55. Discretion of directors as to calls.—Stock subscribed was payable in such instalments as might be called for or required by the directors of the company, and at such times and in such manner as they might direct. The statute authorized the directors to require payments from subscribers at such times and in such proportions and on such conditions as they should see fit. *Held*, that the directors might require the whole subscription to be paid at one time, or might divide it into such instalments as might seem to them proper. *Haun* v. *Mulberry & J. Gravel Road Co.*, 33 *Ind.* 103.

The necessity of the "call" is not open to question by the stockholders. The determination of that question is for the board of directors. *Budd* v. *Multnomah St. R. Co.*, 15 *Oreg.* 413, 15 *Pac. Rep.* 659.

A provision in a charter authorizing the directors to require payment of subscriptions to stock at such times and in such amounts as they shall deem fit does not prohibit the company from taking a bond secured by mortgage in payment. Such provision is designed for the benefit and protection of such subscribers as may avail themselves of it, and leaves the company to

*See also *post*, 72.

make special contracts with others. *Western Bank* v. *Tallman*, 17 *Wis.* 530.

56. Stockholders. — Where assessments upon stock are levied by the stockholders by virtue of a by-law framed and adopted by the stockholders, a stockholder who assisted in framing the by-law and gave his voice for its adoption is estopped from questioning the legality of the assessments. *Willamette Freighting Co.* v. *Stanus*, 4 *Oreg.* 262.

57. Treasurer. — Calls made by the treasurer under general authority given by the board are valid although the resolutions do not specify the amount of each call. *Hays* v. *Pittsburgh & S. R. Co.*, 38 *Pa. St.* 81.

58. When the court will make a call.—Under a charter it was the duty of the president and directors to make calls for instalments of unpaid stock. *Held*, that, on a failure of the officers to do so, a court of equity, at the suit of a creditor, could make the calls, which would bind stockholders though they were not parties to the suit. *Hawkins* v. *Glenn*, 131 *U. S.* 319, 9 *Sup. Ct. Rep.* 739.

3. *Form, Requisites, and Validity.*

59. In general.— Calls may be made payable in advance. *North Western R. Co.* v. *M'Michael*, 6 *Ex.* 273, 6 *Railw. Cas.* 495, 20 *L. J. Ex.* 233. *Ambergate N. & B. & E. J. R. Co.* v. *Norcliffe*, 6 *Ex.* 629.

Where the directors of a company pass a resolution on the 13th of March that a call shall be made on the 30th of March, to be paid on the 1st of May, such call is not invalid because the resolution is prospective. *Sheffield, A.-under-L. & M. R. Co.* v. *Woodcock*, 7 *M. & W.* 574. *Great North of England R. Co.* v. *Biddulph*, 7 *M. & W.* 243, 2 *Railw. Cas.* 401.

Calls are not illegal by reason of the shares having been altered from £25 to £20 after the formation of the company. *Ambergate N. & B. & E. J. R. Co.* v. *Mitchell*, 4 *Ex.* 540, 6 *Railw. Cas.* 235, 19 *L. J. Ex.* 89.

A member of the committee of a company authorized to make calls is not estopped from setting up the irregularity of certain calls by the fact that he joined in making them, or by his payment of a part of them. *Stratford & M. R. Co.* v. *Stratton*, 2 *B. & Ad.* 519.

Where money is subscribed to be paid for in a special mode on call, it must be shown that the call was made by adequate authority, and it must conform to the terms of the subscription. *New Jersey Midland R. Co.* v. *Strait*, 35 *N. J. L.* 322.

All that is necessary to constitute a valid call is a resolution by the board of directors which shows a clear intent to render due and payable a part or the whole of unpaid subscriptions. *Budd* v. *Multnomah St. R. Co.*, 15 *Oreg.* 413, 15 *Pac. Rep.* 659.

60. Must be periodical, not all at one time.—Where a railway act authorizes the company to make calls provided that no such calls shall be made at an interval of less than two months from each other, several calls made all at one time are irregular. *Stratford & M. R. Co.* v. *Stratton*, 2 *B. & Ad.* 519.

Where several calls are made by a company all at one time, and are on that account irregular, they are not ratified by the mention of them in a subsequent act of parliament reciting that the capital had not been subscribed, that the company had proceeded with the works, incurred debts, etc., and that a certain sum was due from defaulters in the payment of calls, and providing for carrying on the works and for making further calls. *Stratford & M. R. Co.* v. *Stratton*, 2 *B. & Ad.* 519.

In order to recover subscriptions to stock which is to be called for in proportions, it must appear that the instalments were called for periodically, and not that the assessments therefor were all made at one time, without notice of previous assessments. *Spangler* v. *Indiana & I. C. R. Co.*, 21 *Ill.* 276.

61. Intervals between calls.—Where the special act of a company requires an interval of at least three months between successive calls, the directors may on the 11th of January pass a resolution for a call to be paid on the 15th of February, and on the 8th of May pass a resolution for a call to be paid on the 19th of June. It is not necessary that three months elapse between the date when a call is payable and the date of the next call. *Ambergate N. & B. & E. J. R. Co.* v. *Mitchell*, 4 *Ex.* 540, 6 *Railw. Cas.* 235, 19 *L. J. Ex.* 89.

The Railways Clauses Consolidation Act, 14 & 15 Vict. c. 51, provides that no call shall be made "at a less interval than two months from the previous call." *Held*, that calls made on the 1st of September, 1st of November, 1st of January, etc., were bad.

The first day is to be excluded, as its inclusion leaves one day less than two months between calls. *Buffalo, B. & G. R. Co.* v. *Parke*, 12 *U. C. Q. B.* 607.

The calls upon stock in a company cannot be made at less intervals than two months. Where directors at one meeting make several calls, payable at intervals of two months from each other, a stockholder who has paid the first call thus made and then assigned his share is not responsible for the subsequent calls thus illegally made. *Moore* v. *McLaren*, 11 *U. C. C. P.* 534.

The insolvency of the assignee of the stock is no ground for vitiating the assignment, the only condition precedent for the valid assignment of stock being the payment of all calls. *Moore* v. *McLaren*, 11 *U. C. C. P.* 534.

62. Amount of call.—Where stock is subscribed for on condition that not more than five dollars on a share shall be called for at any one time, an order of the board of directors calling for two or more assessments at the same time is not void, where not more than five dollars is required to be paid at one time. *Penobscot & K. R. Co.* v. *Dunn*, 39 *Me.* 587.

If the charter provides that no assessments shall be laid upon any share to a greater amount than $100, in the whole, any assessment beyond that sum is void. *Lewey's Island R. Co.* v. *Bolton*, 48 *Me.* 451.

Directors were authorized to make such equal assessments from time to time on all the shares in the corporation as they might deem expedient and necessary in the execution and progress of the work; provided "that no assessments shall be laid upon any share in said corporation of a greater amount than $100 in the whole on such share; and if a greater amount of money shall be necessary to complete said road, it shall be raised by creating new shares." *Held*, that the charter limited the amount of all the assessments to $100 on a share, and that assessments beyond that sum, made by the directors for the payment of the debts of the corporation, were illegal. *Great Falls & C. R. Co.* v. *Copp*, 38 *N. H.* 124.

63. Equality of assessment. — The act of incorporation of plaintiff company authorized the directors to make such equal assessments, from time to time, on all the shares as they might deem necessary and expedient. The directors in making the first assessment expressly excluded $250,000 of stock subscribed in the United States. *Held*, (1) that this was not an equal assessment, and was therefore bad; (2) that the act (30 Vict. c. 12) which authorized the directors to restrict the assessment to one half the subscribed stock would not justify the assessment altogether excluding any portion of the stock, but at most allowed them to make an equal assessment on all the stock to that extent; (3) that this defect was not cured by 32 Vict. c. 54, and the first assessment was therefore illegal. *European & N. A. R. Co.* v. *McLeod*, 16 *New Brun.* 3.

Nine other assessments were made on the defendant's stock, none of which being paid a notice was given, under the 32 Vict. c. 54, which included all the assessments, and a sale was made, after which defendant was sued for the residue of the calls. *Held*, that the fact of the first assessment being unequal did not vitiate the sale, and defendant was liable for the deficiency remaining on the nine assessments, after deducting the amount realized from the sale of his shares, with interest and expenses. *European & N. A. R. Co.* v. *McLeod*, 16 *New Brun.* 3.

64. Sufficiency and effect.—A resolution of directors making calls on shares to a certain amount is, in the absence of proof of bad faith, conclusive evidence that the company requires the money. *Odessa Tramways Co.* v. *Mendel*, *L. R.* 8 *Ch. D.* 235, 47 *L. J. Ch. D.* 505, 26 *W. R.* 887, 38 *L. T.* 731; *affirming* 37 *L. T.* 275.

A resolution of the board of directors requiring stockholders to pay an instalment of ten per cent. every thirty days on subscriptions until the whole is paid, and that due notice thereof be given, is admissible in evidence to show a call for payment of an instalment in thirty days, and one every thirty days thereafter. *Heaston* v. *Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275.

65. Recording. — An omission to record a call for a particular instalment is supplied by the record of a call for all other unpaid instalments. *Hays* v. *Pittsburg & S. R. Co.*, 38 *Pa. St.* 81.

4. *Notice.*

66. Necessity. — Where no notice of assessments and calls is required by the charter, it is not an indispensable requisite of a suit to collect the stock subscriptions.

Eppes v. *Mississippi, G. & T. R. Co.*, 35 *Ala.* 33. *Wilson* v. *Wills Valley R. Co.*, 33 *Ga.* 466.

No right of action accrues for the recovery of assessments upon stock from a stockholder, until notice has been given to him of such assessments. *Alabama & F. R. Co.* v. *Rowley*, 9 *Fla.* 508.

Where a subscription is made to the stock of a railroad to be paid on calls or assessments to be made by the directors, the subscriber is entitled to notice fixing the amount and time of payment of assessments. *Wear* v. *Jacksonville & S. R. Co.*, 24 *Ill.* 593.

Where stock is to be paid "in such manner, and in such proportion, and at such times" as the company shall direct, personal notice of a call for stock is not requisite. It is not necessary to give in evidence the book containing subscriptions to the stock. *Fisher* v. *Evansville & C. R. Co.*, 7 *Ind.* 407. —APPROVED IN Pacific R. Co. *v.* Seely, 45 Mo. 212.

The terms of payment contained in the resolutions subscribed were that one dollar be paid in hand on each share, at the time of subscribing, and that ten per cent. on each share be paid every sixty days after the work should be put under contract. The work was put under contract in 1850; but there was no evidence that defendant had notice of that fact, nor that any call had been made for the payment of instalments, or payment demanded, though the declaration alleged such demand. *Held*, that such notice was not necessary. *Breedlove* v. *Martinsville & F. R. Co.*, 12 *Ind.* 114. —REVIEWING Ross *v.* Lafayette & I. R. Co., 6 Ind. 298.

The general railroad law does require notice, or a personal demand, before proceeding to forfeit the stock, but not before suit to recover instalments. Subscribers must take notice of the acts of directors, as to calls. *Heaston* v. *Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275. *Smith* v. *Indiana & I. R. Co.*, 12 *Ind.* 61.

Where a charter requires notice as a condition precedent to suits for instalments of stock subscriptions, and there is no waiver of the notice, it must be given as required. *Heaston* v. *Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275.

1 Gav. & H. Ind. St. 507, § 8, authorizing notice to be given of calls for payment by instalments of stock subscriptions, only applies to subscriptions in money. *Ohio, I. & I. R. Co.* v. *Cramer*, 23 *Ind.* 490.

Notice of calls is only necessary for the purpose of authorizing a forfeiture of the stock. It is not required to support an action upon a subscription which specifies no condition nor time of payment. The General Railroad Act of 1850, § 7, provides that directors may require stock paid "in such manner and in such instalments as they may deem proper," but expressly requires notice to be given before declaring stock forfeited for more payment. *Lake Ontario, A. & N. Y. R. Co.* v. *Mason*, 16 *N. Y.* 451.

Under Pa. General Railroad Law of 1849, before suit can be brought for a subscription, notice of the call therefor must be shown. *McCarty* v. *Selinsgrove & N. B. R. Co.*, 87 *Pa. St.* 332.—DISTINGUISHING Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 162; Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 306.

The time and place for payment of calls need not be specified in the resolution by the directors making them, but the directors must fix a time and place, notice of which must be given to the shareholders, allowing twenty-one days for payment. *Newry & E. R. Co.* v. *Edmunds*, 2 *Ex.* 119, 5 *Railw. Cas.* 275, 17 *L. J. Ex.* 102.

67. Sufficiency, generally. — In assumpsit to recover assessments upon stock, notice of the assessment as averred must be specific, and not general. *Mississippi, O. & R. R. R. Co.* v. *Gaster*, 22 *Ark.* 361.—FOLLOWING Mississippi, O. & R. R. R. Co. *v.* Gaster, 20 Ark. 455.

If the stockholder be a resident of a town or city the construction and operation of the road through such town or city would ordinarily be sufficient notice. *New Albany & S. R. Co.* v. *McCormick*, 10 *Ind.* 499.

Where a corporation is limited to fifteen per cent. calls per annum, and ten per cent. has already been called, it is immaterial that the last call did not specify the amount, time, or place of payment, the accompanying notice pointing out the time and place. *Andrews* v. *Ohio & M. R. Co.*, 14 *Ind.* 169.

A notice requiring payments to be made to A B, residing in the city of Troy, is *prima facie* a sufficient compliance with the requirement of the statute that the place of payment shall be designated in the notice. *Troy T. & R. Co.* v. *M'Chesney*, 21 *Wend.* (*N. Y.*) 296.

A company gave notice to a subscriber that it would move for a judgment against him for the sum of $300 with interest on

$150, part thereof, from October 1, 1871, and on $150, the residue thereof, from March 3, 1873, till paid, it being for the first and second quotas of thirty per cent. on five shares of stock of said company called for by the board of directors of said company. *Held*, that the notice sufficiently alleged and described a contract of subscription. *Stuart* v. *Valley R. Co.*, 32 *Gratt.* (*Va.*) 146.

An act amending an act to incorporate a railroad provided that "to entitle the company to recover against any subscriber or stockholder, a notice shall be given by the president of such company" stating the amount of stock called for, such notice to be published. The president published a notice beginning: "I hereby give notice that the following calls for payment of the capital stock to the E. & N. A. railway is [*sic*] hereby made." *Held*, that the notice was of a call made by the president, while the statute contemplated a call made by the directors, and only notice thereof given by the president; that it was not a compliance with the law, and therefore not binding on stockholders. *European & N. A. R. Co.* v. *Dunn*, 16 *New Brun.* 320.

68. Effect. — The time when a resolution to call is passed, and not the time when notice of the call is given, is the time when the call is made. *Reg.* v. *Londonderry & C. R. Co.*, 13 *Q. B.* 998, 6 *Railw. Cas.* 1, 13 *Jur.* 939, 18 *L. J. Q. B.* 343.

Where directors pass a resolution for a call, specifying the amount of the call and the day of payment, but not the place where or the person to whom payment is to be made, such call is not invalid, provided a notice thereof subsequently inserted in the local newspapers, according to the directions of the company's act, specifies all those matters. *Sheffield, A.-under-L. & M. R. Co.* v. *Woodcock*, 7 *M. & W.* 574. *Great North of England R. Co.* v. *Biddulph*, 7 *M. & W.* 243, 2 *Railw. Cas.* 401.

Assessments, as understood in subscription contracts, mean a rating by the board of directors, by instalments, of which notice is to be given. After notice has been given, and the period for payment has passed, an action will lie for the aggregate amount. *Spangler* v. *Indiana & I. C. R. Co.*, 21 *Ill.* 276.

69. Personal notice.— Generally, when the law requires notice to be given to a party, but does not specify the mode in which it shall be given, personal notice must be given and proved, before any liability can be fixed on him; but this principle does not apply to the case of a defaulting subscriber to the capital stock of a company, when such personal notice is not required by the charter of the company, nor by the terms of the subscription. *Grubbs* v. *Vicksburg & B. R. Co.*, 50 *Ala.* 398.

Where a charter prescribes that "payment of the shares of the capital stock shall be made in such sums and at such periods as shall be fixed by the board of directors, provided, that sixty days' notice be given of each call, published in at least two newspapers in South Arkansas, and one in the city of Little Rock," the notice thus prescribed is a condition precedent to the right of action by the company, but the mode of giving notice is directory, and personal notice is sufficient. *Mississippi, O. & R. R. R. Co.* v. *Gaster*, 20 *Ark.* 455.—FOLLOWED IN Mississippi, O. & R. R. R. Co. *v.* Wells, 20 Ark. 462; Mississippi, O. & R. R. R. Co. *v.* Chesnutt, 20 Ark. 461.

The declaration in such case set forth the days on which the assessments sued for were made, alleging that defendant then had notice, and was requested to make payment. *Held*, on demurrer, that the court would look to the time of filing the declaration to ascertain whether the sixty days had expired. *Mississippi, O. & R. R. R. Co.* v. *Gaster*, 20 *Ark.* 455.

70. Publication.—Under the London and Brighton Railway Act (1 Vict. c. 119, §§ 146, 148), providing for the method of making calls, the resolution need not specify a time or place of payment, but these must appear in the advertisement. *London & B. R. Co.* v. *Fairclough*, 3 *Scott N. R.* 68, 2 *M. & G.* 674, 2 *Railw. Cas.* 544.

Where no method of giving notice of calls for payment upon corporate stock is fixed by the charter or a by-law, publication in a newspaper in the county where the company has its principal office is not sufficient as to subscribers living in other counties. *Alabama & F. R. Co.* v. *Rowley*, 9 *Fla.* 508.

When the charter expressly requires notice to be given in certain newspapers, and for a certain number of days, before the calls for instalments shall be valid, the company must show a compliance with such condition precedent before a recovery can be had on such calls. *Macon & A. R. Co.* v. *Vason*, 57 *Ga.* 314.

When the charter of a railway company requires notice of calls on subscribers to be

published for thirty days in two newspapers, the court is inclined to hold that such publication cannot be dispensed with by giving actual notice to the subscribers. *Tomlin* v. *Tonica & P. R. Co.*, 23 *Ill.* 429.

A charter required that notice of the demand for the payment of instalments on subscriptions should be published in a newspaper at least three weeks prior to the day the instalments became due. In a suit to recover instalments, a copy of the publication made in the newspaper, accompanied by the publisher's oath that it had been so published for three weeks, was produced in evidence. Objection was made that the three successive papers in which the notice was published were not produced. *Held*, that the evidence was *prima facie* sufficient. *Unthank* v. *Henry County Turnpike Co.*, 6 *Ind.* 125.

To constitute legal notice of calls for stock instalments, under Indiana General Railroad Law, the same notice, fixing the same time for payment, must be published in a newspaper in each county in which one is published through which the railroad runs. *Heaston* v. *Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275

Defendant, by his subscription to stock, promised to pay the several assessments thereon as they should from time to time be ordered, according to the act of incorporation, which provided that the directors should give notice of the several assessments, and of the time and place of their payment, in certain newspapers. *Held*, that it was a condition of defendant's liability that such notice should be given as required by the charter, but that such condition might be waived by defendant. *Rutland & B. R. Co.* v. *Thrall*, 35 *Vt.* 536.

71. Mailing notice.—Proof that a notice of a call by the directors for the subscriptions was duly mailed and addressed to a subscriber makes a *prima facie* case of notice of such call. *Braddock* v. *Philadelphia, M. & M. R. Co.*, 16 *Am. & Eng. R. Cas.* 436, 45 *N. J. L.* 363.

72. Waiver.* — When notified that an instalment of stock was due, a subscriber replied that he was not a stockholder and that the notice must be an error. *Held*, that this was a waiver of further notice, as provided for in Pa. Act of Feb. 19, 1849, and that other instalments and the penalty of one per cent. a month could be recovered without notice. *Cass* v. *Pittsburg, V. & C. R. Co.*, 80 *Pa. St.* 31.

5. Calls after Transfer.

73. Liability of transferor. — Where the company incorporated and the undertaking authorized by act of parliament are in effect the same company and undertaking to which a person has subscribed a certain number of shares, the directors are entitled to place the subscriber's name on the register of shareholders, although, before the act was passed, the subscriber, without the knowledge of the company, had sold his shares. *Nixon* v. *Brownlow*, 3 *H. & N.* 686, 4 *Jur. N. S.* 878, 27 *L. J. Ex.* 508.

Where a person has signed the subscriber's agreement for the organization of a company, and has been allotted scrip, which he has sold before the act of parliament authorizing the construction of the railway was obtained, his name having been entered on the register of shareholders, though such entry was without his consent, he is liable for calls until the name of the purchaser of the scrip is inserted in the register. *Midland G. W. R. Co.* v. *Gordon*, 16 *M. & W.* 804, 11 *Jur.* 440, 16 *L. J. Ex.* 165.

A provision in a charter that "no transfer of such stock shall exempt the party transferring it from the obligation of paying instalments afterwards called for until fifty per cent. on each share shall have been paid" exempts from liability only those who have transferred their shares after the payment of fifty per cent. on each share, before the instalments have matured, and payment has been demanded. *Vicksburg, S. & T. R. Co.* v. *McKeen*, 14 *La. Ann.* 735.

A transfer of stock by a subscriber made for the purpose of escaping the liability upon it, without the consent of the company, is not a valid defense to an action against him by the company for the purchase money of the stock subscribed. *Everhart* v. *West Chester & P. R. Co.*, 28 *Pa. St.* 339.—FOLLOWED IN Graff *v.* Pittsburgh & S. R. Co., 31 Pa. St. 489.

An original subscriber to the stock of a company incorporated subject to the Pa. General Railroad Act of February 19, 1849, is not discharged from liability for the amount remaining unpaid upon such stock by transferring it to another, whether the transfer is made in good faith or not. *Pitts-*

* See also *ante*, **52**.

burgh & C. R. Co. v. *Clarke*, 29 *Pa. St.* 146. —FOLLOWED IN Graff *v.* Pittsburgh & S. R. Co., 31 Pa. St. 489.

A subscription to the stock of a railroad company creates a debt against the subscriber from which he cannot relieve himself by an assignment or transfer made without the sanction of the directors. *Graff* v. *Pittsburgh & S. R. Co.*, 31 *Pa. St.* 489.—FOLLOWING Pittsburgh & C. R. Co. *v.* Clarke, 29 Pa. 146; Everhart *v.* Philadelphia & W. C. R. Co., 28 Pa. St. 339.—FOLLOWED IN Robinson *v.* Pittsburgh & C. R. Co., 32 Pa. St. 334.

74. —— of transferee.—In order to show, in an action for calls, that defendant is a proprietor under a deed of transfer of shares, it is not necessary to prove the entry in its books, by the clerk of the company, of a memorial of the transfer, as is required by the company's act, but the seller of shares is released from liability for future calls. *London & B. R. Co.* v. *Fairclough*, 2 *M. & G.* 674, 3 *Scott N. R.* 68, 2 *Railw. Cas.* 544.

Under 8 & 9 Vict. c. 16 the name of a transferee of scrip certificates of shares must be entered on the sealed register of shareholders at the time when a call is made, in order to hold him liable for such calls. *Newry & E. R. Co.* v. *Edmunds*, 2 *Ex.* 119, 5 *Railw. Cas.* 275, 12 *Jur.* 101, 17 *L. J. Ex.* 102.

A stockholder who derives his stock by a transfer from the original subscriber, and who receives a new certificate from the company, is personally liable for instalments called for after the transfer. *Hartford & N. H. R. Co.* v. *Boorman*, 12 *Conn.* 530.—DISTINGUISHED IN Seymour *v.* Sturgess, 26 N. Y. 134. REVIEWED IN Small *v.* Herkimer M. & H. Co., 2 N. Y. 330.

75. Assignment of the call.—A railway company may assign as security for a debt a call which it has made, although the call has not become payable. *Pickering* v. *Ilfracombe R. Co.*, 37 *L. J. C. P.* 118, *L. R.* 3 *C. P.* 235, 16 *W. R.* 458, 17 *L. T.* 650.

III. ACTIONS TO ENFORCE SUBSCRIPTIONS.

1. *Election of Remedies. Forms of Action Allowed.*

76. In general.*—A proceeding by notice and motion, on the part of a company, against a delinquent stockholder, is "a suit" within the meaning of Ala. Code, § 2398, and security for costs must be given when the notice is placed for service in the hands of the sheriff. *Alabama & T. R. R. Co.* v. *Harris*, 25 *Ala.* 232.

77. Remedy by forfeiture cumulative only.—An action will lie to recover a subscription for stock in a corporation, although the charter declares that, upon the failure of the subscriber to pay any requisition of the directors thereon, his stock "shall be forfeited to the company, with the instalments which have been paid." The charter remedy is only cumulative. *Selma & T. R. Co.* v. *Tipton*, 5 *Ala.* 787.—FOLLOWING Beene *v.* Cahawba & M. R. Co., 3 Ala. 660.—DISAPPROVED IN New Hampshire C. R. Co. *v.* Johnson, 30 N. H. 390.—*Beene* v. *Cahawba & M. R. Co.*, 3 *Ala.* 660. —NOT FOLLOWING Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80; Andover & M. Turnpike Corp. *v.* Gould, 6 Mass. 40; New Bedford & B. Turnpike Corp. *v.* Adams, 8 Mass. 138.—DISAPPROVED IN New Hampshire C. R. Co. *v.* Johnson, 30 N. H. 390. FOLLOWED IN Carlisle *v.* Cahawba & M. R. Co., 4 Ala. 70; Selma & T. R. Co. *v.* Tipton, 5 Ala. 787. REVIEWED IN Greenville & C. R. Co. *v.* Cathcart, 4 Rich. (So. Car.) 89.—*Mann* v. *Cooke*, 20 *Conn.* 178. — DISTINGUISHED IN Seymour *v.* Sturgess, 26 N. Y. 134.—*White Mountains R. Co.* v. *Eastman*, 34 *N. H.* 124. *Boston, B. & G. R. Co.* v. *Wellington*, 113 *Mass.* 79. *Freeman* v. *Winchester*, 18 *Miss.* 577. *Troy & R. R. Co.* v. *Kerr*, 17 *Barb.* (*N. Y.*) 581.—EXPLAINED IN Ogdensburgh, R. & C. R. Co. *v.* Frost, 21 Barb. 541.—*Troy & B. R. Co.* v. *Tibbits*, 18 *Barb.* (*N. Y.*) 297. *Ogdensburgh, R. & C. R. Co.* v. *Frost*, 21 *Barb.* (*N. Y.*) 541.—FOLLOWING Northern R. Co. *v.* Miller, 10 Barb. 269.—*Buffalo & N. Y. C. R. Co.* v. *Dudley*, 14 *N. Y.* 336. — FOLLOWING Schenectady & S. Plank-road Co. *v.* Thatcher, 11 N. Y. 102.—*Greenville & C. R. Co.* v. *Cathcart*, 4 *Rich.* (*So. Car.*) 89.—REVIEWING Beene *v.* Cahawba & M. R. Co., 3 Ala. 660.

A charter provision authorizing the directors to exact a forfeiture of the stock and previous payments, as a penalty for non-payment of the instalments, does not, before any forfeiture has been declared, impair the remedy of the directors to enforce payment by action at common law. *Northern R. Co.* v. *Miller*, 10 *Barb.* (*N. Y.*) 260.—DISAPPROVED IN New Hampshire C. R. Co.

*Corporation's right of action against delinquent subscribers, see very full note, 81 AM. DEC. 393.

v. Johnson, 30 N. H. 390. FOLLOWED IN Ogdensburgh, R. & C. R. Co. *v.* Frost, 21 Barb. 541.

Where the power to require payment from stockholders is vested in a board of directors, an action will not lie to recover instalments unless all the prerequisites of the charter have been complied with. *Banet* v. *Alton & S. R. Co.*, 13 *Ill.* 504.

78. Assumpsit. — Although a charter authorizes the sale of stock of the subscriber for the non-payment of calls made thereon, yet an action of assumpsit will lie upon his subscription, which is a promise to pay. *Carlisle* v. *Cahawba & M. R. Co.*, 4 *Ala.* 70. — FOLLOWING Beene *v.* Cahawba & M. R. Co., 3 Ala. 660. — EXPLAINED IN Selma & T. R. Co. *v.* Tipton, 5 Ala. 787. — *Peake* v. *Wabash R. Co.*, 18 *Ill.* 88. *Kennebec & P. R. Co.* v. *Jarvis*, 34 *Me.* 360. — EXPLAINING Portland, S. & P. R. Co. *v.* Graham, 11 Metc. (Mass.) 1. — DISTINGUISHED IN Peoria & R. I. R. Co. *v.* Preston, 35 Iowa 115; York & C. R. Co. *v.* Pratt, 40 Me. 447. — *Hartford & N. H. R. Co.* v. *Kennedy*, 12 *Conn.* 499. — DISTINGUISHED IN Kennebec & P. R. Co. *v.* Kendall, 31 Me. 470; Seymour *v.* Sturgess, 26 N. Y. 134. FOLLOWED IN Northern R. Co. *v.* Miller, 10 Barb. (N. Y.) 260. REVIEWED IN Small *v.* Herkimer M. & H. Co., 2 N. Y. 330; Buffalo & N. Y. C. R. Co. *v.* Dudley, 14 N. Y. 336. — *Bavington* v. *Pittsburgh & S. R. Co.*, 34 *Pa. St.* 358.

Defendant, with others, signed a writing promising to pay to a railroad company the sum of fifty dollars for every share of stock set opposite their names. A verdict was taken for plaintiff for the value of shares subscribed, subject to the opinion of the court, upon a statement of facts, with an agreement that the court might make such inferences from the facts as a jury might. At the time of the subscription, it was admitted by the statement that the committee who obtained it represented to defendant that T. W. Canal stock would be taken at par for any subscriptions to the railroad company. Defendant resided in Maryland, and was ready to pay in canal stock. *Held*, that an action for money had and received could not be maintained. *Swatara R. Co.* v. *Brune*, 6 *Gill* (*Md.*) 41.

79. Debt. — The City of Toronto and Lake Huron railroad company has, under 8 Vict. c. 83, amending the original act 6 Will. IV. c. 5, creating the company, a right to sue in debt one of the original stockholders for an instalment due upon stock originally subscribed and called in by the directors appointed under the original act of incorporation. *Toronto & L. H. R. Co.* v. *Crookshank*, 4 *U. C. Q. B.* 309. — DISTINGUISHED IN Grand Junction R. Co. *v.* Peterborough County, 6 Ont. App. 339. FOLLOWED IN Fraser *v.* Hickman, 12 U. C. C. P. 584; Port Dover & L. H. R. Co. *v.* Grey, 36 U. C. Q. B. 425.

2. *Jurisdiction. Tender. Demand before Suit.*

80. Jurisdiction.* — An action for calls made by an Irish railway company can be maintained only in the courts in Dublin, where the company's act authorizes it to sue for calls in such courts. *Dundalk Western R. Co.* v. *Tapster*, 1 *G. & D.* 657, 1 *Q. B.* 667, 5 *Jur.* 699, 2 *Railw. Cas.* 586.

Where a suit for a subscription is against an administrator, the common pleas courts of Indiana have jurisdiction, though the amount sued for exceeds $1000. *Fleece* v. *Indiana & I. C. R. Co.*, 8 *Ind.* 460.

81. Tender of certificates. — It is not necessary for a company to show that it has issued or offered to issue certificates of stock as a condition precedent to a right of recovery on a subscription. A subscription for stock does not stand on the same footing as a contract of purchase, so that the company, like the vendor, must offer to deliver before demanding the price. Whenever the subscriber pays, he is the owner of stock in the company. It is the payment that makes him a stockholder, not the certificate. The certificate is only the evidence of his right. He is a full stockholder, with all the rights of one, if the certificate is not issued at all. *Fulgam* v. *Macon & B. R. Co.*, 44 *Ga.* 597. *Chandler* v. *Northern Cross R. Co.*, 18 *Ill.* 190. *New Albany & S. R. Co.* v. *McCormick*, 10 *Ind.* 499. — QUOTED IN Slipher *v.* Earhart, 83 Ind. 173. — *Vawter* v. *Ohio & M. R. Co.*, 14 *Ind.* 174. *Heaston* v. *Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275. *Webb* v. *Baltimore & E. S. R. Co.*, 54 *Am. & Eng. R. Cas.* 202, 77 *Md.* 92, 26 *Atl. Rep.* 113. — *Astoria & S. C. R. Co.* v. *Hill*, 20 *Oreg.* 177, 25 *Pac. Rep.* 379. — DISTINGUISHING Robbins *v.* St. Paul, S. & T. F. R. Co., 22 Minn. 286.

* Equitable jurisdiction to compel payment of unpaid subscriptions to stock, or to make calls thereon, see note, 3 AM. ST. REP. 810.

A party gave to a company his promissory note for $500, payable with interest on January 1, 1882, and containing a condition that if a certain railroad should be constructed so that cars might be run between certain points on or before January 1, 1882, it should be paid, and five shares of the capital stock of the company should be issued to the maker, otherwise the note should be void. *Held*, that this was only a contract of subscription to the stock, and not one for the purchase of shares, and that a tender of the stock was not a condition precedent to a right of action on the note. *Wemple* v. *St. Louis, J. & S. R. Co.*, 30 *Am. & Eng. R. Cas.* 246, 120 *Ill.* 196, 11 *N. E. Rep.* 906, 9 *West Rep.* 159.

Where subscription is made to the stock of a corporation, no action can be maintained to recover the total instalments without a tender of the certificates of stock. *Hedge* v. *Gibson*, 7 *Am. & Eng. R. Cas.* 69, 58 *Iowa* 656, 12 *N. W. Rep.* 713.

Where subscriptions to stock are made to be paid in instalments, and certificates of stock are to be issued for the several instalments, a readiness and willingness to issue the certificates at the time payment is to be made is all that can be required. *James* v. *Cincinnati, H. & D. R. Co.*, 2 *Disney* (*Ohio*) 261.

82. Demand before suit. — By the by-law of a company it was required that all the stockholders who should fail or refuse to pay up the instalments then called in, or which might be called in by a certain date, should be sued for the full amount of their subscriptions. Defendant was sued as a stockholder, but was president of the company and present at the time of the adoption of the by-law in question. *Held*, that a demand of payment of his subscription prior to the suit against him was not necessary. *Winter* v. *Muscogee R. Co.*, 11 *Ga.* 438.

In an action on a note given upon a subscription to stock, defendant pleaded that no demand had been made of the amount of the stock subscribed. *Held*, that the company was under no obligation to make such demand. *Goodrich* v. *Reynolds*, 31 *Ill.* 490.

Where the time of payment is fixed by the contract of subscription, no demand before suit is necessary. *New Albany & S. R. Co.* v. *Pickens*, 5 *Ind.* 247.

A subscription to stock contained a provision that it should be paid in cash at such times and places as should thereafter be specified by the directors of the company, and should be applied to the construction of the road. *Held:* (1) that the subscription was not payable until the directors, at a regular meeting, fixed the time and place of payment; (2) that it was not necessary to give notice to the subscriber of the time and place of payment. *Ross* v. *Lafayette & I. R. Co.*, 6 *Ind.* 297. — DISTINGUISHED IN Ohio, I. & I. R. Co. *v.* Cramer, 23 Ind. 490. REVIEWED IN Breedlove *v.* Martinsville & F. R. Co., 12 Ind. 114.

By the terms of subscription, stock was payable at such times and in such sums as the board of directors should, from time to time, require, but no assessment was to exceed 10 per cent. of the subscription, and assessments were not to be laid oftener than once in sixty days. *Held*, that no personal demand of payment of instalments was necessary before suit; and that it was no objection that the assessments upon different subscribers were not uniform in amount, so that they did not exceed 10 per cent. *Johnson* v. *Crawfordsville, F., K. & Ft. W. R. Co.*, 11 *Ind.* 280.

A contract to pay for stock in instalments as assessed is a contract to pay them on demand, and the bringing of a suit is a sufficient demand. *Smith* v. *Indiana & I. R. Co.*, 12 *Ind.* 61.

Where a subscription is made payable in work and materials, and not in instalments, the company cannot require payment in instalments by resolution of the board of directors. *Ohio, I. & I. R. Co.* v. *Cramer*, 23 *Ind.* 490.

A corporation may bring assumpsit for assessments on stock, but notice and demand are necessary. *Essex Bridge Co.* v. *Tuttle*, 2 *Vt.* 393.—FOLLOWED IN Connecticut & P. R. R. Co. *v.* Bailey, 24 Vt. 465.

3. *Parties.*

83. In general.—One corporation cannot maintain an action upon a subscription or promise made to another, however identical the object sought by both, or the parties composing them. *Thrasher* v. *Pike County R. Co.*, 25 *Ill.* 393.

84. Party for whose benefit subscription was made. — Defendant and others signed a writing reciting that they were desirous of procuring the extension of a certain railroad to a certain place, and

that a development company proposed to construct the road on condition that the subscribers would procure a right of way and pay to the company $20,000 when the road was completed; and each agreed "in consideration of the premises" to pay the sum set opposite his name. *Held*, that the contract was for the benefit of the development company, and as the money when recovered would belong to it, it was the real party in interest, and the proper one to sue on the contract. *Western Development Co.* v. *Emery*, 61 *Cal.* 611.

An action for the instalments due on subscriptions to stock, made to commissioners named in the charter, is properly brought in the name of the company after its organization, the contract being with the commissioners as agents, and for the benefit of the corporation. *Delaware & A. R. Co.* v. *Irick*, 23 *N. J. L.* 321.

85. Successor company, or assignee of subscription.—Where a company, having a claim for unpaid subscription to stock, transfers the same by its authorized agent, the purchaser will be protected in equity, and his right to the proceeds of the claim will not be affected by the fact that there may not have been a formal written assignment thereof. *Morris* v. *Cheney*, 51 *Ill.* 451.

Defendant subscribed a certain sum as a donation to aid a railroad, upon condition that the road should be built between certain points and through certain towns. The party receiving the subscription abandoned the construction of the road, and assigned the subscription to a railroad company, which substantially complied with the conditions of the subscription. *Held*, that the assignee could maintain an action for the amount of the subscription. *Smith* v. *Hollett*, 34 *Ind.* 519.

Where the promise is to an existing company, its successors or assigns, the completion of the road by the successor, to whom had been assigned all franchises and property, including such subscription, will enable the successor to enforce the promise in its own name; the building and opening of the road constitute the essence of the agreement. *Michigan Midland & C. R. Co.* v. *Bacon*, 33 *Mich.* 466.

86. Original subscriber may call his vendee in warranty.—Where property encumbered with a mortgage to secure the subscription of a shareholder to the capital stock of a corporation is sold with shares of stock, for a certain price, and without guaranty against the mortgage, the purchaser is liable to the original stockholder, who, when called on for payment of the subscription, may call in warranty his vendee, although there had never been any transfer of the stock on the books of the company. *Clinton & P. H. R. Co.* v. *Eason*, 14 *La. Ann.* 828.

4. *Pleading.*

87. Declaration or complaint, generally.—A declaration in an action by a company for calls may be good, although not conformable to the form for a declaration given in the statute. *East Lancashire R. Co.* v. *Croxton*, 5 *Ex.* 287, 6 *Railw. Cas.* 214, 1 *L., M. & P.* 298, 19 *L. J. Ex.* 313. *Midland G. W. R. Co.* v. *Evans*, 4 *Ex.* 649, 6 *Railw. Cas.* 205, 7 *D. & L.* 203, 19 *L. J. Ex.* 118. *Newport, A. & H. R. Co.* v. *Hawes*, 3 *Ex.* 476.

A complaint in an action by the members of a "railroad committee," appointed by residents along the line of a proposed railway to raise funds by subscription to secure a right of way and depot grounds, alleging the facts connected with their appointment as such committee, and showing that one of their number, who was their authorized agent, had secured subscriptions from many residents along the road, and that at his instance defendant had subscribed an amount specified, in satisfaction of which he had executed two notes set out in the complaint, which were payable to the order of their agent, that no part of either of the notes had been paid, and that plaintiffs had purchased various rights of way and depot grounds, for which they had paid more than the amount of defendant's subscription, relying thereupon, sufficiently states a cause of action as against a general demurrer. *Judson* v. *Gage*, 91 *Cal.* 304, 27 *Pac. Rep.* 676.

88. Averments as to incorporation and organization.—In a suit against a stockholder for assessments, which could only be made by the board of directors, under the charter, averments that "the corporation was organized," and that "the board of directors of said corporation made assessments," are sufficient averments of the existence of the board of directors. *Mississippi, O. & R. R. R. Co.* v. *Gaster*, 20 *Ark.*

455.—FOLLOWED IN Mississippi, O. & R. R. R. Co. *v.* Gaster, 22 Ark. 361; Mississippi, O. & R. R. R. Co. *v.* Turrentine, 21 Ark. 445.

An averment that plaintiff was, and still is, a body corporate, is sufficient in an action to recover subscriptions of stock to a railway company, especially where the declation is demurred to. *Spangler* v. *Indiana &c. I. C. R. Co.*, 21 *Ill.* 276.

89. Averments as to defendant's subscription.—A declaration in an action by a company for calls is good after verdict, although it should have alleged a subscription by deed and failed to do so. *Great North of England R. Co.* v. *Biddulph*, 7 *M. &c. W.* 243, 2 *Railw. Cas.* 401.

A declaration in a suit to enforce payment of a subscription to stock need not aver compliance with a provision of the charter requiring each subscriber to pay ten per cent. at the time of his subscription. If such payment was made, it is matter of defense; but the mere fact of a failure to pay will not release the subscriber. *Illinois River R. Co.* v. *Zimmer*, 20 *Ill.* 654.

A railroad was authorized to be built by divisions, and in such event the charter made it lawful to take subscriptions for either of the divisions or for the whole road. A count to recover on a subscription described it as a general subscription, instead of one to a division, but failed to show a division of the road by a by-law, and the call shown was to subscribers to a division. *Held*, that no recovery could be had. *Tomlin* v. *Tonica &c. P. R. Co.*, 23 *Ill.* 429.

Where a complaint in a suit upon a subscription to stock makes no reference to any written contract of subscription, and does not aver any assessment or call by the directors, the complaint does not state a good cause of action. *McClasky* v. *Grand Rapids &c. I. R. Co.*, 16 *Ind.* 96.

An averment in a declaration that defendant subscribed for certain shares of the capital stock of plaintiff company, "according to the statute incorporating the company," will be held on general demurrer to mean that he had done everything required by the charter in order to become a subscriber. *Fiser* v. *Mississippi &c. T. R. Co.*, 32 *Miss.* 359.

In an action against a stockholder to recover the amount of his subscription, a complaint alleging that he had agreed to take a certain number of shares which had been allotted to him, and that various calls had been duly made on such shares in accordance with the company's act of incorporation "whereby the said defendant became liable to pay to the said plaintiff the sum of," etc., enumerating the sums due on each call, and then alleging the lapse of the time for payment fixed by the various calls and defendant's refusal to pay, is good in form. *Buffalo &c. N. Y. C. R. Co.* v. *Dudley*, 14 *N. Y.* 336.

The charter of a company permitted subscriptions in labor, materials, or land, as well as in money. In an action by the corporation to recover a stock subscription, the complaint alleged that "defendant subscribed to the joint stock of the said company $400, for and in consideration of eight shares of the capital stock," and also alleged a demand of payment. *Held*, on demurrer, that the complaint sufficiently stated that the subscription was pa able in money and was due before action brought. *Cheraw &c. C. R. Co.* v. *White*, 14 *So. Car.* 51. FOLLOWED IN Cheraw & C. R. Co. *v.* Garland, 14 So. Car. 63.

90. —— or holding shares.—The statute 8 & 9 Vict. c. 16, § 26, gives a form of declaration to be used in an action by a company for calls. In that form, the allegation that "the defendant is the holder of shares" means that he was the holder at the time the call was made. *Belfast &c. C. D. R. Co.* v. *Strange*, 1 *Ex.* 739, 5 *Railw. Cas.* 548.

A declaration in an action by a company for calls is good on special demurrer, although it is objected that there was no allegation that defendant was a holder of the shares mentioned at the time the calls were made. *Wilson* v. *Birkenhead, L. &c. C. J. R. Co.*, 6 *Ex.* 627, 6 *Railw. Cas.* 771, 20 *L. J. Ex.* 306.

91. Alleging notice to defendant.—In an action against a stockholder for instalments required to be paid upon his shares, it should be alleged that defendant had notice of the requisitions; but a general averment in the declaration, "of all which the defendant had notice," is sufficient on general demurrer. *Carlisle* v. *Cahawba &c. M. R. Co.*, 4 *Ala.* 70.

In an action to recover assessments upon stock, an averment of notice of the assessments, without alleging that "due" notice was given, is sufficient. *Mississippi, O. &c. R. R. R. Co.* v. *Turrentine*, 21 *Ark.* 445.—FOLLOWING Mississippi, O. & R. R. R. Co. *v.* Gaster, 20 Ark. 455.

A complaint in an action upon a subscription to railroad stock, payments of which were to be made in such instalments as by the directors required, etc., failing to state that any instalment had been required by the directors is demurrable. *Gebhart* v. *Junction R. Co.*, 12 *Ind.* 484.

92. —— and demand of performance by him.—An averment that a subscription to stock was payable in labor and materials within two years, but that the subscriber had failed to perform the labor or furnish the materials within the time, whereby the subscription became payable in cash, is good after verdict without an allegation of a demand for the work or materials. *Hayworth* v. *Junction R. Co.*, 13 *Ind.* 348.

Complaint alleged the subscription by defendant to the stock of plaintiff company of fifty acres of land, and a refusal to convey, and demanded payment in money for the land so subscribed, without alleging a promise to pay money or a previous demand for money. *Held*, on demurrer, to state facts sufficient to constitute a cause of action. *Cheraw & C. R. Co.* v. *Garland*, 14 *So. Car.* 63.

93. Alleging performance of conditions on plaintiff's part.—Where a subscription is made for the express purpose of securing the extension of a road, it is not necessary to aver in the declaration that the company was ready to make the extension; and where the company has two remedies against the stockholder, one by statute and the other by forfeiture, it is not necessary to give notice before suit which of these remedies the company elects to pursue. *New Albany & S. R. Co.* v. *Pickens*, 5 *Ind.* 247.

Where a given amount of capital stock is required to be subscribed before a corporation, by its charter, is authorized to go into operation, it is necessary, in an action by the company against a stockholder, to recover the amount subscribed by him, that the petition should allege that the requisite amount of stock had been subscribed before he was called upon for the amount of his subscription; and a failure to make such averment may be relied upon for reversal, although the question was not made in the trial court. *Fry* v. *Lexington & B. S. R. Co.*, 2 *Metc.* (*Ky.*) 314.—DISTINGUISHED IN Peoria & R. I. R. Co. *v.* Preston, 35 Iowa 115. QUOTED IN Livesey *v.* Omaha Hotel Co., 5 Neb. 50; Estabrook *v.* Omaha Hotel Co., 5 Neb. 76.

But where the promise is unconditional to pay to a corporation a certain sum of money, either as an ordinary debt or as a subscription to its capital stock, it is unnecessary to aver that the requisite amount of capital stock has been subscribed, as provided by the charter, in order to present a good cause of action. *Lail* v. *Mt. Sterling Coal Road Co.*, 13 *Bush* (*Ky.*) 32.

And where the terms of a subscription are determined by charter, it is not necessary to aver the terms in the complaint. A general averment that all the terms and conditions necessary to authorize a demand of payment have been complied with is sufficient, under Ky. Code of Prac. § 149. *Henderson & N. R. Co.* v. *Leavell*, 16 *B. Mon.* (*Ky.*) 358.—FOLLOWING McMillan *v.* Maysville & L. R. Co., 15 B. Mon. 218.—APPROVED IN Pacific R. Co. *v.* Seely, 45 Mo. 212.

And it is not necessary that the corporation aver its regular organization where it is created by statute, as a subscriber is not permitted to deny its corporate existence. And it is not necessary to aver readiness to perform conditions which are to be performed thereafter. *Henderson & N. R. Co.* v. *Leavell*, 16 *B. Mon.* (*Ky.*) 358.

Suit was brought on a contract to pay to a company a certain sum of money when its road should be completed through a particular county, provided it should pass through certain lands in a specified locality. *Held*, that an averment "that accepting and acting on said agreement and subscription, said company did construct and build such railroad, and that the same was so far completed in accordance with said contract and agreement that, on," etc., "the same was ready for running cars thereon through said county," was not a sufficient averment of performance of the conditions of the contract to entitle plaintiff to recover. *Hays* v. *Branham*, 36 *Ind.* 219, 5 *Am. Ry. Rep.* 18.

A company, although a corporation *de facto* and entitled as such to maintain actions, cannot recover upon subscriptions to its stock without showing performance of all those acts which by the statute are made conditions precedent. *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.—APPROVED IN Paducah & M. R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. Rep. 842.

The promises of the respective parties to a subscription contract are concurrent and dependent, and neither can require the other to perform without performing, or offering to perform, on his part. A complaint, in an action by a corporation upon a subscription to stock, which does not aver that the company has issued, or offered to issue, the stock is not sufficient. *St. Paul, S. & T. F. R. Co.* v. *Robbins*, 23 *Minn.* 439, 17 *Am. Ry. Rep.* 81.

An action was instituted upon a subscription contract conditioned to be paid in such instalments as might, from time to time, be called for by the directors, provided the instalments should be expended upon a certain line of road to be thereafter located by the company. *Held*, that a petition showing neither the road constructed along the line designated, nor an offer nor readiness to expend the money subscribed according to the condition, is defective; and that upon a demurrer by plaintiff to an answer to such petition, such defects in the petition require the demurrer to be overruled. *Trott* v. *Sarchett*, 10 *Ohio St.* 241.

In an action to recover money agreed to be paid or stock, an averment of a readiness and willingness to issue and deliver the certificates of stock is necessary. The right to enforce payment is not distinct and independent from the ability to issue and deliver the stock. If the subscriber cannot get the stock, the payment of money cannot be enforced. The acts to be done must be regarded as contemporaneous. *James* v. *Cincinnati, H. & D. R. Co.*, 2 *Disney* (*Ohio*) 261.

A subscription to stock contained a condition that the money subscribed was to be expended upon a particular section of the route. In an action to collect the subscription, the declaration averred generally that the conditions required had all been complied with, and that the assessments had been "duly made and laid." *Held*, upon demurrer, that such general allegations were not sufficient. The manner in which the conditions had been performed, and the purpose for which the assessments had been made in fact, should be specifically stated. *Woonsocket Union R. Co.* v. *Taft*, 8 *R. I.* 411.

94. Pleas and answers, generally. —The pleas allowed in an action for calls under a railway act by which the directors are entitled to recover upon proving that defendant was a proprietor and that notice was given, unless defendant should prove that he had paid the full amount of his subscription, are, *nunquam indebitatus;* that defendant was not a proprietor; and that the directors have exercised their power of declaring the shares forfeited. *South Eastern R. Co.* v. *Hebblewhite*, 4 *P. & D.* 246, 2 *Railw. Cas.* 247.

In an action to recover the amount of a subscription to stock, an answer alleging a failure to tender a certificate of such stock is insufficient. *Drover* v. *Evans*, 59 *Ind.* 454.

Under Ohio Act of May 1, 1852, relating to corporations, where a corporation sues to recover unpaid instalments of stock, an allegation in the complaint that the board of directors made a call for payments of a certain amount at a certain time and place is necessary to a recovery; and an answer which denies this is good on general demurrer. *Mansfield, C. & L. M. R. Co.* v. *Hall*, 26 *Ohio St.* 310, 11 *Am. Ry. Rep.* 56.

The fourth, fifth, and sixth pleas set up that notice of the calls sued on was not duly given and published; that the call exceeded ten per cent. on the subscribed capital, contrary to the statute; and as to the second call, that it was made payable at a less interval than two months from the previous call. *Held*, good, under 35 Vict. c. 53, §§ 13, 14, and C. S. C. c. 66, § 48. *Port Dover & L. H. R. Co.* v. *Grey*, 36 *U. C. Q. B.* 425.

95. General denial. — Suit upon a subscription to stock. The complaint set forth the article subscribed to, alleged performance on the part of the company, and a subsequent promise to pay by defendant. Answer: 1, the general denial; 2, payment. *Held*, that the latter was new matter, not provable under the general denial, and the paragraph setting it up was not demurrable. *Ensey* v. *Cleveland & St. L. R. Co.*, 10 *Ind.* 178.

An answer in general denial not verified, to a complaint by a company to recover upon a subscription, admits the capacity of the company to sue, and the execution of a written subscription to stock. Subsequent paragraphs of the same answer denying the existence of the corporation may be rejected on motion. *Price* v. *Grand Rapids & I. R. Co.*, 18 *Ind.* 137.

Where a subscription is conditional, and the complaint avers performance of the conditions, all evidence admissible under answers of failure and want of considera-

tion and non-performance of such conditions is admissible under the general denial; and, where the latter is pleaded, error in sustaining demurrers to the former is harmless. *Drover* v. *Evans*, 59 *Ind.* 454.

96. Nil debet. — *Nil debet* may be pleaded to an action by a railway company for calls. *Welland R. Co.* v. *Blake*, 6 *H. & N.* 410, 30 *L. J. Ex.* 161, 9 *W. R.* 386, 3 *L. T.* 678, 7 *Jur. N. S.* 373.

The plea of *nil debet* in an action by a railway company for calls does not admit that the defendant was a shareholder, although this is alleged in the declaration. *Birkenhead, L. & C. J. R. Co.* v. *Brownrigg*, 4 *Ex.* 426, 19 *L. J. Ex.* 27, 13 *Jur.* 943.

97. Infancy.—Where, to an action for calls, defendant pleads infancy, the plea is bad if it does not appear thereby that he became a shareholder by contract and avoided it. *Leeds & T. R. Co.* v. *Fearnley*, 4 *Ex.* 26, 5 *Railw. Cas.* 644, 7 *D. & L.* 68, 18 *L. J. Ex.* 330.

Where an infant is sued for calls, and infancy is pleaded as a defense, the plea should allege a repudiation of the contract within a reasonable time after defendant became of age. *Dublin & W. R. Co.* v. *Black*, 7 *Railw. Cas.* 434, 8 *Ex.* 181, 22 *L. J. Ex.* 94.

98. Instances of bad pleas. — To an action upon promissory notes given as a subscription to stock, pleas to the effect that the company's agent who procured the subscription did so by representing that the road would be economically built, that the stock would be a good investment and would pay dividends, and by making other like representations, and that all these representations proved to be untrue, set forth no valid defense and were properly stricken out on demurrer. *Weston* v. *Columbus Southern R. Co.*, 90 *Ga.* 289, 15 *S. E. Rep.* 773.

A plea which admits a refusal to take certain stock subscribed for, and that a third person had agreed to take it, and that the commissioners had counted the stock to such person, is not sufficient. The signature of the first subscriber should have been erased and that of the other person substituted, or something done to hold the latter liable. *Ryder* v. *Alton & S. R. Co.*, 13 *Ill.* 516.

An answer in a suit upon a stock subscription which set up fraud, in that the company, since defendant's cash subscription, had taken a large land subscription at enormous prices, is bad on demurrer. *Maccoun* v. *Indiana & I. C. R. Co.*, 9 *Ind.* 262. *Hornaday* v. *Indiana & I. C. R. Co.*, 9 *Ind.* 263.

An answer denying that the company has given defendant's stock to him is bad. The company is at most only bound to tender it conditionally. *Hardy* v. *Merriweather*, 14 *Ind.* 203.—FOLLOWING Gorham *v.* Reeves, 1 Ind. 421.

It is not a good bar to an action upon a subscription to the stock of a railroad company to aver that, at the time the subscription was made, the soliciting agent of the company agreed in writing, separate from the contract of subscription, that if the citizens of a named place and vicinity would subscribe a given sum to such stock, the proposed road should be located within a given distance of such place, and that such subscription should be expended on a certain part of said road, and that the subscription was made in consideration of such agreement, and that said agreement was not performed by the company. *Brownlee* v. *Ohio, I. & I. R. Co.*, 18 *Ind.* 68.

A plea by a stockholder, setting up a deviation in the route of the road prescribed by the charter as a defense to a suit to enforce his subscription for stock, "that said road was not constructed in accordance with the requirements of the charter," is bad for uncertainty. *Champion* v. *Memphis & C. R. Co.*, 35 *Miss.* 692.

Defendant pleaded that the act of incorporation provides that $25,000 of stock shall be subscribed, and fifty per cent. paid thereon, and the railway be *bona fide* commenced within two years, otherwise the charter should be forfeited and be void; and that this requirement was not complied with. *Held*, bad. *Port Dover & L. H. R. Co.* v. *Grey*, 36 *U. C. Q. B.* 425.—FOLLOWING Toronto & L. H. R. Co. *v.* Crookshank, 4 U. C. Q. B. 309.

Eighth plea was that, by plaintiffs' charter, the capital stock was declared to be $250,000; that defendant never subscribed except on the terms expressed in the charter, that the full amount of stock should be subscribed for before the road should be commenced; that not one-third of such stock was subscribed for; that the ten per cent. actually subscribed was sufficient for the expenses in procuring the act and making the surveys and estimates for the works; and that defendant subscribed before the general

meeting required by section 8 of the act, on the day of which meeting $100,000 was subscribed. *Held*, no defense. *Port Dover & L. H. R. Co.* v. *Grey*, 36 *U. C. Q. B.* 425.

Ninth plea, on equitable grounds, set out, in substance, that the road and extension would cost $900,000; that the assets which the company had or could acquire would not exceed half that sum; that there was no possibility of making the road therewith, as the directors and plaintiffs well knew, but that they were proceeding to construct part, and to expend all said assets, in bad faith, for improper purposes, and with the view of personal gain to the directors and others in collusion with them. *Held*, no defense; that the charges were too loose and indefinite; and that if sustainable they would form proper ground for a bill in equity only. *Port Dover & L. H. R. Co.* v. *Grey*, 36 *U. C. Q. B.* 425.

99. Replication.—Where the defendant in an action for calls pleads that the directors made more calls and for a greater amount than were authorized by the company's act, a replication that the calls mentioned in the plea were not authorized and were therefore void, and that the call sued for was not in excess of authority if the void calls were not reckoned, and that the defendant did not pay the void calls, is bad, since it does not show that the directors declared the unauthorized calls void. *Welland R. Co.* v. *Berrie*, 6 *H. & N.* 416, 30 *L. J. Ex.* 163, 9 *W. R.* 385, 3 *L. T.* 811.

100. Profert. — It is unnecessary to make profert of defendant's written subscription to the capital stock of a company, in a suit for calls made upon his stock, the written subscription not being declared on as the foundation of the action. *Mississippi, O. & R. R. R. Co.* v. *Gaster*, 20 *Ark.* 455.

5. *Evidence.*

101. In general.—It cannot be proved collaterally that a railroad company has not expended five per cent. within three years, as required by statute. *Thornburgh* v. *Newcastle & D. R. Co.*, 14 *Ind.* 499.

Where a defendant, by way of defense to a note given in payment of a subscription to stock, pleads, in general terms, that it is wholly without consideration and void, and plaintiff, without requiring a statement of the facts on which the defense is based, joins issue, any evidence is admissible which tends to impeach or sustain the consideration. *Chamberlain* v. *Painesville & H. R. Co.*, 15 *Ohio St.* 225.

Evidence that no work has been done towards grading a road is relevant to the issue of location. *Carolina, C. G. & C. R. Co.* v. *Seigler*, 24 *So. Car.* 124.

102. Proof of plaintiff's corporate character. — Where the statute provides for a board of commissioners to receive subscriptions to stock, the minutes of the board are presumptive evidence against a subscriber that the requisitions of the company's charter have been complied with, and the corporation regularly organized. *Ryder* v. *Alton & S. R. Co.*, 13 *Ill.* 516.

When suit is brought upon the preliminary articles of subscription for stock, they constitute the cause of action, and a copy of the articles of association, certified by the secretary of state, may be given in evidence to prove the existence of the corporation. *Heaston* v. *Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275.

Where it appears that defendant attended a meeting of directors at which an assessment on stock was made, it is immaterial with what motive and under what circumstances defendant acted; and evidence as to these facts is properly excluded. *Penobscot R. Co.* v. *White*, 41 *Me.* 512.

A subscriber signed a subscription which recited that the company had been formed under the General Railroad Act, and that the articles of association and the necessary affidavits had been duly filed as required by the statute. *Held*, that this was conclusive evidence of incorporation against the subscriber. *Black River & U. R. Co.* v. *Clarke*, 25 *N. Y.* 208; *affirming* 31 *Barb.* 258.

Where, in a petition to recover a subscription to stock, it is averred that the directors had been duly elected by the stockholders, in pursuance of notice, it is to be presumed that the requisite amount of stock had been subscribed to authorize such election, and also to authorize the location of the road and the making of assessments by the directors. *Ashtabula & N. L. R. Co.* v. *Smith*, 15 *Ohio St.* 328.

103. Showing subscription by defendant and others.* — Where a subscriber is sued for assessments on his stock, evidence is admissible that he entered into

* Evidence of contract between shareholders and company, see note, 4 AM. & ENG. F CAS. 290.

an agreement with third parties to guarantee a dividend on their stock, and the inducements which he held out to them. *Danbury & N. R. Co.* v. *Wilson*, 22 *Conn.* 435.

Where a written instrument is not declared on, but *indebitatus assumpsit* is brought to recover upon a subscription to stock, proof of the subscription is necessary, but for this purpose a stockholder is incompetent. *Peake* v. *Wabash R. Co.*, 18 *Ill.* 88.

In case of a subscription to the stock of a corporation, the notes given in payment therefor and the receipt issued by the company for payment for the stock, being connected together and part of the same transaction, are admissible in evidence as part of the same contract. *Hedge* v. *Gibson*, 7 *Am. & Eng. R. Cas.* 69, 58 *Iowa* 656, 12 *N. W. Rep.* 713.

In suits to recover calls upon stock, it is not necessary for the company, under Miss. Act of 1854, to prove defendant's subscription as set forth in the complaint, unless he denies it under oath. *Thigpen* v. *Mississippi C. R. Co.*, 32 *Miss.* 347.

And evidence of a subscription by defendant, and the production of the books of subscription on trial, are unnecessary, unless defendant denies the subscription under oath. *Thigpen* v. *Mississippi C. R. Co.*, 32 *Miss.* 347.

It is implied that a subscriber to stock, upon condition that others subscribe a certain amount of the same stock, shall be charged by any evidence which would be sufficient in an action brought against such other persons upon their subscriptions. Their acknowledgment of their signatures to the subscription, although after suit brought, is sufficient. *Philadelphia & W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

So proof by a witness who called upon them for the purpose, and saw them severally write their names, although since suit brought, may be given in evidence to corroborate their admissions. *Philadelphia & W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

Proof of the payment for stock standing in the name of a person making the payment involves proof for a previous subscription. *Philadelphia & W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

The books of a corporation, purporting to contain subscriptions to the stock of the company, are not of themselves evidence of the existence of such subscriptions. *Philadelphia & W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

The return to the governor is evidence of a subscription by one of the commissioners; and he is estopped from denying it. *Bavington* v. *Pittsburgh & S. R. Co.*, 34 *Pa. St.* 358.

In an action to recover a subscription to stock in the "National Express and Transportation Company," a subscription to the stock of the "National Express Company" is admissible to prove the subscription, it appearing that there had been a change from the latter to the former name. *Priest* v. *Glenn*, 51 *Fed. Rep.* 400, 4 *U. S. App.* 478, 2 *C. C. A.* 305; *affirming* 48 *Fed. Rep.* 19.

104. Proof that defendant is a stockholder. — A person subscribed for certain shares in a corporation, and the clerk entered his name upon the records, and the subscriber subsequently stated that he had taken the shares, and the treasurer offered him a certificate for the same. *Held*, that the evidence was competent to show him a shareholder, so far as to be liable for all legal assessments that might be made upon his shares. *New Hampshire C. R. Co.* v. *Johnson*, 30 *N. H.* 390.

In an action for instalments by a company against a stockholder, a proxy which defendant and others had signed "as stockholders," designating the number of shares opposite their names, respectively, is *prima facie* evidence that defendant is a stockholder. *Greenville & C. R. Co.* v. *Smith*, 6 *Rich.* (*So. Car.*) 91.

105. Of performance of conditions on plaintiff's part. — Where it appears that the subscription in satisfaction of which the notes in suit were given was made on condition that the road was to be constructed through defendant's land, on a specified line, testimony that the railroad was built substantially as described in the subscription, and that if there was any slight variance from the exact line therein described such variance was with defendant's knowledge and consent, and that the road conformed with his ideas, will support a finding that the conditions of the subscription were complied with. *Judson* v. *Gage*, 91 *Cal.* 304, 27 *Pac. Rep.* 676.

In an action to recover the amount of a subscription to stock which was made upon conditions precedent, the company has the burden to prove that the conditions have been complied with or waived. *Brand* v. *Lawrenceville Branch R. Co.*, 77 *Ga.* 506, 1 *S. E. Rep.* 255.

In an action on a written conditional subscription of stock, the written subscription is properly admissible in evidence for the purpose of showing performance of the condition. *Evansville, I. & C. S. L. R. Co.* v. *Tressler*, 10 *Ind.* 548.

A company cannot recover on a subscription to its capital stock where its evidence fails to show that it has performed all the conditions under which such subscription was made. *Shearer* v. *Evansville, I. & C. S. L. R. Co.*, 12 *Ind.* 452.

Where a charter provides that the company shall not engage in nor commence construction of the railway until three fourths of the estimated cost of the road has been subscribed for by responsible persons, the corporation is not obliged to show a compliance with this provision in order to maintain an action against a subscriber for an assessment upon the stock. *Penobscot R. Co.* v. *White*, 41 *Me.* 512.

For the purposes of an assessment upon subscriptions to the stock of a company, either the road must be regarded as an entirety, or the separate division set apart for construction must be considered and proceeded with by itself as a whole. An action for an assessment upon such subscription cannot be maintained without proof that the necessary subscriptions had been obtained between the two *termini* of the division designated and set apart, or within the required distance from them. *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.

106. Of calls made, notice to defendant, etc. — Where a subscription to stock provides that it shall be paid "in such instalments and at such times as may be decided by a majority of the stockholders, or board of directors or trustees empowered for the purpose by a majority of the stockholders," and suit is brought on such contract against a subscriber and no proof is offered showing that the stockholders, directors, or trustees have ever provided in what instalments the subscriptions shall be paid, or fixed a time or times for such payment, or made any call for payment, there should be a judgment of nonsuit against plaintiff. *North & S. St. R. Co.* v. *Spullock*, 88 *Ga.* 283, 14 *S. E. Rep.* 478.

A subscription book, with the orders of the company requiring payment, are competent evidence under the general count. Neither actual notice of the calls nor demand of payment need be proved. *Peake* v. *Wabash R. Co.*, 18 *Ill.* 88.

Where a charter makes the certificate of the secretary "evidence of the regular organization" of the company, and of any act or order of the board of directors, the secretary's certificate that a proper call was made on subscriptions is not competent proof of that fact, but it must be made to appear by copies of the orders of the board, duly certified. *Tomlin* v. *Tonica & P. R. Co.*, 23 *Ill.* 429.

In such case the secretary's certificate of the publication of notice of calls upon subscriptions to stock is not evidence of that fact, and the publication must be proved by competent legal evidence, the same as any other fact. *Tomlin* v. *Tonica & P. R. Co.*, 23 *Ill.* 429.

Where suit is brought on a special conditional subscription to stock, it is not necessary to prove that calls were made by the company, as required in the case of ordinary subscriptions. *Stanstead, S. & C. R. Co.* v. *Brigham*, 17 *Low. Can.* 54.

Defendant was sued on his subscription for twenty-five shares of railroad stock. On the trial he objected that the words "twenty-five" had been written over "ten" in the book where his subscription was made. *Held*, that the presumption of a change was sufficiently rebutted by the fact that a previous call of two and one half per cent. had been made, and defendant had paid in two and one half per cent. of the amount of twenty-five shares. *Fraser* v. *Hickman*, 12 *U. C. C. P.* 584.

107. Evidence in defense — Defendant not a stockholder. — Where a defendant in an action for calls denies that he is a shareholder, he may not only dispute that he is such *de facto* but may show that he is not a shareholder *de jure*. *Shropshire Union R. & C. Co.* v. *Anderson*, 3 *Ex.* 401, 6 *Railw. Cas.* 56, 6 *D. & L.* 482, 13 *Jur.* 175, 18 *L. J. Ex.* 232.

A defendant in a suit upon a subscription to the original stock of a company cannot demand inspection of the articles of association subscribed by him, and which are on file with the secretary of state. *Eakright* v. *Logansport & N. I. R. Co.*, 13 *Ind.* 404.— DISTINGUISHED IN Reed *v.* Richmond St. R. Co., 50 Ind. 342.

Nor can he show by parol that he would not have subscribed if he had supposed that a particular route would be adopted. *Eak-*

right v. *Logansport & N. I. R. Co.*, 13 *Ind.* 404.—FOLLOWED IN Carlisle *v.* Evansville, I. & C. S. L. R. Co., 13 Ind. 477.

A defendant interposed a plea of *non est factum* in a suit against him on a subscription to stock. The evidence showed that the signature was not in defendant's handwriting, but tended to show that he was one of a committee to procure subscribers; that he attended a meeting of subscribers and expressed a willingness to close his subscription by note. *Held*, that the evidence was sufficient to require the admission of the instrument in evidence, after which it was for the jury to determine upon the facts. *Houston & T. C. R. Co.* v. *Chandler*, 51 *Tex.* 416.

Defendant, to prove that he never became a legal subscriber to the capital stock of plaintiff company, that his proposal to become a subscriber was revoked by him with the consent of those to whom it was made previous to the organization of the company, and that the company, upon its organization, refused to receive it as a subscription or treat him as a subscriber, offered, in connection with oral evidence to be introduced, the records of the company in relation to its organization, in which records, in two statements of lists of subscribers, defendant's name did not appear. *Held*, that the records were competent evidence. *Stuart* v. *Valley R. Co.*, 32 *Gratt.* (*Va.*) 146.

108. Assurances and inducements by officials of plaintiff.—Where a party is sued to recover assessments upon his shares of stock, it is inadmissible to allow oral testimony to be given as to the inducements and circumstances which led to the subscription and the understanding of the subscribers when they signed, unless such testimony goes to establish fraud or mistake. *Martin* v. *Pensacola & G. R. Co.*, 8 *Fla.* 370.

Defendant was sued to recover the amount of his subscription to stock, and pleaded, among other things, that he was induced to subscribe by representations of the president and other agents of the company that the road should not be stocked or bonded above certain specified amounts per mile. It appeared that his principal inducement to subscribe was to secure the road to his town. He testified that the road was stocked and bonded for more than the amounts specified; but he did not testify that he would not have subscribed if he had known this at the time. A verdict was found for the company. *Held*, that there was no error in a refusal by the trial court to set aside the verdict and grant a new trial. *Weems* v. *Georgia Midland & G. R. Co.*, 88 *Ga.* 303, 14 *S. E. Rep.* 583.

Where a subscription to stock is conditioned upon the road being located on a certain route, plaintiff may prove, in a suit on the subscription, that defendant owned land upon that route, as showing what induced him to subscribe. *Vawter* v. *Ohio & M. R. Co.*, 14 *Ind.* 174.

Evidence is admissible for a defendant that the agent of the company who procured his subscription agreed to hold it until he should authorize its delivery to the company, and that a person not a director obtained the paper to look at, and without consent of the agent or defendant delivered it to the company. *Cass* v. *Pittsburg, V. & C. R. Co.*, 80 *Pa. St.* 31.

In an action to recover a subscription to stock it is not competent for the defendant to testify to representations made to him at the time of his subscription to induce him to subscribe. *Cass* v. *Pittsburg, V. & C. R. Co.*, 80 *Pa. St.* 31.

In a subscription to stock it was stated that the road was to be commenced "as soon as sufficient funds shall be subscribed to carry on the work." *Held*, in a suit for the subscription, that the assurances of the officers at a public meeting held for procuring subscriptions, at which defendant subscribed, that the money would not be called for till $150,000 were subscribed, were evidence, being an inducement on which the subscription was obtained. *Caley* v. *Philadelphia & C. County R. Co.*, 80 *Pa. St.* 363.—DISTINGUISHED IN Montgomery Southern R. Co. *v.* Matthews, 24 Am. & Eng. R. Cas. 9, 77 Ala. 357, 54 Am. Rep. 60.

Where previous to signing a subscription to stock in a corporation, defendant objected to signing for the reason that certain conditions on which the subscription was to be made did not appear therein, and was assured by the president of the corporation that these conditions should be considered a part of the contract, parol evidence of these conditions is admissible in a suit on the subscription, and the non-performance of them is a defense. *McCarty* v. *Selinsgrove & N. B. R. Co.*, 87 *Pa. St.* 332.

109. Agreement that subscription should be payable in work or materials.—Evidence that it was agreed that

defendant should work out the price of the subscriptions of others as well as his own is properly excluded where he has failed to prove that he worked out his own subscription. *Boyle* v. *Crawfordsville, F. & Ft. W. R. Co.*, 18 *Ind.* 457.

In a subscription to stock the covenant was to pay money on call. In a suit therefor defendant offered to prove an oral agreement that he might pay in labor and materials, without offering to show that he attempted to ascertain when and where he could do so, or had made a tender thereof. *Held*, that the offer was not admissible. *McClure* v. *People's Freight R. Co.*, 1 *Am. & Eng. R. Cas.* 371, 90 *Pa. St.* 269.

110. Secondary evidence.— A written subscription to stock in a company was shown by parol evidence to have been conditional. Notice had been given, and an order of court made, to obtain the production of the subscription on the trial; but it was not produced. The question as to the admissibility of such evidence was not presented in this court. *Held*, that the evidence was entitled to full weight. *Jewett* v. *Lawrenceburgh & U. M. R. Co.*, 10 *Ind.* 539.—DISTINGUISHED IN McAllister *v.* Indianapolis & C. R. Co., 15 Ind. 11.

Evidence of the loss of a subscription book, so as to let in secondary evidence of the fact of subscription, is for the court and not for the jury. Proof of diligent search and inquiry by the proper custodian is sufficient to let in secondary evidence, unless the book be traced to other hands. *Graff* v. *Pittsburgh & S. R. Co.*, 31 *Pa. St.* 489.

111. Varying written evidence by parol.—Where it appears that defendant, by putting his name to a blank paper, authorized the secretary of a meeting to subscribe for stock for him, and the name was subsequently transferred to the subscription books of the company, without further authority, he may show by parol evidence that he authorized the subscription only on certain conditions. *Tonica & P. R. Co.* v. *Stein*, 21 *Ill.* 96.

A parol promise to construct a branch road cannot be proven as a part of the written contract of subscription to the main road, and hence the money paid on such subscription cannot be recovered on the ground of a breach of contract. *McAllister* v. *Indianapolis & C. R. Co.*, 15 *Ind.* 11.—DISTINGUISHING Jewett *v.* Lawrenceburgh & U. M. R. Co., 10 Ind. 539.

The defendant, in an action by a corporation for assessments upon shares subscribed for by him, may not introduce parol evidence to show that his subscription was upon a condition not expressed in the writing. *Kennebec & P. R. Co.* v. *Waters*, 34 *Me.* 369.

Where a subscription in writing to the stock of a company provides that the road is to run on the east side of a creek, oral testimony is not admissible to show the meaning of the paper, the words not being susceptible of a double signification, nor applicable to more than one subject. *Carolina, C. G. & C. R. Co.* v. *Seigler*, 24 *So. Car.* 124.

Evidence of the location of defendant's lands, if intended to show that the subscription was made with the understanding that the road was to run by these lands, is incompetent, because it adds claims to the written paper; and if not so intended, it is irrelevant. *Carolina, C. G. & C. R. Co.* v. *Seigler*, 24 *So. Car.* 124.

Evidence of the location of lands through which defendant and others had given a right of way, and the nature of the country through which one of the surveys ran, is improper. *Carolina, C. G. & C. R. Co.* v. *Seigler*, 24 *So. Car.* 124.

Declarations of the president of the company at the time of a part payment by defendant on his subscription may be proved to explain the payment, but cannot be used to affect a written paper of subscription. *Carolina, C. G. & C. R. Co.* v. *Seigler*, 24 *So. Car.* 124.

Defendant, a subscriber to stock in plaintiff company, gave his note for certain assessments thereon, "for value received, payable to the order of Samuel Henshaw, treasurer," etc. *Held:* (1) that plaintiff might, by parol evidence, show that it is the person from whom the consideration moved, and to whom the note was in fact given; (2) that an action might be sustained upon the note in the name of the corporation; (3) that in declaring upon the note it was not necessary for plaintiff to allege in the declaration that the note was made payable to it, by the name of its treasurer. *Rutland & B. R. Co.* v. *Cole*, 24 *Vt.* 33.

112. Documentary evidence.—In an action of assumpsit on a subscription to stock, and a trial upon the general issue, plaintiff proved by a secretary that certain books came into his possession from his

predecessor as books of the company, one of which contained subscriptions to stock and the other contained proceedings of meetings. Certain entries were admitted in evidence. The subscription book contained resolutions of the directors fixing the amount of shares, the terms of payment, etc. To these the declaration averred that defendant placed his signature with the number of shares he desired. *Held:* (1) that the proof of the identity of the instrument offered in evidence with that declared on was sufficient, if such proof was at all necessary; (2) that under the issue proof of the execution of the instrument was not necessary. *Breedlove* v. *Martinsville &* F. R. Co., 12 *Ind.* 114.

Where persons attend a public meeting held for the purpose of procuring subscriptions to a railroad, and authorize the persons conducting the meeting to write their names on a memorandum or paper as subscribers, and the persons writing them down are authorized to transfer the names to a regular subscription book, such book is admissible in evidence without accounting for the loss or absence of the memorandum. *Iowa &* M. R. Co. v. *Perkins*, 28 *Iowa* 281. —DISTINGUISHED IN Peoria & R. I. R. Co. *v.* Preston, 35 Iowa 115.

The records kept, by the clerk of a railroad corporation, of the proceedings of the directors, in ordering assessments on the shares of the capital stock, may be used as evidence by the corporation in a suit brought by it to recover an assessment on the shares subscribed for by the defendant, he being one of the original grantees in the charter, and a director at the time the assessment was ordered, and having exercised the privilege of a stockholder by virtue of the shares on which the assessment was made. *White Mountains R. Co.* v. *Eastman*, 34 *N. H.* 124.

The books of a corporation are competent evidence against a corporator to prove the amount of the instalments as well as the calls. *Bavington* v. *Pittsburgh &* S. R. Co., 34 *Pa. St.* 358.

A stock ledger and a shareholders' list, kept by the company, and a memorandum made by an agent appointed by the company to collect quotas due from subscribers, showing the names subscribed, which stock ledger and shareholders' list were shown to have been subsequently compiled from such memorandum and from many original subscription lists, are competent evidence for plaintiff company in an action to recover on a subscription to stock. *Stuart* v. *Valley R. Co.*, 32 *Gratt.* (*Va.*) 146.

In such case it is not competent to propose to prove that before the ledger list and memoranda were in existence defendant had, by withdrawal of his proposal to subscribe, accepted and acted upon by plaintiff, ceased to occupy any relation of contract or subscription to plaintiff. *Stuart* v. *Valley R. Co.*, 32 *Gratt.* (*Va.*) 146.

In an action for calls, in order to show that the defendant is a proprietor it is incumbent on the company to produce the book required to be kept by the company for the entry of names and additions of the proprietors, with the number of shares they are entitled to, in addition to the book required to be kept by another clause of the act in which were to be entered the names and places of abode of the persons entitled to shares. *London &* B. R. Co. v. *Fairclough*, 3 *Scott N. R.* 68, 2 *M. &* G. 674, 2 *Railw. Cas.* 544. *London G. J. R. Co.* v. *Freeman*, 2 *Scott N. R.* 705, 2 *M. &* G. 607, 2 *Railw. Cas.* 468. *London G. J. R. Co.* v. *Graham*, 2 *Railw. Cas.* 870, 1 *Q. B.* 271.

113. Variance.—Where a declaration on a subscription to stock describes the contract as containing the ordinary dollar mark prefixed to the figures 500.00 set opposite to defendant's name, a contract without such mark prefixed to the figures or to any in the column, and where there is nothing in the instrument to indicate that the sum opposite defendant's name meant so many dollars, is variant from that declared on, and is not admissible in evidence. *Jacksonville, N. W. &* S. E. R. Co. v. *Brown*, 67 *Ill.* 201.

In such case the fact that defendant had given his note for fifty dollars, which stated that it was for ten per cent. of his subscription, is not sufficient to avoid the variance. If plaintiff had declared generally in the *indebitatus* counts, for calls due, and proved the execution of the instrument, the indebtedness might have been established by the recital in the note. *Jacksonville N. W. &* S. E. R. Co. v. *Brown*, 67 *Ill.* 201.

Where a former judgment is pleaded to a suit on a stock subscription of fourteen shares, it is not competent to show two subscriptions aggregating fourteen shares. *Hanes* v. *Dayton &* S. E. R. Co., 40 *Ohio St.* 95.

It is not error to admit in evidence a contract of subscription varying from that declared upon, where it works no injury to defendants, who are otherwise proved liable by acts of participation in the company's affairs, such as voting, acting as directors, judges, etc., and by active exertions to obtain a municipal subscription on the faith of a subscription certified to have been made by the parties so acting. *Hays* v. *Pittsburgh & S. R. Co.*, 38 *Pa. St.* 81.

Such acts are not merely evidence of an original subscription, but are conclusive, amounting to an estoppel upon the parties against denying it. It is primary and not secondary evidence. *Hays* v. *Pittsburgh & S. R. Co.*, 38 *Pa. St.* 81.

6. *Defenses.**

a. Abandonment or Delay of Enterprise.

114. Abandonment, when releases subscriber.—Proof that a railroad company has abandoned the construction of its line is sufficient to defeat an action to recover unpaid subscriptions to its stock; and it is for the jury to determine whether, under the evidence, the company has abandoned the construction. *Delaware River & L. R. Co.* v. *Rowland*, (*Pa.*) 30 *Am. & Eng. R. Cas.* 524, 9 *Atl. Rep.* 929.

As to how far the abandonment of a road is a defense to an action to collect a subscription to stock, generally, see *Montgomery Southern R. Co.* v. *Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 367. *Illinois G. T. R. Co.* v. *Cook*, 29 *Ill.* 237. *Morgan County* v. *Thomas*, 76 *Ill.* 120. *Taggart* v. *Western Md. R. Co.*, 24 *Md.* 563. *Miller* v. *Pittsburgh & C. R. Co.*, 40 *Pa. St.* 237.

115. —— when not a release.—The fact that a railroad has been abandoned furnishes no defense to subscribers to stock, as against the creditors of the corporation who are pursuing the stockholders for the debts of the corporation. The stockholders may be liable in such case after the corporate existence has ceased. *Bish* v. *Bradford*, 17 *Ind.* 490.

The act incorporating a company required it to commence work in sections as nearly simultaneously as might be, and pointed out where the sections should begin, and in what direction the work should be carried on. It contained a proviso that the stock subscribers in each parish or corporation, or a majority in amount, should have the right to designate on what section of the road they desired their subscriptions to be used. Defendant, when sued for his subscription, offered to prove that the company had abandoned work on one section, and had determined to appropriate the funds of the company to work on another section. *Held*, that the evidence was properly rejected, for the defense set up could not avail defendant. *Vicksburg, S. & T. R. Co.* v. *McKean*, 12 *La. Ann.* 638.

Subscribers to stock gave their notes for the amounts payable when the road should be completed, but were subsequently induced to take up these notes, and give new ones payable in four years, in order to enable the company to carry out a contract for the completion of the road, and upon a confident and honest expression of opinion by its officers that if they would do so the road would be completed under such contract in less than four years. *Held*, that the subscribers were liable on the new notes, although the contract was abandoned before anything had been done under it, and the road never completed. *Four Mile Valley R. Co.* v. *Bailey*, 18 *Ohio St.* 208.

It is no defense to an action on a subscription to stock that the company has not completed the road in its entirety, nor that it has abandoned a part of the enterprise, when no condition to that effect is expressed in the subscription. *Armstrong* v. *Karshner*, 44 *Am. & Eng. R. Cas.* 238, 47 *Ohio St.* 276, 24 *N. E. Rep.* 897.

116. Delay, when a defense.—Where subscriptions are made to a company which is limited by its charter to a definite time for building its road, the subsequent extension of the time by the legislature will not impair or release the subscriptions, unless such a release is made a condition of the extension and accepted by the company. *Jacks* v. *Helena*, 41 *Ark.* 213.

In order that delay in the completion of a road may be available as a defense to a promissory note given upon a subscription for shares, the time of completion must be shown to have been a condition agreed upon by the parties as a term of the subscription. *Jefferson* v. *Hewitt*, 95 *Cal.* 535, 30 *Pac. Rep.* 772.

If a company abandons the undertaking, and refunds some of the subscriptions, the

* Defenses to actions on subscriptions, see note, 1 AM. & ENG. R. CAS. 377.

other subscribers are discharged. Or if the undertaking be not commenced, *bona fide*, within the period prescribed by the charter, no action can be maintained for a subscription. *McCully* v. *Pittsburgh & C. R. Co.*, 32 *Pa. St.* 25.

A subscriber who has been released from liability by the neglect of the company is not again rendered liable by giving an incomplete letter of attorney to vote on a question of accepting a supplement to the charter and any subscription that might be tendered for stock in the road. *McCully* v. *Pittsburgh & C. R. Co.*, 32 *Pa. St.* 25.

Texas Act of 1885, which provides that "All limitations as to the time within which any part of any railroad shall be constructed * * * shall be suspended until January 1, 1887," cannot have the effect of authorizing a company, whose charter had been forfeited prior to the passage of such act by a failure to commence the construction of its road within the statutory period, to maintain an action against a subscriber to its stock, such subscriber being presumed to have contracted with reference to the law in force at the date of his subscription, and the legislature being without power to revive an obligation which has lapsed. *Bywaters* v. *Paris & G. N. R. Co.*, 38 *Am. & Eng. R. Cas.* 498, 73 *Tex.* 624, 11 *S. W. Rep.* 856.

117. —— and when not.—An agreement between a company and a subscriber to stock that the latter should not be required to pay his subscription until all the stock was subscribed, and that if the road should not be built within a certain time he should not be required to pay it at all, would, it seems, be a fraud upon other stockholders who subscribed upon less favorable terms; and such an agreement ought not to be enforced. *Foy* v. *Blackstone*, 31 *Ill.* 538.

Where a county subscribes to railroad stock, the fact that the road was not completed within a certain time is not a defense to an action on the subscription, where there is no evidence that time was of the essence of the contract, and the road is built and the expected advantage to the county is derived therefrom. *Kansas City, St. J. & C. B. R. Co.* v. *Alderman*, 47 *Mo.* 349.—APPROVED IN Nicolay *v.* St. Clair County, 3 Dill. (U. S.) 163. FOLLOWED IN State ex rel. *v.* Nodaway County Court, 48 Mo. 339; Smith *v.* Clark County, 54 Mo. 58; Ralls County *v.* Douglass, 105 U. S. 728.

If a subscriber consents to the refunding of some of the subscriptions, and to a delay in commencing the road, as matters of corporate policy, which are not to affect his liability as a subscriber, he will be estopped from setting up these matters as a defense. *McCully* v. *Pittsburgh & C. R. Co.*, 32 *Pa. St.* 25.

b. Change in Charter, Name, Route, Termini, etc.

118. In general. — A subscriber to stock is only released by a subsequent fundamental change in the organization or purposes of the company, and when such change is not provided for or contemplated either by the general law of the state or the charter when the subscription is made. *Nugent* v. *Putnam County Sup'rs*, 19 *Wall.* (*U. S.*) 241.—DISTINGUISHED IN Nœsen *v.* Port Washington, 37 Wis. 168. FOLLOWED IN Washburn *v.* Cass County, 3 Dill. (U. S.) 251. REVIEWED IN State ex rel. *v.* Garroutte, 67 Mo. 445.

Where, in a suit to recover assessments, the defense is that the corporation has accepted from the legislature an amendment which radically alters the original charter, to constitute this a good defense the defendant must show affirmatively that he dissented from such an alteration in a reasonable time, before any debts had been contracted, or rights had accrued to third parties under such alteration; and it is not incumbent upon the corporation to show his assent in order to be able to maintain the action. *Martin* v. *Pensacola & G. R. Co.*, 8 *Fla.* 370.

If a company ceases to prosecute work in the construction of its road, or attempts to misapply its funds, or makes a radical change so as to constitute it a different corporation, for the attainment of other purposes than that to which the subscription was made, a subscriber to its stock is released, and may enjoin the company from collecting subscriptions given to the original undertaking. *Illinois G. T. R. Co.* v. *Cook*, 29 *Ill.* 237.

If a statute in force at the time a subscription to stock is made authorizes an extension of the road, the subsequent exercise of such power by the company will not affect the subscription. *Jewett* v. *Valley R. Co.*, 34 *Ohio St.* 601, 21 *Am. Ry. Rep.* 21.

119. What is such a change in the charter as will release the subscribers.—If a subscriber to stock enters gen-

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erally into a corporation, without specific stipulations, he is bound and concluded by the action of a majority of the corporation, and if the legislature amends the charter with the assent of the company, he will not be thereby discharged from his liability for his subscription for stock made previous to the amendment. But if the subscription is of such a character, and the change is of such a nature as to increase the amount which he was originally bound to pay by virtue of his subscription, it will absolve him from his contract and liability. *Delaware R. Co.* v. *Tharp*, 1 *Houst.* (*Del.*) 149.

Where a company is incorporated to build a railway across the state, as a continuous project under one management, with a common interest, if the charter is afterwards amended so as to divide the project into three parts to be under separate control, thereby destroying the unity of interest, and there is no proper acceptance of the change of the charter, subscribers to stock will be released. *Fulton County Sup'rs* v. *Mississippi & W. R. Co.*, 21 *Ill.* 338.—DISTINGUISHING Banet *v.* Alton & S. R. Co., 13 Ill. 504; Sprague *v.* Illinois River R. Co., 19 Ill. 174; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654.

The relation between a corporation and a stockholder is one of contract, and any legislative enactment which, without the assent of the stockholder, authorizes a material change in the powers or purposes of the corporation, not in aid of its original object, is not binding upon him. *Sparrow* v. *Evansville & C. R. Co.*, 7 *Ind.* 369.—REVIEWING Stevens *v.* Rutland & B. R. Co., 29 Vt. 545.—*McCray* v. *Junction R. Co.*, 9 *Ind.* 358. *Kenosha, R. & R. I. R. Co.* v. *Marsh*, 17 *Wis.* 13.—REVIEWING Banet *v.* Alton & S. R. Co., 13 Ill. 504. REVIEWING AND DISTINGUISHING Oliver Lee & Co.'s Bank, 21 N. Y. 20.—REVIEWED AND FOLLOWED IN Nœsen *v.* Port Washington, 37 Wis. 168.

After the instalments of stock sued for became due, and before suit, the company altered its charter, by adding a power to purchase steamboats, etc. *Held*, that the subscriber was not liable, having given no assent to the alteration. *Hartford & N. H. R. Co.* v. *Croswell*, 5 *Hill* (*N. Y.*) 383. —APPROVED IN Winter *v.* Muscogee R. Co., 11 Ga. 438; Stevens *v.* Rutland & B. R. Co., 29 Vt. 545. DISAPPROVED IN Pacific R. Co. *v.* Hughes, 22 Mo. 291. DISTINGUISHED IN Buffalo & N. Y. C. R. Co. *v.* Dudley, 14 N. Y. 336; White *v.* Syracuse & U. R. Co., 14 Barb. (N. Y.) 559; Buffalo, C. & N. Y. R. Co. *v.* Pottle, 23 Barb. 21; Greenville & C. R. Co. *v.* Coleman, 5 Rich. (So. Car.) 118. EXPLAINED IN Carlisle *v.* Terre Haute & R. R. Co., 6 Ind. 316. RECONCILED IN Northern R. Co. *v.* Miller, 10 Barb. 260. REVIEWED IN New Haven & D. R. Co. *v.* Chapman, 38 Conn. 56; Troy & R. R. Co. *v.* Kerr, 17 Barb. 581.

By a supplement to an act incorporating an iron and railroad company, the name of the company was changed, authority was given to purchase and cancel the original stock, and the main purpose of the new company was to be that of a general transportation company. *Held*, that it was a fair question for the jury whether a combination to change the fundamental purpose of the original act by the supplement, and so divert the stock of an original subscriber to this new end, was not a fraud upon him; and if they so found, an action for the amount of this original subscription could not be sustained. *Southern Pa. I. & R. Co* v. *Stevens*, 87 *Pa. St.* 190.

120. What change or amendment will not release a subscriber.—An act of the legislature amending a charter, to be binding on all the stockholders, must be accepted by a vote of a majority of the stock, at a regular meeting. So a plea by a stockholder to an action on his subscription, which sets up a statute changing the charter as to the location of the road, is bad on demurrer when it does not show that the amendment was so accepted as to be binding on the corporation. *Mississippi, O. & R. R. R. Co.* v. *Gaster*, 24 *Ark.* 96.

An amendment to a charter, after individuals have subscribed to stock, giving to a city a right to subscribe $200,000 to the stock, and to appoint two directors with a certain number of votes, is not such change as to relieve the individuals from their subscriptions. *New Haven & D. R. Co.* v. *Chapman*, 38 *Conn.* 56, 4 *Am. Ry Rep.* 1.—QUOTING Buffalo & N. Y. C. R. Co. *v.* Dudley, 14 N. Y. 336. REVIEWING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383; Troy & R. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581.

Where a subscriber agrees to be subject to such rules and regulations as may be adopted from time to time, he is not released from payment because the charter is subsequently amended and accepted by the

company, reducing the length of notice to be given to subscribers. *Illinois River R. Co.* v. *Beers*, 27 *Ill.* 185.

An amendment to a charter which makes certain changes as to the termination of the railroad, and confers additional powers upon the company not only to build branches, but also to issue new stock, does not discharge subscribers to its stock. *Pacific R. Co.* v. *Hughes*, 22 *Mo.* 291. — FOLLOWING Pacific R. Co. v. Renshaw, 18 Mo. 210.— DISAPPROVED IN Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178.

When legislative changes in a charter of incorporation of a railroad are such as consist only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what may be considered as substantially the original objects of its creation, one who has previously subscribed to the stock of said railroad company cannot set up such changes as a defense at law to an action for calls upon such subscription of stock. The remedy, if any, is in equity. *Pacific R. Co.* v. *Hughes*, 22 *Mo.* 291.—DISAPPROVING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 385; Winter *v.* Muscogee R. Co., 11 Ga. 451; Banet *v.* Alton & S. R. Co., 13 Ill. 505. DISTINGUISHING Greenville & C. R. Co. *v.* Coleman, 5 Rich. (So. Car.) 140.

Defendant subscribed for stock in a company which was organized with a capital of $1,500,000. Subsequently the articles of association were amended so as to reduce the amount of stock to $325,000, and one terminus of the road was so changed as to shorten the entire distance nearly one half. The company also transferred a part of its road and leased the remainder during the continuance of its charter. *Held*, that this did not release defendant. *Troy & R. R. Co.* v. *Kerr*, 17 *Barb.* (*N. Y.*) 581. — REVIEWING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383.

Where the power is reserved to alter or amend a charter, a subsequent legislative amendment changing the name of the company, increasing its capital, and extending the road, does not release a subscriber; and this is so whether the alteration is beneficial to the defendant or not, where it is duly made without fraud on the part of the company. *Buffalo & N. Y. C. R. Co.* v. *Dudley*, 14 *N. Y.* 336. — DISTINGUISHING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383.

A change in the charter of a company by which it is authorized, for the purpose of raising means to make and equip the road as originally contemplated, to issue preferred stock, and which amendment is accepted by a majority of the stockholders, and such preferred stock issued, is not such a radical change in the structure and objects of the company as will exonerate from liability an original stockholder. *Everhart* v. *West Chester & P. R. Co.*, 28 *Pa. St.* 339.

After subscribing for stock under the act of assembly which required subscriptions to a certain amount before corporate authority should be granted, a subsequent act was passed reducing the amount of subscriptions required, under which the company was organized. *Held*, that the change would not release from liability a subscriber who had also voted at the organization, and for the election of directors, in right of his subscription; and in an action by the company against such stockholder for the sum subscribed, it was error to instruct the jury that defendant was relieved by the change if he did not know of it, and to refer the question of his knowledge to them. *Bedford R. Co.* v. *Bowser*, 48 *Pa. St.* 29.

Where part of a railroad is sold under a mortgage, and, under an act of reorganization, a new company is organized which is only bound to build the part sold, a subscriber to the stock of the new company cannot defeat his subscription because the road is not built to the terminal points as fixed by the original charter. *Chartiers R. Co.* v. *Hodgens*, 85 *Pa. St.* 501.

In an action to recover the amount of a railroad subscription it appeared that defendant had signed a subscription paper, in the ordinary form, by which he obligated himself to pay the amount subscribed in calls according to the provisions of the charter; that at the time of such subscription the agent of the company, in good faith, represented to him verbally that each stockholder would have a direct vote in the selection of the route, and that this was the express condition upon which he subscribed; that afterwards, by an almost unanimous vote of the stockholders, and pursuant to an amendment of the charter, it was agreed that the matter of locating the road should be decided by the board of directors, upon the survey of the engineer. *Held*, that this action on the part of the stockholders did not in any way affect the obligation of de-

fendant's contract. *East Tenn. & V. R. Co.* v. *Gammon*, 5 *Sneed* (*Tenn.*) 567.

Subscriptions to stock are not released by amendments to the company's charter which have not been acted upon by the company. *Taylor* v. *Greenville County Sup'rs*, 86 *Va.* 506, 10 *S. E. Rep.* 433.

Where the object and purpose of a railroad corporation were to build a road from a certain point to a certain other point, and it has caused a portion of its road to be built, and transferred to another road the right to operate the part completed, still retaining all its rights and franchises to build the other portion of the road, it cannot be said there has been such a fundamental and radical change in the character of the original purpose and object of the corporation as to release subscribers to the stock of the corporation who did not assent to such change. *Lynch* v. *Eastern, L. F. & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 652, 57 *Wis.* 430, 15 *N. W. Rep.* 743, 825.

Where, however, as in this case, the subscriber for the stock contemplated that a change would be made in the objects and purposes of the corporation, he will be held to his subscription notwithstanding such change. *Lynch* v. *Eastern, L. F. & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 652, 57 *Wis.* 430, 15 *N. W. Rep.* 743, 825.

Plaintiff sold certain land to railroad contractors for the purposes of the road. By their contract the contractors took a number of shares in the company for which they did not receive scrip at the time, but which they were to pay for in work. Plaintiff received in stock the price agreed on for the land, and the certificate for the shares was given to her by defendants. An act (16 Vict. c. 51) was subsequently passed, making material alterations in the charter of the company, a clause of which provided that any original shareholders in the company (the contractors and some others excepted) might within a given time apply for and obtain repayment of any instalment paid by them in cash, and have their shares canceled. *Held*, that plaintiff was not within the meaning of this proviso, and could not claim from the company the amount of her shares. *McDonell* v. *Ontario, S. & H. R. U. Co.*, 11 *U. C. Q. B.* 271.

121. Change in charter granting further privileges or franchises. — An amendment to the company's charter after defendant subscribed for stock, authorizing it to extend its road, and otherwise to assume new and increased responsibilities, does not release him. *Rice* v. *Rock Island & A. R. Co.*, 21 *Ill.* 93. — FOLLOWED IN Terre Haute & A. R. Co. *v.* Earp, 21 Ill. 290. —*Peoria & O. R. Co.* v. *Elting*, 17 *Ill.* 429.

An amendment of the charter or act of incorporation which merely enlarges the powers of the corporation without materially changing its original purposes will not release a stockholder from its original obligation. *Peoria & R. I. R. Co.* v. *Preston*, 35 *Iowa* 115, 5 *Am. Ry. Rep.* 7.

The mere fact that a company has accepted an amendment to its charter authorizing it to build a branch road will not *per se* release stockholders who have not consented to the amendment, where the company has taken no steps to appropriate funds to build the branch. *Hawkins* v. *Mississippi & T. R. Co.*, 35 *Miss.* 688.—DISTINGUISHING New Orleans, J. & G. N. R. Co. *v.* Harris, 27 Miss. 517.

An alteration in the charter of a company, by which the additional privilege is given to the corporation to extend its road, is not such an invasion of the contract of subscription as will relieve the subscriber to the stock from his liability to pay. *Cross* v. *Peach Bottom R. Co.*, 1 *Am. & Eng. R. Cas.* 366, 90 *Pa. St.* 392.—DISTINGUISHING Indiana & E. Turnpike Road Co. *v.* Phillips, 2 P. & W. 184; Manheim, P. & L. Turnpike Co. *v.* Arndt, 31 Pa. St. 317. FOLLOWING Gray *v.* Monongahela Nav. Co., 2 Watts & S. 156.

A stockholder is not absolved from liability to pay the amount of his subscriptions by an amendment of the charter procured without his consent by a majority of the stockholders, authorizing the company to build a branch road, and by the company's actually building it. *Greenville & C. R. Co.* v. *Coleman*, 5 *Rich.* (*So. Car.*) 118.

122. Alteration of charter reserving the power of alteration or repeal. —When a charter contains a clause authorizing the legislature to repeal or alter it, an alteration by the legislature, made on the application of the directors, without consulting the stock subscribers, does not absolve the latter from their subscription. *Northern R. Co.* v. *Miller*, 10 *Barb.* (*N. Y.*) 260.—FOLLOWING Hartford & N. H. R. Co. *v.* Kennedy, 12 Conn. 500. RECONCILING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383.—NOT FOLLOWED IN Za-

briskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178.—*Agricultural Branch R. Co.* v. *Winchester*, 13 *Allen* (*Mass.*) 29. *Mowrey* v. *Indianapolis & C. R. Co.*, 4 *Biss.* (*U. S.*) 78. *Pacific R. Co.* v. *Renshaw*, 18 *Mo.* 210. —DISAPPROVED IN Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178. FOLLOWED IN Pacific R. Co. *v.* Hughes, 22 Mo. 291.

But under a reserved power to alter and repeal, the legislature may not change the fundamental character of a corporation, but its general objects must remain the same. *Buffalo & N. Y. C. R. Co.* v. *Dudley*, 14 *N. Y.* 336.—NOT FOLLOWED IN Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178. QUOTED IN New Haven & D. R. Co. *v.* Chapman, 38 Conn. 56.

Where articles of incorporation restrict the calls of stock in any one year to a certain percentage of the whole amount, and provide for a change in the articles by a vote of the directors, a change in the amount and time of payment of the calls, upon a compliance with Iowa Code, §§ 678-680, will be binding upon stockholders who subscribed previous to such alteration of the articles. *Burlington & M. R. R. Co.* v. *White*, 5 *Iowa* 408.

123. Change in corporate name. —A subscription to stock is not invalidated by a legislative change in the name, and may be recovered in a suit under the new name. *Bucksport & B. R. Co.* v. *Buck*, 68 *Me.* 81, 19 *Am. Ry. Rep.* 10. *Greenville & P. R. N. G. R. Co.* v. *Johnson*, 8 *Baxt.* (*Tenn.*) 332.

Nor by an amendment whereby the name of the company has been changed, and the length and *termini* of the road materially altered. *Delaware & A. R. Co.* v. *Irick*, 23 *N. J. L.* 321.

124. Change of route, when releases subscriber.—An amendment of a charter materially changing the location of the road releases non-consenting subscribers. *Witter* v. *Mississippi, O. & R. R. R. Co.*, 20 *Ark.* 463.—COMMENTING ON Banet *v.* Alton & S. R. Co., 13 Ill. 506. REVIEWING Hester *v.* Memphis & C. R. Co., 32 Miss. 380.—APPLIED IN Mississippi, O. & R. R. R. Co. *v.* Gaster, 24 Ark. 96.—*Mississippi, O. & R. R. R. Co.* v. *Gaster*, 24 *Ark.* 96. —APPLYING Witter *v.* Mississippi, O. & R. R. R. Co., 20 Ark. 490.—*Hester* v. *Memphis & C. R. Co.*, 32 *Miss.* 378.—REVIEWED IN Witter *v.* Mississippi, O. & R. R. R. Co., 20 Ark. 463.—*Champion* v. *Memphis & C. R. Co.*, 35 *Miss.* 692. *Buffalo, C. & N. Y. R. Co.* v. *Pottle*, 23 *Barb.* (*N. Y.*) 21.—DISTINGUISHING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383.—*Næsen* v. *Port Washington*, 37 *Wis.* 168.—DISTINGUISHING Nugent *v.* Putnam County Sup'rs, 19 Wall. (U. S.) 241. REVIEWING AND FOLLOWING Kenosha, R. & R. I. R. Co. *v.* Marsh, 17 Wis. 13.

Under 73 Ohio Laws, 115, permitting a change of location of a railroad on consent of the stockholders, provided that "any subscription of stock made upon the faith of the location of such railroad, * * * upon any line abandoned by such change, shall be canceled at the written request of the subscriber not having consented," a subscriber who expressly stipulated against a change does not waive his right to enforce that condition by failing to make such request. *Railway Co.* v. *Fisher*, 39 *Ohio St.* 330.

125. What change of route will not bar action for subscription.—A subscriber to stock will not be released from payment of his subscription by a change of route from that first fixed by law, provided the change does not make an improvement of a different character, and his interest is not materially affected by the alteration. *Banet* v. *Alton & S. R. Co.*, 13 *Ill.* 504.—APPROVED IN Sprague *v.* Illinois River R. Co., 19 Ill. 174. COMMENTED ON IN Witter *v.* Mississippi, O. & R. R. R. Co., 20 Ark. 463. DISAPPROVED IN Pacific R. Co. *v.* Hughes, 22 Mo. 291; Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178. DISTINGUISHED IN Fulton County Sup'rs *v.* Mississippi & W. R. Co., 21 Ill. 338. FOLLOWED IN Terre Haute & A. R. Co. *v.* Earp, 21 Ill. 291. REVIEWED IN Kenosha, R. & R. I. R. Co. *v.* Marsh, 17 Wis. 13.—*Danbury & N. R. Co.* v. *Wilson*, 22 *Conn.* 435. *Wilson* v. *Wills Valley R. Co.*, 33 *Ga.* 466.—EXPLAINING Winter *v.* Muscogee R. Co., 11 Ga. 438.—*Boston, B. & G. R. Co.* v. *Wellington*, 113 *Mass.* 79. *Michigan Midland & C. R. Co.* v. *Bacon*, 33 *Mich.* 466. *Greenville & C. R. Co.* v. *Coleman*, 5 *Rich.* (*So. Car.*) 118.—DISTINGUISHING Hartford & N. H. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383.—FOLLOWED IN North Carolina R. Co. *v.* Leach, 4 Jones (N. Car.) 340.

A subsequent change in the location of a road which had not been definitely located when the defendant subscribed does not release him from his contract. *Eppes* v. *Mississippi, G. & T. R. Co.*, 35 *Ala.* 33.

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Where the directors are authorized by charter to vary the route and change the location of the road whenever a cheaper or better one can be had, a change which places the road upon a cheaper route, and procures a larger subscription of stock, and also furnishes a reasonable probability that the business and profits of the road will be thereby considerably augmented, does not exonerate subscribers from payment for their stock. *Fry* v. *Lexington & B. S. R. Co.*, 2 *Metc.* (*Ky.*) 314.

Where a company changes a terminus of its road from one county into an adjoining county, under Ohio Act of 1872 (69 Ohio L. 163), the mere fact that the route to the new terminus passes through a portion of a third county will not invalidate existing subscriptions to the capital stock. *Jewett* v. *Valley R. Co.*, 34 *Ohio St.* 601, 21 *Am. Ry. Rep.* 21.

Subscribers to stock are not released from their subscriptions by a change afterwards made in the line of the road, under Ohio Rev. St. § 3275, so as to pass through a county not named in its articles of incorporation. It is only when the road is diverted from a county named in the articles of incorporation that persons who subscribed to stock of the company on the line of that part of the road so changed are released from their subscriptions. *Armstrong* v. *Karshner*, 44 *Am. & Eng. R. Cas.* 238, 47 *Ohio St.* 276, 24 *N. E. Rep.* 897.

The charter of a company allowed it to select such route for its road between fixed points as a majority of the stockholders should deem most advisable, and provided that after the selection any stockholder who was dissatisfied with the route selected should have the right to withdraw, "provided such stockholder shall have designated at the time of subscribing the route which he desires to be selected." *Held:* (1) that such stockholders as had designated the route which they desired were entitled to vote upon the question of selection at a meeting for determining the route; (2) that a subscriber who had not designated the route he desired at the time of subscribing was not entitled to withdraw, and could not show by parol that he had instructed the agent who subscribed for him to designate the route he desired; (3) that the company was not bound to select the most practicable route; (4) that a slight change from the route first selected did not absolve a stockholder who had not designated the route he desired. *Greenville & C. R. Co.* v. *Coleman*, 5 *Rich.* (*So. Car.*) 118.—APPLIED IN North Eastern R. Co. *v.* Rodrigues, 10 Rich. (So. Car.) 278. DISTINGUISHED IN Pacific R. Co. *v.* Hughes, 22 Mo. 291.

Defendant authorized one of the commissioners who received subscriptions to subscribe for him. His name was entered by another commissioner who acted as clerk; but the entries were certified by all the commissioners, and defendant afterwards voted as a stockholder. *Held*, that he was liable as such. *Greenville & C. R. Co.* v. *Coleman*, 5 *Rich.* (*So. Car.*) 118.

126. When change of termini will release subscribers.—It is involved in the nature of a subscription to the stock of a company to construct a road from one place to another that the *termini* are part of the contract. So if the *termini* be changed by a subsequent act, subscriptions are no longer binding. *Manheim, P. & L. Plank Road Co.* v. *Arndt*, 31 *Pa. St.* 317.—DISTINGUISHED IN Cross *v.* Peach Bottom R. Co., 1 Am. & Eng. R. Cas. 366, 90 Pa. St. 392. FOLLOWED IN Caley *v.* Philadelphia & C. County R. Co., 80 Pa. St. 363.—*Witter* v. *Mississippi, O. & R. R. R. Co.*, 20 *Ark.* 463. *Thompson* v. *Guion*, 5 *Jones Eq.* (*N. Car.*) 113. *Marietta & C. R. Co.* v. *Elliott*, 10 *Ohio St.* 57.—REVIEWING Pearce *v.* Madison & I. R. Co., 21 How. (U. S.) 441. —*Kenosha, R. & R. I. R. Co.* v. *Marsh*, 17 *Wis.* 13.—QUOTED IN Attorney-General *v.* Chicago & N. W. R. Co., 35 Wis. 425.

And this is so although, when the subscription was made, the general law under which the first charter was obtained authorized amendments to be made to the charter, the route to be changed, and the capital stock to be increased. *Snook* v. *Georgia Imp. Co.*, 38 *Am. & Eng. R. Cas.* 492, 83 *Ga.* 61, 9 *S. E. Rep.* 1104.—APPROVING Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178.

In a suit to recover a subscription to a reorganized railroad, under a new charter, an affidavit of defense that the company had not built to the *termini* fixed by the original charter, which was made a part of the agreement of subscription, is *prima facie* a good defense on a motion for judgment for want of sufficient affidavit of defense. *Chartiers R. Co.* v. *Hodgens*, 77 *Pa. St.* 187; *but see* 85 *Pa. St.* 501.

If the change be a material and essential alteration of the original contract, it will

release a subscriber from his stock subscription, unless his assent to such alteration can be shown. *Winter* v. *Muscogee R. Co.*, 11 *Ga.* 438.—DISAPPROVED IN Pacific R. Co. *v.* Hughes, 22 Mo. 291. EXPLAINED IN Wilson *v.* Wills Valley R. Co., 33 Ga. 466. REVIEWED IN Southern Kan. & P. R. Co. *v.* Towner, 41 Kan. 72, 21 Pac. Rep. 221.—*Caley* v. *Philadelphia & C. County R. Co.*, 80 *Pa. St.* 363.—FOLLOWING Indiana & E. Turnpike Road Co. *v.* Phillips, 2 P. & W. (Pa.) 184; Manheim, P. & L. Turnpike Co. *v.* Arndt, 31 Pa. St. 317.—FOLLOWED IN Moore *v.* Hanover Junction & S. R. Co., 4 Am. & Eng. R. Cas. 256, 94 Pa. St. 324.

127. When change of termini is no defense. — A change in a terminus of a railroad, made by the legislature and assented to by the company, does not discharge non-assenting subscribers to stock from liability to pay their subscriptions, if the amount of such liability is not increased by the change. *Delaware R. Co.* v. *Thurp*, 1 *Houst.* (*Del.*) 149.

A subscriber to stock cannot avoid payment because the charter of the company has been so changed as to authorize it to purchase stock in other companies, even though the terminus of the road is thereby changed. *Terre Haute & A. R. Co.* v. *Earp*, 21 *Ill.* 291.—FOLLOWING Banet *v.* Alton & S. R. Co., 13 Ill. 504; Sprague *v.* Illinois River R. Co., 19 Ill. 174; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654; Rice *v.* Rock Island & A. R. Co., 21 Ill. 93.

In an action by a railroad corporation to recover upon a subscription to its stock, a change of the location and terminus of the road by the corporation, in violation of an agreement among the subscribers prior to organization and with intent to injure the subscriber, is not available as a defense, the corporation not being a party to such agreement. *White Hall & P. R. Co.* v. *Myers*, 16 *Abb. Pr. N. S.* (*N. Y.*) 34.

Articles of association stated that the road was to be built and operated from a designated point to the state line. The road was built from the starting point to a point within twelve miles of the state line, and the evidence simply showed that the road stopped at that point, but there was no finding that the remaining portion had been abandoned. *Held*, not sufficient to release a subscriber. *Buffalo & J. R. Co.* v. *Gifford*, 4 *Am. & Eng. R. Cas.* 387, 87 *N. Y.* 294; *affirming* 22 *Hun* 359.

A stockholder who seeks to avoid the payment of his subscription, on the ground that one of the *termini* of the road was materially changed from that designated in the charter, must show that the alteration was made without his concurrence or consent. *North Carolina R. Co.* v. *Leach*, 4 *Jones* (*N. Car.*) 340.—APPLYING Reg. *v.* York & N. M. R. Co., 16 Eng. L. & Eq. 299. FOLLOWING Greenville & C. R. Co. *v.* Coleman, 5 Rich. (So. Car.) 118. QUOTING Blakemore *v.* Glamorganshire Canal Nav. Co., 6 Eng. Cond. Ch. 544.

c. Consolidation. Sale. Lease.

128. Consolidation.—An amendment to a charter authorizing the consolidation of the road with any other intersecting road will not excuse a stockholder from paying his subscription. *Sprague* v. *Illinois River R. Co.*, 19 *Ill.* 174.—APPROVING Banet *v.* Alton & S. R. Co., 13 Ill. 504.—DISTINGUISHED IN Fulton County Sup'rs *v.* Mississippi & W. R. Co., 21 Ill. 338. FOLLOWED IN Terre Haute & A. R. Co. *v.* Earp, 21 Ill. 290.

A corporation was formed under a general law which authorized the amendment or repeal of the law at the discretion of the legislature, but did not authorize the consolidation of the company with other companies. After defendant had subscribed to the stock of the company it was consolidated with another under a statute authorizing it; but such consolidation was for purposes for which the company had been organized, and it did not work a fundamental change in its object. *Held*, that defendant was not discharged from his subscription. *Hanna* v. *Cincinnati & Ft. W. R. Co.*, 20 *Ind.* 30. —REVIEWED IN Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Subscriptions to the capital stock of railroad companies, made since the taking effect of Ind. Act of Feb. 23, 1853, authorizing the consolidation of such companies, will not be discharged or invalidated by the subsequent consolidation of the company in which they are made, but they will be held to have been made with reference to said law. *Bish* v. *Johnson*, 21 *Ind.* 299.—DISTINGUISHING McCray *v.* Junction R. Co., 9 Ind. 358; Booe *v.* Junction R. Co., 10 Ind. 93.

It does not defeat an action for an assessment upon subscriptions that pending it the

plaintiff consolidated with another company. The cause of action does not die, but passes to the new company; and this objection, if valid in any form, should be considered matter in abatement merely, and should have been pleaded *puis darrein. Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.—REVIEWING Hanna *v.* Cincinnati & Ft. W. R. Co., 20 Ind. 30.

In case of the consolidation of a Michigan company with an Indiana company, the objection is not open to a subscriber to the former company, when sued upon his subscription by the consolidated company, that it is not alleged or proved that the statutory amount per mile had been subscribed for the entire road, as well that in Indiana as that in Michigan, where it clearly appears that the requisite amount per mile of the road in Michigan had been subscribed; this requirement of the Michigan statute has exclusive reference to corporations created for the construction of roads within the state, and was not intended to have any extra-territorial operation. *Monroe* v. *Ft. Wayne, J. & S. R. Co.*, 28 *Mich.* 272, 12 *Am. Ry. Rep.* 273.

129. Sale.—A company which sells its road without authority to do so cannot collect from unwilling subscribers their unpaid subscriptions. A stockholder's *pro rata* ownership of the proceeds of such sale does not take the place of an interest in the railroad owned and worked by the corporation itself. *South Ga. & F. R. Co.* v. *Ayres*, 56 *Ga.* 230.

A promise to pay a certain sum to a railroad company when a certain amount of the work of construction is done, with an agreement on the part of the company to deliver to the party, upon the payment of the money, a certificate for a like amount of its capital stock, on demand, is a subscription to the stock of the road to assist in its construction, and not a purchase of stock. And if the company, without authority, attempts to sell and transfer its powers to another company, such attempt constitutes no defense against the payment of the subscription, being unlawful. *Ottawa, O. & F. R. V. R. Co.* v. *Black*, 79 *Ill.* 262.

Where a mortgage on a railroad is foreclosed, and the road sold after suit is commenced against a stockholder on his subscription, the fact of the sale constitutes no defense. *Buffalo & J. R. Co.* v. *Gifford*, 4 *Am. & Eng. R. Cas.* 387, 87 *N. Y.* 294; *affirming* 22 *Hun* 359.—DISTINGUISHING Lake Ontario Shore R. Co. *v.* Curtiss, 80 N. Y. 219.

A statute authorizing a company to sell the whole or any part of its road, in force at the time a subscription is made to its stock, becomes a part of the contract, and a sale thereafter made by the company of a part of its road, under authority of such statute, does not release the subscriber, except when and as provision is made therefor in the statute. *Armstrong* v. *Karshner*, 44 *Am. & Eng. R. Cas.* 238, 47 *Ohio St.* 276, 24 *N. E. Rep.* 897.—DISTINGUISHING Toledo & G. R. R. Co. *v.* Hinsdale, 45 Ohio St. 556.

130. Sale or lease.—A plea averred that a subscription to stock was to be paid when the road should be completed between certain points, and on payment the subscriber was to receive a certificate for a like amount of stock; and that the company had sold or leased the road. *Held*, that the plea was bad on demurrer. If the charter authorized the sale or lease, the party subscribing must have known that the power could be exercised; if there was no such power conferred, then the sale or lease was void, and on payment, and receipt of his certificate, he would hold his stock unimpaired, and there was not a failure of consideration. *Hays* v. *Ottawa, O. & F. R. V. R. Co.*, 61 *Ill.* 422, 12 *Am. Ry. Rep.* 454.

Where a company, by its charter, has power to lease its road, subscriptions to its capital stock will be regarded as having been made with reference to such power, and the exercise of it will not exonerate subscribers to the stock of the company from the payment of their subscriptions. *Ottawa, O. & F. R. V. R. Co.* v. *Black*, 79 *Ill.* 262.

A lease of a railroad which is unauthorized by law will not discharge a subscriber to its stock from his obligation to pay calls thereon. *Troy & R. R. Co.* v. *Kerr*, 17 *Barb.* (*N. Y.*) 581.

d. **Failure to Make Preliminary Payment.***

131. Such failure does not invalidate the subscription.—A charter provided that "upon the subscription for shares in said stock the subscribers shall pay the sum of five dollars upon each share sub-

* Payment of deposit as essential to validity of subscription to stock, see note, 81 AM. DEC. 397.

scribed for by such subscriber; provided, that said company may commence the construction of their railroad and boating so soon as three thousand shall be subscribed." *Held:* (1) that the payment of five dollars a share was not a condition precedent to either the existence of the corporation or its right to commence business; (2) that the neglect to pay the five dollars did not render the subscription void. *Mitchell* v. *Rome R. Co.*, 17 *Ga.* 574.—EXPLAINED IN Wood *v.* Coosa & C. R. R. Co., 32 Ga. 273.

Where a charter requires a certain sum to be paid at the time of subscribing, a failure to pay the requisite sum will not invalidate the subscription where the subscriber is a commissioner to receive money and procure the stock to be taken. *Ryder* v. *Alton & S. R. Co.*, 13 *Ill.* 516.

The omission of a subscriber to pay an instalment of five dollars on each share subscribed, as required by statute, does not invalidate the subscription. *Webb* v. *Baltimore & E. S. R. Co.*, 54 *Am. & Eng. R. Cas.* 202, 17 *Md.* 92, 26 *Atl. Rep.* 113.

Subscriptions to stock may be collected although the construction of the road has been commenced before twenty per cent. of each share subscribed has been paid in, contrary to the provisions of the charter. *Agricultural Branch R. Co.* v. *Winchester*, 13 *Allen* (*Mass.*) 29.

It is no defense to an action for an assessment upon subscriptions to stock, that stock has been awarded by the commissioners to persons whose names were not on the stock book, or to those who had not actually paid in the required five per cent. on subscribing; one who has received what he subscribed for cannot complain of an award to those who could not have compelled it. *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.

Pa. Act of April 4, 1868, authorizes the formation of railroad corporations by persons subscribing articles of association which are to be filed with the secretary of the commonwealth and become the charter of the company, but not until $9000 per mile have been subscribed and ten per cent. paid in good faith; no subscription to be taken without the payment of ten per cent. Defendant subscribed the articles for such corporation, but did not pay the ten per cent.; the articles were filed and the certificate of charter issued. *Held*, in a suit against him for his subscription after the certificate was issued, that he was liable, although he had not paid the ten per cent. *Garrett* v. *Dillsburg & M. R. Co.*, 78 *Pa. St.* 465.

A subscriber to stock cannot escape liability to pay his subscription on the ground that he did not pay the sum required by statute to be paid at the time of subscription. *Pittsburgh, W. & K. R. Co.* v. *Applegate*, 16 *Am. & Eng. R. Cas.* 440, 21 *W. Va.* 172. — DISTINGUISHING Union Turnpike Road *v.* Jenkins, 1 Cai. (N. Y.) 381; Highland Turnpike Co. *v.* M'Kean, 11 Johns. (N. Y.) 98; Hibernia Turnpike Co. *v.* Henderson, 8 S. & R. (Pa.) 219; Ogle *v.* Somerset & Mt. P. Turnpike Co., 13 S. & R. 256; Leighty *v.* Susquehanna & W. Turnpike Co., 14 S. & R. 434; McRae *v.* Russel, 12 Ired. (N. Car.) 224; Greenville & C. R. Co. *v.* Woodsides, 5 Rich. (So. Car.) 145; Vermont C. R. Co. *v.* Clayes, 21 Vt. 30; Maltby *v.* Northwestern Va. R. Co., 16 Md. 422; Starr *v.* Scott, 8 Conn. 483; Crocker *v.* Crane, 21 Wend. (N. Y.) 211; Napier *v.* Poe, 12 Ga. 170; Taggart *v.* Western Md. R. Co., 24 Md. 563.

132. Subscriber cannot take advantage of his own breach of duty. —A subscription to stock is not rendered invalid by a failure to pay a small sum on each share at the time of subscribing. If the statute makes it the duty of the subscriber to pay, he cannot take advantage of his own wrong in failing to discharge that duty. *Wight* v. *Shelby R. Co.*, 16 *B. Mon.* (*Ky.*) 4. *Vicksburg, S. & T. R. Co.* v. *McKean*, 12 *La. Ann.* 638.

133. Effect of payment subsequent or anterior to time of subscription. —Where an act of incorporation requires five per cent. upon stock to be paid at the time of subscription, if the subscriber does not then pay it, but a judgment is afterwards rendered against him therefor, which he satisfies, he cannot object, to a suit brought for other assessments, that he did not pay the five per cent. in cash when he subscribed. *Hall* v. *Selma & T. R. Co.*, 6 *Ala.* 741. *Klein* v. *Alton & S. R. Co.*, 13 *Ill.* 514.

The payment of one per cent. on the amount of subscriptions to stock, as required by the charter of the company, need not be contemporaneous with the act of subscribing; a payment upon a prior invalid subscription made anterior to that time is sufficient to make the contract valid. *Barrington* v. *Mississippi C. R. Co.*, 32

Miss. 370.—DISTINGUISHED IN Minneapolis & St. L. R. Co. *v.* Bassett, 20 Minn. 535 (Gil. 478).

A subscription to stock is not rendered invalid by a failure to pay ten per cent. thereof, as required by N. Y. General Railroad Act of 1850, ch. 140, § 4, especially where the subscriber subsequently ratifies the subscription by paying forty per cent. thereof. *Black River & U. R. Co.* v. *Clarke*, 25 *N. Y.* 208; *affirming* 31 *Barb.* 258.—DISTINGUISHED IN Minneapolis & St. L. R. Co. *v.* Bassett, 20 Minn. 535 (Gil. 478); Tasker *v.* Wallace, 6 Daly (N. Y.) 364. FOLLOWED IN New York & O. M. R. Co. *v.* Van Horn, 57 N. Y. 473. REFERRED TO IN Beach *v.* Smith, 30 N. Y. 116.

134. Effect of giving note—Waiver—Estoppel.* — Where a charter requires that a subscriber to stock shall pay five per cent. on the amount at the time of his subscription, but instead he gives his note therefor, participates in the organization of the company, becomes one of its directors, and pays his note, he cannot afterwards insist as a defense to an action to recover an instalment that he did not pay the five per cent. at the time of subscribing. *Selma & T. R. Co.* v. *Tipton*, 5 *Ala.* 787.

Pa. Act of Feb. 19, 1849, regulating railroads, provides that where subscriptions are made to stock previous to the issue of letters patent, no subscription shall be valid unless the party making the same shall at the time of subscribing pay five dollars on each share for the use of the company. *Held:* (1) that giving a note for a subscription is not a payment within the meaning of the law; (2) that such a subscriber, who has taken no other part in the affairs of the company, is not estopped from setting up the absence of such payment as a defense to an action of assumpsit for the subscription. *Boyd* v. *Peach Bottom R. Co.*, 90 *Pa. St.* 169.

The charter of a company provided that each stockholder should at the time of subscribing pay the first instalment in money. Defendant became a subscriber, and for the first instalment the commissioners took his promissory note payable to themselves, gave him a receipt as for money, reported him as having paid, and he acted by his proxy in organizing the company. The note was afterwards transferred by the commissioners to the company. *Held*, that, even conceding that the receipt of the note was not such a payment as the charter required, defendant, by acting as a stockholder in organizing the company, had waived the irregularity and could not refuse to pay the rest of the instalments called for. *Greenville & C. R. Co.* v. *Woodsides*, 5 *Rich.* (*So. Car.*) 145.

The fact that commissioners appointed to receive subscriptions did not exact five per cent. from a subscriber, as required, is no defense to one who has given his note for the stock. *Blair* v. *Rutherford*, 31 *Tex.* 465.

135. Payment in services to company. — Defendant subscribed for $500 of stock in a company, upon the understanding that the first ten per cent., required by law to be paid in cash, should be paid by services in procuring subscriptions and right of way. He subsequently presented an account against the company for services, from which it appeared that at the date of the subscription the company was indebted to him in an amount greater than the cash payment required, in which account he applied and credited fifty dollars for ten per cent. upon his subscription, and fifty dollars for the first call thereon. The account was allowed by the company, and the balance paid to defendant. *Held*, that this was a sufficient compliance with the statute, and made the subscription obligatory. *Beach* v. *Smith*, 30 *N. Y.* 116; *affirming* 28 *Barb.* 254.—REFERRING TO Black River & U. R. Co. *v.* Clarke, 25 N. Y. 208; Jenkins *v.* Union Turnpike Road, 1 Cai. Cas. (N. Y.) 86.—FOLLOWED IN New York & O. M. R. Co. *v.* Van Horn, 57 N. Y. 473.

136. Ratification of payment by stranger.—A subscriber for stock was informed that the percentage on his subscription required by the charter to be paid had been paid for him by another, and the subscriber made no objection, but promised, then, and on several subsequent occasions, to pay the instalments due on his stock. *Held*, that his conduct was a ratification of the payment made by such third person, and that the subscription was binding on him. *Mississippi & T. R. Co.* v. *Harris*, 36 *Miss.* 17.

137. Rule where subscription is subsequent to organization.—A charter provided that "upon every subscription there shall be paid at the time of subscribing the sum of one dollar on every share

* See also *post*, **215**.

subscribed." Books were opened by the commissioners, the requisite number of shares subscribed, a board of directors and president elected, and the company was fully organized. After organization defendant subscribed, in one of the subscription books, for ten shares, upon the terms and conditions prescribed therein and in the charter, with the further condition that the road should be built on the existing track of a branch road, but he did not pay the one dollar per share. *Held*, in an action to recover the amount of calls on the subscription, that the corporation, being organized, succeeded to the powers previously vested in the commissioners to sell and dispose of the remaining shares without regard to the conditions imposed on them; and that the act of the agent in taking the subscription, being recognized by the corporation by receiving and registering the subscription among the conditional subscriptions, was equivalent to a previous appointment of the agent for that purpose. *Taggart* v. *Western Md. R. Co.*, 24 *Md.* 563.

138. Such charter provision may be waived by the company.—A provision in a charter requiring five dollars to be paid on each share of stock at the time of the subscription is for the benefit of the company and may be waived by it, and it is no defense to a subscriber, sued on his subscription, that he never paid such five dollars. *Minneapolis & St. L. R. Co.* v. *Bassett*, 20 *Minn.* 535 (*Gil.* 478).—DISTINGUISHING Black River & U. R. Co. *v.* Clarke, 25 N. Y. 208; Charlotte & S. C. R. Co. *v.* Blakley, 3 Strobh. (So. Car.) 245; Barrington *v.* Mississippi C. R. Co., 32 Miss. 370. REVIEWED IN Spartanburg & A. R. Co. *v.* Ezell, 14 So. Car. 281.

139. Georgia rule.—Under a provision that no subscription to stock shall be received or allowed unless a certain sum be then paid, a subscription without such payment is absolutely void, and the company cannot recover instalments upon such stock. *Wood* v. *Coosa & C. R. R. Co.*, 32 *Ga.* 273.—APPLYING Hibernia Turnpike Road *v.* Henderson, 8 S. & R. (Pa.) 219. DISTINGUISHING Union Turnpike Road *v.* Jenkins, 1 Cai. (N. Y.) 381. EXPLAINING Napier *v.* Poe, 12 Ga. 182; Mitchell *v.* Rome R. Co., 17 Ga. 574.

140. New York rule.—Where a statute requires a stated amount to be subscribed for each mile of road to be built, and ten per cent. paid thereon in good faith, each subscriber is not required to pay ten per cent. on the amount of his subscription. If the amount is met, it does not affect the validity of defendant's subscription that he has not paid ten per cent. on his stock. *Ogdensburgh, R. & C. R. Co.* v. *Frost*, 21 *Barb.* (*N. Y.*) 541.—EXPLAINING Troy & R. R. Co. *v.* Kerr, 17 Barb. 601.

N. Y. General Railroad Act, § 4, requiring every subscriber to pay ten per cent. in cash, and forbidding the reception of any subscription without such payment, relates exclusively to filling up the stock by means of new subscriptions, after the articles have been filed and the company has assumed a corporate existence. *Ogdensburgh, R. & C. R. Co.* v. *Frost*, 21 *Barb.* (*N. Y.*) 541.

A check given for the ten per cent. required by statute, payment of which has been stopped and which remains uncollected, is not a payment "in cash," as required by the statute, and gives no interest in the stock, and the company cannot sustain an action for calls. *Excelsior Grain Binder Co.* v. *Stayner*, 58 *How. Pr.* (*N. Y.*) 273.—FOLLOWING Union Turnpike Road *v.* Jenkins, 1 Cai. (N. Y.) 381.

An actual payment is needful to make a complete contract, though not necessarily to be made at the time of the subscription. *Excelsior Grain Binder Co.* v. *Stayner*, 58 *How. Pr.* (*N. Y.*) 273.

A subscription to the capital stock of a corporation organized under N. Y. General Railroad Act of 1850, ch. 140, made after the formation of the corporation, is invalid where ten per cent. of the amount subscribed has not been paid (as required in section 4); and in an action by the corporation against a subscriber to recover the amount subscribed, the latter is not estopped from denying such payment because of a statement in the subscription paper that ten per cent. has been paid. A statute cannot be evaded by estoppel. *New York & O. M. R. Co.* v. *Van Horn*, 57 *N. Y.* 473. —FOLLOWING Black River & U. R. Co. *v.* Clarke, 25 N. Y. 208; Beach *v.* Smith, 30 N. Y. 116; Ogdensburgh, C. & R. R. Co. *v.* Wolley, 1 Keyes (N. Y.) 118.

It seems that such a subscription cannot be validated by a subsequent statute, as a statute thus attempting to make a binding contract between parties where none previously existed would be violative of the constitutional inhibition against depriving a

person of property without due process of law. (N. Y. Const. art. 1, § 6.) *New York & O. M. R. Co.* v. *Van Horn*, 57 *N. Y.* 473.—REFERRED TO IN People *v.* O'Brien, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173.

The provision of N. Y. Act of 1869, ch. 84, § 2, providing that no subscription to the stock of a certain company shall be invalidated or affected by reason of the non-payment of ten per cent. thereof at the time of subscription, does not apply to prior subscriptions, but operates prospectively only. *New York & O. M. R. Co.* v. *Van Horn*, 57 *N. Y.* 473.

141. English rule.—In an action for calls against one whose name is on the register of shareholders, the *prima facie* inference that he is a shareholder is rebutted by a letter from the company allotting him shares, but requiring him to make certain payments and execute certain agreements within a specified time or forfeit the shares allotted, and evidence that defendant has not done these acts. *Waterford, W., W. & D. R. Co.* v. *Pidcock*, 8 *Ex.* 279, 7 *Railw. Cas.* 439, 17 *Jur.* 26, 22 *L. J. Ex.* 146.

142. Canadian rule.—A company sued defendant as a shareholder, alleging that he held four shares, and had paid ten per cent. thereon, and was indebted to the company for unpaid calls on each of said shares. The statute (35 Vict. c. 53, § 7) enacts that no subscription of stock shall be valid unless ten per cent. shall be paid thereon within five days after subscription; and by 37 Vict. c. 57, § 1, all subscriptions of stock shall be valid on which ten per cent. shall have been actually and *bona fide* paid. *Held*, that a plea that after the passing of the act incorporating the company, 35 Vict. c. 53, O., and before 37 Vict. c. 57, O., amending it, defendant subscribed for said shares, but did not, within five days next thereafter, pay ten per cent. thereon, whereby the subscription became void, was bad, for the payment after the five days was sufficient. *Port Dover & L. H. R. Co.* v. *Grey*, 36 *U. C. Q. B.* 425.

c. Fraudulent Representations.*

143. False representations and fraud a good defense.—A subscription to stock procured by the fraud of the company's agent in soliciting subscriptions may be defeated on the plea of fraud, when the company attempts to enforce it by suit. *Montgomery Southern R. Co.* v. *Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 357, 54 *Am. Rep.* 60.—CRITICISING Henderson *v.* San Antonio & M. G. R. Co., 17 Tex. 560. DISTINGUISHING Caley *v.* Philadelphia & C. County R. Co., 80 Pa. St. 363; Kostenbader *v.* Peters, 80 Pa. St. 438; Lippincott *v.* Whitman, 83 Pa. St. 244. QUOTING Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92.—*Kent County R. Co.* v. *Wilson*, 5 *Houst.* (*Del.*) 49. *Taylor* v. *Fletcher*, 15 *Ind.* 80.—QUOTED IN Slipher *v.* Earhart, 83 Ind. 173.—*Davis* v. *Dumont*, 37 *Iowa* 47. *Nugent* v. *Cincinnati, H. & I. S. L. R. Co.*, 2 *Disney* (*Ohio*) 302. *Connecticut & P. R. R. Co.* v. *Baxter*, 32 *Vt.* 805. *Waldo* v. *Chicago, St. P. & F. du L. R. Co.*, 14 *Wis.* 575.

In consideration of subscriptions to its stock a company agreed to deposit collaterals to secure them. After defendant had paid certain instalments of his subscription, the company made such a disposition of the collaterals as to put them beyond the control of the subscribers. *Held*, that defendant was released from further liability and might, at his election, recover back the money advanced. *Reusens* v. *Mexican Nat. Constr. Co.*, 22 *Fed. Rep.* 522, 23 *Blatchf.* (*U. S.*) 19; *appeal dismissed in U. S. Sup. Ct. Feb.* 13, 1888.

If a subscriber to stock be induced to give his note therefor by representations of the president and other agents of the company that stock to the amount of only $3000 and bonds to the amount of only $12,000 per mile will be issued, and in fact, at the time these representations are made, stock to the amount of $12,000 and bonds to the amount of $15,000 per mile have been, or are agreed to be and afterwards are, issued, his subscription is not binding. *Weems* v. *Georgia Midland & G. R. Co.*, 84 *Ga.* 356, 11 *S. E. Rep.* 503.

If the representations are as to matters controlled by the charter, and as to which the subscriber is legally bound to know that the agent has no right to make representations inconsistent therewith, they will not avoid the subscription. As to matters not controlled by the charter, false and fraudulent representations which come within the limitations, and by which one has been entrapped into a subscription, will avoid the

* Subscriptions to capital stock obtained by fraud, see note, 81 AM. DEC. 401.

Fraud and mistake as affecting stockholders' liability for unpaid subscriptions, see note, 3 AM. ST. REP. 824.

contract, just as fraud vitiates contracts of every character. *Selma, M. & M. R. Co.* v. *Anderson*, 51 *Miss.* 829.

In a suit against a subscriber for stock under Pa. Act of April 4, 1868, defendant may give evidence that he signed a blank paper for the stock, under an arrangement with the agent obtaining his subscription that his signature should not be binding, nor "the heading," being the articles of association, be attached to the paper until it should be presented to him and approved, and that it never was presented to him nor approved by him. *Bucher* v. *Dillsburg & M. R. Co.*, 76 *Pa. St.* 306.

A subscription fraudulently obtained from a person, by which he is injured, is void, although the name of the subscriber is accepted and entered upon the stock book of the company, unless, by his failure to notify it in a reasonable time after the fraud was discovered, the company will be injured by its release. *Cunningham* v. *Edgefield & K. R. Co.*, 2 *Head* (*Tenn.*) 23.

144. Fraud must appear, and that defendant was misled thereby.—A plea averred that the inducement to subscribe for stock was to procure a competing line, and that the agent at the time represented that the road should remain a competing line, but when completed it was leased to the competing road. *Held*, that this plea was bad on demurrer, as it failed to aver that the agent falsely and fraudulently made the representations. *Hays* v. *Ottawa, O. & F. R. V. R. Co.*, 61 *Ill.* 422, 12 *Am. Ry. Rep.* 454.

Contemporaneous parol representations cannot be set up as a defense to an action on a contract of subscription to stock when it is not shown that they were omitted as conditions in a written contract by some fraud of the plaintiff, or by accident or mistake. *Jack* v. *Naber*, 15 *Iowa* 450.—FOLLOWING Gelpcke *v.* Blake, 15 Iowa 387.

Fraud in procuring subscriptions must be affirmatively shown and will not be presumed. *First Nat. Bank* v. *Hurford*, 29 *Iowa* 579.

A subscriber for stock cannot avoid his subscription upon the ground that the agent who procured it obtained, from an influential person in the neighborhood, whom he represented to be well acquainted with such matters, a colorable subscription for stock, with the secret understanding that he was not to be bound thereby, and presented said subscription to the subscriber and others as *bona fide*, to induce them to take stock, unless it also appears that he relied upon that fact, and was induced thereby to make the subscription. *Walker* v. *Mobile & O. R. Co.*, 34 *Miss.* 245.

A statement on the part of the agent of a corporation as to the pecuniary condition and prospect of his corporation will not avoid a subscription, unless the falsity and fraud of such representations are clearly shown, and unless it is manifest that the alleged condition of the enterprise constituted a material inducement to the subscription. *Selma, M. & M. R. Co.* v. *Anderson*, 51 *Miss.* 829.

To avoid a subscription upon the ground of false representation by an agent, it must be shown that the statement was not uttered as an opinion, but as an ascertained and existing fact. It must not only be false in fact, but must also either be known to be so by the party uttering it, or his position must be one that made it his duty to know the truth. The resisting subscriber must show that he acted upon such statement; that his own opinion was such as warranted him in so acting; and that the statement was as to a fact material to the question of his subscription. *Selma, M. & M. R. Co.* v. *Anderson*, 51 *Miss.* 829.

Proof that certain of the promoters of a railroad scheme guaranteed that the route would pass near to a certain tract of land, accompanied with proof of a deviation from such line, will not be sufficient to discharge a subscriber who had subscribed in reliance on such statement, there being no evidence tending to show any fraudulent intent. *Braddock* v. *Philadelphia, M. & M. R. Co.*, 16 *Am. & Eng. R. Cas.* 436, 45 *N. J. L.* 363.

If a party is induced to take stock by false representations which are not fraudulent and which form no part of the contract of subscription, he is not entitled to be relieved from the payment of his subscription. But if he acts upon such representations to his injury, he is entitled to relief, although they may have been innocently made. *Cunningham* v. *Edgefield & K. R. Co.*, 2 *Head* (*Tenn.*) 23.

145. Mere expressions of opinion.*—The mere expression of an opinion cannot be a fraudulent representation, unless

* Expressions as to matters of opinion do not constitute fraudulent representations, see note, 24 AM. & ENG. R. CAS. 17.

falsely made, with intent to deceive, and actually deceiving; nor can it constitute a fraud, vitiating a contract thereby procured, when it relates to a matter equally open to both parties. *Montgomery Southern R. Co.* v. *Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 357, 54 *Am. Rep.* 60. *Jefferson* v. *Hewitt*, 95 *Cal.* 535, 30 *Pac. Rep.* 772. *Evansville, I. & C. S. L. R. Co.* v. *Posey*, 12 *Ind.* 363. *Bish* v. *Bradford*, 17 *Ind.* 490. *Walker* v. *Mobile & O. R. Co.*, 34 *Miss.* 245. *Jackson* v. *Stockbridge*, 29 *Tex.* 394.—QUOTING Trower *v.* Newcome, 3 Meriv. 704; Juzan *v.* Toulmin, 9 Ala. 684.

Representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route of the road, as to its intended location, and the time within which it will be completed to a particular place, are but the mere expression of an opinion, and neither constitute a fraud, nor are available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive. *Montgomery Southern R. Co.* v. *Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 357, 54 *Am. Rep* 60. *Jefferson* v. *Hewitt*, 95 *Cal.* 535, 30 *Pac. Rep.* 772.

Although an action on the defendant's subscription for stock cannot be defeated on the ground of fraud, when the representations of the corporation's soliciting agent were merely the expression of an opinion as to the probable location and completion of the road, yet, if the agent further represented that the money subscribed would be refunded unless the road was so located and completed, and he was authorized to make these representations, the action will, it seems, be enjoined in equity, on proof of the insolvency of the corporation and its abandonment of the work before completion. *Montgomery Southern R. Co.* v. *Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 357, 54 *Am. Rep.* 60.

Stock subscribed must be paid for, notwithstanding the subscriber was induced to give a note therefor by misrepresentations of the agents of the company as to the amount of stock then subscribed and the time within which the road would be completed. *Goodrich* v. *Reynolds*, 31 *Ill.* 490.

False representations by a soliciting agent of a company that the persons undertaking to construct the road were able to complete it without any financial aid from the company are no defense to an action upon a subscription to its stock. *Andrews* v. *Ohio & M. R. Co.*, 14 *Ind.* 169.

The allegation that the stock solicitor fraudulently represented that a sufficient amount of solvent stock was subscribed to complete the road within two years, that the means of the company were ample, and that it could and would press said road to completion within that time, but that it failed to do so, constitutes no bar to a recovery on such subscription. *Brownlee* v. *Ohio, I. & I. R. Co.*, 18 *Ind.* 68.

While false statements, made by an authorized agent of a railroad corporation, in regard to the past or present status of the corporate enterprise, or of material matters connected therewith, whereby a subscription is obtained to its capital stock, may be fraudulent, and defeat a recovery thereon, representations concerning the future intention, purpose, or expectation of the corporation will not have that effect, especially when it is not shown that they were fraudulently made for the purpose of deceiving. *Armstrong* v. *Karshner*, 44 *Am. & Eng. R. Cas.* 238, 47 *Ohio St.* 276, 24 *N. E. Rep.* 897.

146. Public utterances of company's officials.—The opinion of one of the commissioners appointed to receive subscriptions for stock, that a subscriber might forfeit his stock by failing to pay an assessment thereon, can have no influence upon the liability of the latter, and in an action brought for the recovery of an assessment is irrelevant testimony. *Hall* v. *Selma & T. R. Co.*, 6 *Ala.* 741.

It is not competent for the defendant, in a suit by a company for assessments upon stock, to prove declarations made by the agent of the company in public speeches in order to obtain subscriptions, that the road would pass through a particular county, unless the substance of such declarations had been incorporated in the contract of subscription, and a compliance therewith by the company made a condition precedent to the payment of such assessment. *Mississippi, O. & R. R. R. Co.* v. *Cross*, 20 *Ark.* 443.

Parol declarations made by officers of a company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber who does not show that such declarations amounted to fraud on the part of the company, inducing error on his own part when he subscribed. *Vicks-*

burg, S. & T. R. Co. v. *McKean*, 12 *La. Ann.* 638.

Persons subscribing to the stock of a corporation must take notice of the law creating it and defining its powers, and if the directors, in order to secure stock subscriptions, propose to do that which they are prohibited by the statute from doing, no subscriber can be heard to insist that the same shall be done contrary to such statute. *Peters* v. *Lincoln & N. W. R. Co.*, 4 *McCrary* (*U. S.*) 269, 14 *Fed. Rep.* 319.

147. Unauthorized representations of agents. — Where defendant is sued upon notes given for stock, evidence is not admissible to prove that the parties who obtained the subscription represented that the road was to be of standard gauge, and was to be equipped by a strong existing company, both of which promises were violated, unless they were authorized to make the statements. *Bell* v. *Americus, P. & L. R. Co.*, 76 *Ga.* 754.

The promise of an agent of a company to a party subscribing for stock therein upon the faith of such promise, that the payment should be delayed a longer time than that expressed in the charter, is not binding on the company; for the written contract of subscription cannot be altered by a verbal promise, such promise being inconsistent with the charter, and void for want of power to make it. *Thigpen* v. *Mississippi C. R. Co.*, 32 *Miss.* 347.

148. Representations that may not be relied upon. — A party is presumed to know the contents of an instrument which he signs, and has, therefore, no right to rely upon the statements of the other party as to its legal effect. *New Albany & S. R. Co.* v. *Fields*, 10 *Ind.* 187. *Thornburgh* v. *Newcastle & D. R. Co.*, 14 *Ind.* 499.

Nor as to the ultimate value of the stock. *Vawter* v. *Ohio & M. R. Co.*, 14 *Ind.* 174.

Nor that the proposed road will be aided by another, since such representations involve the question of the corporate power of that other, even supposing that the agent had authority to make the representations, and that they were material. *Johnson* v. *Crawfordsville, F., K. & Ft. W. R. Co.*, 11 *Ind.* 280.

Representations that the company has stock enough to complete the road, and will do it in two years, are too vague to constitute a defense to a suit on notes given for an instalment of a subscription. *Hardy* v. *Merriweather*, 14 *Ind.* 203.

Where the directors of a company are authorized at their discretion to change the location of a road, and a true representation was made that the road was located through a certain locality, the fact of a subsequent change will not avoid a subscription though the first location was the inducement for making the subscription. *Ellison* v. *Mobile & O. R. Co.*, 36 *Miss.* 572.—DISTINGUISHING Hester *v.* Memphis & C. R. Co., 32 Miss. 378.

149. Representations not wilfully false.—A stockholder is bound by his subscription though he subscribed under the mistaken belief that he might forfeit his stock at his pleasure; and it makes no difference that he was assured by the person taking subscriptions that he had the right under the terms of the charter to forfeit, such assurance being founded on mistake and not being wilfully false. *North Eastern R. Co.* v. *Rodrigues*, 10 *Rich.* (*So. Car.*) 278. —APPLYING Greenville & C. R. Co. *v.* Smith, 6 Rich. 91.—REVIEWED IN Spartanburg & U. R. Co. *v.* DeGraffenreid, 12 Rich. 675.

150. Frauds practised on others no defense. — There are cases of fraud, and other unlawful acts, particularly acts of the same general character continuous in their nature, where it is permissible to prove other similar transactions occurring at or about the same time, as shedding some light on the particular transaction in controversy; but in an action against a subscriber for stock, who defends on the ground of fraudulent representations by the company's agent in procuring his subscription, he cannot be allowed to prove similar representations made by said agent to other subscribers in the same neighborhood. *Montgomery Southern R. Co.* v. *Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 357, 54 *Am. Rep.* 60.

A fraud practised by one of the commissioners upon his co-commissioners, and upon a portion of the subscribers in the distribution of the stock, cannot be set up by a subscriber to vitiate the proceedings of the commissioners. The subscriber *quoad* the proceedings is deemed a party to the adjudication; strangers may impeach a covinous judgment, but not parties. *Crocker* v. *Crane*, 21 *Wend.* (*N. Y.*) 211.—DISTINGUISHED IN Pittsburgh, W. & K. R. Co. *v.*

Applegate, 16 Am. & Eng. R. Cas. 440, 21 W. Va. 172.

151. Frauds by one subscriber upon others. — Where one having possession of an agreement to take shares in the capital stock of a corporation, after subscribing in good faith for shares of such stock, induces others to subscribe on the faith of his subscription, and subsequently, without the knowledge of the other subscribers, alters the paper by reducing the number of his shares, and delivers the instrument in that condition to the secretary, who is also a director of the company, this will not affect the liability of one thus induced to subscribe, although at the time of such delivery the person making the alteration explains the same to the secretary, who makes no objection thereto. *Jewett* v. *Valley R. Co.*, 34 *Ohio St.* 601, 21 *Am. Ry. Rep.* 21.

152. Effect of laches. — If a person desires to avoid a subscription to stock, on the ground of fraudulent representations made by the soliciting agent of the company, to induce him to subscribe, and he suffers an unreasonable period of time to elapse before he asserts his right to such relief (seven years in this case), he should show a sufficient excuse for his failure to act at an earlier date, or the legal presumption will be against his right to set up said defense at all. *Dynes* v. *Shaffer*, 19 *Ind.* 165.

f. Various Other Defenses.

153. Accord and satisfaction.— In an action upon a subscription paper by which defendant promised to pay a certain sum to A, B, and C, in trust, to be expended in constructing a railroad, defendant answered that when the instrument was executed it was agreed that if the railroad was located through the farm of defendant, he should have the choice of paying the $500 or giving the right of way to the corporation, and that he had given such right of way, which had been accepted by the company. *Held*, a good defense. It did not involve a violation of the rule which excludes parol evidence of an agreement made contemporaneously with a written contract. The matter set up was admissible as showing an accord and satisfaction, and also as showing that the power or authority given to the persons named was not coupled with an interest, and was therefore revocable by the parties signing it at any time before it was executed. *Evansville, T. H. & C. R. Co.* v. *Wright*, 38 *Ind.* 64, 10 *Am. Ry. Rep.* 255.

154. Advances made to company. —In a suit against a stockholder for his unpaid subscription to stock, he should be allowed credit for his subsequent advances to the corporation, even though not credited on his subscription account on the books of the company. *Nettles* v. *Marco*, 33 *So. Car.* 47, 11 *S. E. Rep.* 595.

155. Delivery of subscription in escrow.—It is not a valid defense to allege that a subscription paper was delivered as an escrow, to become effectual on condition when it was delivered to one of the commissioners appointed to receive subscriptions to a railroad. It should have been delivered to a third person to become effectual as an escrow. *Wight* v. *Shelby R. Co.*, 16 *B. Mon.* (*Ky.*) 4.

Defendant delivered his subscription to a director of the company, in escrow, to be delivered to the company only on condition that a certain county failed to vote a subscription to the company. *Held*, in the absence of proof that the county had failed to vote a subscription, that there was no delivery to the company, and no recovery could be had. *Ottawa, O. & F. R. V. R. Co.* v. *Hall*, 1 *Ill. App.* 612.—REVIEWING Price *v.* Pittsburg, Ft. W. & C. R. Co., 34 Ill. 36.

But the fact that such subscription was voted by the county, but was afterwards declared void by the courts, does not constitute such a failure as was contemplated. He did not contract upon the basis of the final validity of the county subscription. *Ottawa, O. & F. R. V. R. Co.* v. *Hall*, 1 *Ill. App.* 612.

In such case the corporation could acquire no right to the subscription until performance of the conditions under which it was delivered, no matter how it got possession thereof, unless there was a second delivery by consent of defendant. *Ottawa, O. & F. R. V. R. Co.* v. *Hall*, 1 *Ill. App.* 612.

If a special agent of a company to receive subscriptions to the capital stock has intrusted to him a subscription which is to be delivered only upon the location of the road in a certain position, and, in disregard of the non-performance of the condition, he delivers the subscription, the subscriber is not liable thereon. *Saginaw, T. & H. R. Co.* v. *Chappell*, 22 *Am. & Eng. R. Cas.* 16, 56 *Mich.* 190, 22 *N. W. Rep.* 278.

The inhabitants of a town appointed a committee to obtain subscriptions to a railroad which were to be delivered to the company only upon the performance of certain parol conditions. *Held*, that a member of the committee was not prevented from receiving the subscriptions in escrow, and a delivery to the company without the performance of the conditions would not bind the subscribers. *Beloit & M. R. Co.* v. *Palmer*, 19 *Wis.* 574.

Defendant subscribed to stock and gave his note in payment, secured by a mortgage, which the company negotiated, and suit was brought thereon by an assignee. The defense set up was that the note and mortgage were delivered in escrow, to be delivered to the company only upon the performance of certain conditions, but that it got possession of them without the consent of defendant, and without performing the conditions. But the evidence showed that defendant knew for about two years before suit that plaintiff owned the note, and made no objection, and after the lapse of said two years received a certificate of stock from the company without objection. *Held*, that he must be regarded as having assented to the delivery of the note and mortgage to the company, and to have waived the original conditions. *Truman* v. *McCollum*, 20 *Wis.* 360.

156. Estoppel to question corporate status.* — A subscriber to the capital stock of a railroad company, when sued for his subscription, cannot set up in defense any mere irregularity in the organization of the company, provided it is a corporation *de facto*, proceeding without interference of the state authorities in the construction, completion, and maintenance of its road. *Monroe v. Ft. Wayne, J. & S. R. Co.*, 28 *Mich.* 272, 12 *Am. Ry. Rep.* 273. —FOLLOWING Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.— *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.—FOLLOWED IN Monroe *v.* Ft. Wayne, J. & S. R. Co., 28 Mich. 272. — *Ohio & M. R. Co.* v. *McPherson*, 35 *Mo.* 13. *Cayuga Lake R. Co.* v. *Kyle*, 64 *N. Y.* 185; *affirming* 5 *T. & C.* 659.—FOLLOWING Buffalo & A. R. Co. *v.* Cary, 26 N. Y. 75.—*Montpelier & W. R. R. Co.* v. *Langdon*, 46 *Vt.* 284.

In an action upon a subscription to a railroad company which recognizes the corporation, the existence of the company cannot be disputed, and questions of the irregularity of its organization are immaterial. *Parker* v. *Northern C. M. R. Co.*, 33 *Mich.* 23. *Wood* v. *Coosa & C. R. R. Co.*, 32 *Ga.* 273. *Rice* v. *Rock Island & A. R. Co.*, 21 *Ill.* 93.—FOLLOWING Illinois River R. Co. *v.* Zimmer, 20 Ill. 654; Sprague *v.* Illinois River R. Co., 19 Ill. 174.—*Ohio & M. R. Co.* v. *McPherson*, 35 *Mo.* 13. *Buffalo & A. R. Co.* v. *Cary*, 26 *N. Y.* 75.—DISAPPROVING First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605.—FOLLOWED IN Cayuga Lake R. Co. *v.* Kyle, 64 N. Y. 185.

Payment of instalments on a subscription to its stock is a sufficient recognition of the legal existence and organization of a railroad, by the subscriber so paying, to enable it to recover the remaining instalments from him. *Malthy* v. *Northwestern Va. R. Co.*, 16 *Md.* 422.

157. Failure of consideration or non-performance by company.* — A subscriber for stock cannot defeat a recovery of his subscription on the ground that no certificate of stock has been tendered to him. *Slipher* v. *Earhart*, 83 *Ind.* 173.— QUOTING New Albany & S. R. Co. *v.* McCormick, 10 Ind. 499; Helm *v.* Swiggett, 12 Ind. 194.

Where a written proposition upon which subscriptions are based stipulates that eighty acres of land, suitable for passenger and freight depots, machine shops, engine and car houses, and side tracks, are to be furnished free of expense to the company, no time being fixed within which such erections are to be made, a failure on the part of the company, up to that time, to make the same will not support a plea of failure of consideration. *First Nat. Bank* v. *Hurford*, 29 *Iowa* 579.

If the stock which a company agrees to supply has a certain and known character, the company has no right to alter or change its character, and still expect it to be received in fulfilment of the contract, unless the change be within the contemplation of the parties. If the acts of the company, after the making of a contract, have so injuriously affected the stock as to destroy the benefits expected from it by the other

* Subscriber to stock is estopped from denying corporate existence, see notes, 81 AM. DEC. 402; 3 AM. ST. REP. 827.

* Release of liability on subscription by failure of company to comply with terms of contract, see note, 4 AM. & ENG. R. CAS. 261.

party, this is a defense. *James* v. *Cincinnati, H. & D. R. Co.*, 2 *Disney* (*Ohio*) 261.

158. Forfeiture of charter—Insolvency.—One who makes a valid subscription to capital stock, when not induced thereto by fraud on the part of the corporation or its officers, assumes the risk of its value, and he cannot defend by showing that the stock subscribed for was valueless. *Lynch* v. *Eastern, L. F. & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 652, 57 *Wis.* 430, 15 *N. W. Rep.* 743, 825.

It is no defense to a suit to recover a subscription to stock, to plead that the road has been seized by the governor. The charter is not forfeited, and the company may still collect its subscriptions. *Mullins* v. *North & S. R. Co.*, 54 *Ga.* 580.

The insolvency of the corporation is no ground for restraining the collection of subscriptions for stock. *Dill* v. *Wabash Valley R. Co.*, 21 *Ill.* 91.

Non-compliance with the provisions of a charter is not a matter of defense, collaterally, between corporations and their stockholders or debtors. *Taggart* v. *Western Md. R. Co.*, 24 *Md.* 563.—DISTINGUISHED IN Oler *v.* Baltimore & R. R. Co., 41 Md. 583; Pittsburgh, W. & K. R. Co. *v.* Applegate, 16 Am. & Eng. R. Cas. 440, 21 W. Va. 172.

Under the Missouri Illegal Banking Act of 1855, a stockholder, sued for his subscription, is not estopped to plead the violation of the act by the corporation, in bar of the suit. (Rev. Code 1855, ch. 14, §§ 4 and 9.) *North Mo. R. Co.* v. *Winkler*, 33 *Mo.* 354.

Any cause which may work a forfeiture of the charter of a company is not the subject of inquiry collaterally, and is not matter of defense to an action brought by the company upon a subscription to the capital stock. *Huntingdon & B. T. M. R. & C. Co.* v. *Decker*, 82 *Pa. St.* 119, 15 *Am. Ry. Rep.* 425.

159. Improper construction of road.—In the absence of any condition in a contract of subscription to stock that the road was to be broad or common gauge, a stockholder cannot defend an action for instalments upon the ground that he supposed the road was to be broad gauge and it had in fact been built narrow gauge. *May* v. *Memphis Branch R. Co.*, 48 *Ga.* 109, 11 *Am. Ry. Rep.* 395.—DISTINGUISHED IN Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240.

160. Increase of capital stock.—One who has been allotted a certain number of shares in a company, and who has not been notified nor received knowledge that the par value of the shares has been doubled by resolution of the directors, is liable only on his contract with the company for the shares at their original value. *In re European C. R. Co., L. R.* 8 *Eq.* 438.

Where the amount of stock is fixed by charter, but with a proviso that additional stock may be issued when the president and directors shall direct, the facts that the whole amount of original stock has been issued, and that the issue of additional stock has not been directed by the officers of the company, are a good defense to an action on a subscription. *McCord* v. *Ohio & M. R. Co.*, 13 *Ind.* 220.—DISTINGUISHED IN Oler *v.* Baltimore & R. R. Co., 41 Md. 583. FOLLOWED IN Ewing *v.* Ohio & M. R. Co., 23 Ind. 438.

But an allegation setting up the overissue as fraudulent is not sufficient, if the fraud be charged in general terms. The particular fraud should be alleged, or the facts constituting it. *McCord* v. *Ohio & M. R. Co.*, 13 *Ind.* 220.

In an action by a corporation to recover a subscription to its stock, the fact of its having taken subscriptions in addition to its authorized stock does not of itself bar its right to recover. If it has retained a sufficient amount of its authorized stock, which it is ready and able to issue to the subscriber to such stock when he performs his part of the contract, it may recover against him. But there can be no recovery against a subscriber to the additional unauthorized stock. *Oler* v. *Baltimore & R. R. Co.*, 41 *Md.* 583, 7 *Am. Ry. Rep.* 495.—DISTINGUISHING McCord *v.* Ohio & M. R. Co., 13 Ind. 221; Taggart *v.* Western Md. R. Co., 24 Md. 583.

A subscriber is not released from his subscription by reason of an increase of the capital and the construction of a branch road in pursuance of an act of the legislature amendatory of the original act of incorporation. *Schenectady & S. Plank-road Co.* v. *Thatcher*, 11 *N. Y.* 102.—DISAPPROVED IN Peoria & R. I. R. Co. *v.* Preston, 35 Iowa 115. DISTINGUISHED IN Erie & N. Y. C. R. Co. *v.* Owen, 32 Barb. (N. Y.) 616. EXPLAINED IN Carlisle *v.* Terre Haute & R. R. Co., 6 Ind. 316. FOLLOWED IN Buffalo & N. Y. C. R. Co. *v.* Dudley, 14 N. Y.

336. NOT FOLLOWED IN Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178. REVIEWED IN Beattys *v.* Solon, 45 N. Y. S. R. 899.

In an action upon a subscription to stock which, after its execution, has been materially altered without the knowledge or consent of the maker, to recover the amount appearing to be due on each altered subscription, and the execution of the contract, as set out, is denied, plaintiff cannot recover the amount due on the original subscription without showing that the alteration was not fraudulently made. *Bery* v. *Marietta, P. & C. R. Co.*, 26 *Ohio St.* 673, 11 *Am. Ry. Rep.* 259.

161. Infancy. — Where an infant is sued for calls on railway shares it is a good *prima facie* defense that while he was an infant he repudiated the contract and subscription. *Newry & E. R. Co.* v. *Coombe*, 3 *Ex.* 565, 5 *Railw. Cas.* 633, 18 *L. J. Ex.* 325.

But his plea of infancy is bad if he does not show that he was a shareholder by contract, and had avoided it. *Leeds & T. R. Co.* v. *Fearnley*, 5 *Railw. Cas.* 644, 7 *D. & L.* 68, 4 *Ex.* 26, 18 *L. J. Ex.* 330.

By the express wording of 8 & 9 Vict., c. 16, an infant is capable of becoming a shareholder; and he is liable at all events for calls on shares registered in his name, if he is sued after attaining his majority and still holds the shares, such holding constituting a ratification. *Cork & B. R. Co.* v. *Cassenove*, 10 *Q. B.* 935, 11 *Jur.* 802. *Birkenhead, L. & C. J. R. Co.* v. *Pilcher*, 6 *Railw. Cas.* 564, 5 *Ex.* 121, 14 *Jur.* 297, 19 *L. J. Ex.* 207.

And he must repudiate the contract within a reasonable time after becoming of age. *Dublin & W. R. Co.* v. *Black*, 8 *Ex.* 181, 7 *Railw. Cas.* 434, 22 *L. J. Ex.* 94.

The plea of infancy is proved if it is shown that he became the purchaser of the shares while he was an infant, although the call was made when he attained full age. *Birkenhead, L. & C. J. R. Co.* v. *Pilcher*, 6 *Railw. Cas.* 564, 5 *Ex.* 121, 14 *Jur.* 297, 19 *L. J. Ex.* 207.

Where a person obtains shares in a company by original agreement with the company, and his name is entered in the register, it is no answer, in an action under 8 & 9 Vict. c. 16, § 26, for calls on such shares, to plead that he was an infant at the time of the agreement and of entering his name and of making the calls, and that he never ratified the purchase, and that the bargain was a disadvantageous one. *North-Western R. Co.* v. *M'Michael*, 6 *Railw. Cas.* 618, 5 *Ex.* 114, 15 *Jur.* 132, 20 *L. J. Ex.* 97.

An infant shareholder is not, under the Companies Clauses Consolidation Act, 1845, absolutely bound, but may waive the purchase, and thereby his liability to calls is at an end. *North-Western R. Co.* v. *M'Michael*, 6 *Railw. Cas.* 618, 5 *Ex.* 114, 15 *Jur.* 132, 20 *L. J. Ex.* 97.

162. Insufficiency of preliminary subscriptions.—It cannot be pleaded to a complaint upon a subscription of stock that at the time it was made there was no such corporation, because the defendant is estopped by his contract to deny the corporation, and because, under the general railroad law, subscriptions of a certain amount of stock are necessary for the organization of a contemplated corporation, and for that reason and purpose are valid before such organization, and may be collected afterwards. *Anderson* v. *Newcastle & R. R. Co.*, 12 *Ind.* 376. — FOLLOWED IN Emery *v.* Evansville, I. & C. S. L. R. Co., 13 Ind. 143.

In an action upon a promissory note given as a voluntary contribution in aid of a proposed railroad, it is no valid defense that the municipal and individual aid and stock subscriptions to the road do not amount to $6000 per mile; the proviso of the statute (Mich. Comp. L. 1871, § 2298) in this regard is to be considered merely as a qualification of the right to levy and collect assessments upon the stock subscribed. *Wright* v. *Irwin*, 35 *Mich.* 347.

Although a company organizing under the statute may have failed to have subscribed the requisite amount to its capital stock previous to the filing of its articles of association, this will not avail a subscriber to the stock as a defense, especially when it does not appear that such subscription was made previous to making the assessment against him. The state may complain of the want of such subscription, but the subscriber to stock cannot. *Sedalia, W. & S. R. Co.* v. *Abell*, 17 *Mo. App.* 645.

Under Oreg. Code, a subscription for one half of the capital stock is a condition precedent to organization and a right of the company to call upon subscribers for payments of stock; and where a company organizes before the required amount of stock is subscribed, a subscriber, when called upon

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for payments, may insist that such conditions be complied with, and is not estopped on the ground that the corporation has a *de facto* existence. *Fairview R. Co.* v. *Spillman*, 23 *Oreg.* 587, 32 *Pac. Rep.* 688.

163. Mismanagement — Improper use of money subscribed. — In a suit by a railroad, or other corporation, against a subscriber for assessments upon his stock, he is not permitted to show, by way of defense to the action, that the corporation has, by misuser or nonuser, violated or failed to comply with the provisions of its charter. *Mississippi, O. & R. R. R. Co.* v. *Cross*, 20 *Ark.* 443. — FOLLOWING Central Plankroad Co. *v.* Clemens, 16 Mo. 359.

A company cannot be enjoined from collecting instalments on subscriptions for stock because the money may be expended in extending the road beyond the county in which the stockholders reside, unless the contract of subscription expressly stipulated that the money should be expended in such county. *Dill* v. *Wabash Valley R. Co.*, 21 *Ill.* 91.

If there was any such condition in the subscription it should be clearly and positively stated in the bill to enjoin payment. A verbal agreement or understanding to that effect would constitute no defense. *Dill v. Wabash Valley R. Co.*, 21 *Ill.* 91.

The fact that the affairs of a corporation are unwisely managed, or its contracts not authorized by the articles of incorporation, will not relieve a stockholder from liability to pay his subscription for stock. *Merrill* v. *Reaver*, 50 *Iowa* 404.

164. Mistake.—A subscriber to stock of a company, chartered, but waiting for subscriptions in order to organize under its charter, can have no relief in a court of equity on the ground that when intending merely to renew an old subscription to the stock, which had fallen through, he, by some unaccountable mistake, subscribed for double the amount; such subscriber ascertaining his mistake immediately after his subscription, and suffering the company to organize and act upon the faith of his subscription, during several months, without notice of his alleged mistake. *Diman* v. *Providence, W. & B. R. Co.*, 5 *R. I.* 130.

A subscription to the stock of a company is valid though made to one who was not a commissioner to receive subscriptions, but who went about in the interest of the road soliciting subscriptions in order to secure a charter; and the subscription is binding though made by a subscriber under the mistaken belief that he could forfeit it at pleasure. *North Eastern R. Co.* v. *Rodrigues*, 10 *Rich.* (*So. Car.*) 278.

165. Objections to the organization. — Where a statute does not *per se* confer corporate powers, but contemplates some act to be done by the company, as the election of officers, etc., such required act must be done to entitle the company to maintain an action against a subscriber for stock, the subscription being made prior to the organization which the charter provided for. *Carlisle* v. *Cahawba & M. R. Co.*, 4 *Ala.* 70.

Where the act creating a corporation provides that its members, or they who may become such, shall organize before their corporate existence is complete, in an action to recover the price of stock subscribed for previous to their organization, defendant by an appropriate plea may throw upon plaintiff the burden of showing a compliance with the requirements of the charter. *Selma & T. R. Co.* v. *Tipton*, 5 *Ala.* 787.

That the corporation was not organized until after defendant had subscribed is not a sufficient reason for refusing to pay instalments. *Danbury & N. R. Co.* v. *Wilson*, 22 *Conn.* 435.

Illegality in the election of directors is no defense to an action on a stock subscription. *Johnson* v. *Crawfordsville, F., K. & Ft. W. R. Co.*, 11 *Ind.* 280.

The law providing for the organization of railroad companies, and for receiving subscriptions to the stock thereof, enters into, forms part of, and determines the effect of subscriptions, as fully as if it were written out and formed in terms a part of the contract of subscription. *Hoagland* v. *Cincinnati & Ft. W. R. Co.*, 18 *Ind.* 452.—QUOTED IN Sedalia, W. & S. R. Co. *v.* Abell, 17 Mo. App. 645.

As a general rule, strict compliance with its charter as to organization must be shown by a company seeking to enforce payment of subscriptions to its stock, but in some cases compliance will be presumed and in others it may be waived. *Maltby* v. *Northwestern Va. R. Co.*, 16 *Md.* 422.—DISTINGUISHED IN Pittsburgh, W. & K. R. Co. *v.* Applegate, 16 Am. & Eng. R. Cas. 440, 21 W. Va. 172.

In order to hold subscribers to an undertaking for a railway, the scheme subscribed

for and that for which the act of parliament is obtained must be identical. *Midland G. W. R. Co.* v. *Gordon*, 5 *Railw. Cas.* 76, 16 *M. & W.* 804, 11 *Jur.* 440, 16 *L. J. Ex.* 165.

166. Reduction of capital stock. —A subscriber to shares in a corporation contracts with reference to the charter; and the number of shares to be subscribed, or the whole capital stock necessary to do the contemplated business, constitutes an important element in the contract. For the corporation to release subscriptions so as to reduce the capital largely and materially may operate as a release of other subscribers. A mere nominal subscription, to fulfil the letter and break the spirit of the contract, is no substantial compliance with the charter, and when released because it was nominal it becomes equivalent to no subscription *ab initio*. *Memphis Branch R. Co.* v. *Sullivan*, 57 *Ga.* 240.

After defendant had subscribed to stock, but before the minimum number of shares required had been taken, the charter was amended, reducing the number of shares. *Held*, that defendant might refuse to pay assessments on his shares. *Oldtown & L. R. Co.* v. *Veazie*, 39 *Me.* 571.—RECONCILING South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547. — REVIEWED IN Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N. J. Eq. 178.

If a statute fixing the amount of the capital stock of a company is amended by another statute providing that the capital required to build the railroad shall be a less sum, taking subscriptions to an amount larger than the capital allowed by the last statute, but less than the capital fixed by the first statute, will not render the subscriptions invalid. *Agricultural Branch R. Co.* v. *Winchester*, 13 *Allen* (*Mass.*) 29.

167. Release.*—A contract made by a corporation or its directors releasing a stockholder from his subscription to stock, if made in good faith, is valid and binding, with or without the consent of the other creditors and stockholders. *Gelpcke* v. *Blake*, 19 *Iowa* 263.

An arrangement between the officers of a company and a portion of its subscribers that if the town in which they reside votes a certain amount of municipal aid, such subscribers, upon paying a certain percentage of their subscription, shall be released from the balance, being one in effect to release a portion of the subscriptions without authority of law, is void. *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.

Where a subscriber to stock who has been released from the obligation of his subscription subsequently votes at an annual election for directors, is himself elected a director, acts as director and as stockholder, and pays money to the company, his acts are evidence of a subscription of some kind, and, in the absence of proof of a special contract, warrant the inference that he has reassumed his original obligation. But they are shorn of their importance where a special contract accounting for them is shown. *Pittsburgh & C. R. Co.* v. *Stewart*, 41 *Pa. St.* 54.

Even if the original subscription had not been released, a new contract between the company and the subscriber, authorizing him to pay in materials at a future time instead of in cash on call, would supersede the original contract. *Pittsburgh & C. R. Co.* v. *Stewart*, 41 *Pa. St.* 54.

Though a contract of subscription can be released only by the stockholders, or by the board of directors duly authorized to do so by the stockholders, yet such release may be proved, not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as binding upon it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof. *Stuart* v. *Valley R. Co.*, 32 *Gratt.* (*Va.*) 146.

168. Secret agreement with company in fraud of other subscribers. —Though a conditional subscription may be admitted, yet private arrangements, not expressed in the subscription, between an agent of a company and a subscriber, by which the latter is to have peculiar privileges not extended to other subscribers, or by which his subscription is not to be collected—being made to induce others to subscribe—are regarded as fraudulent on other subscribers, and are no defense to a suit for the amount subscribed. *New Albany & S. R. Co.* v. *Fields*, 10 *Ind.* 187.—FOLLOWED IN New Albany & S. R. Co. *v.* Slaughter, 10 Ind. 218.

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* Release from subscriptions, see note, 12 AM. & ENG. R. CAS. 678.

Withdrawal or release of subscribers to capital stock, see notes, 81 AM. DEC. 399; 3 AM. ST. REP. 821.

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A secret agreement entered into between the directors of a corporation and a subscriber for shares in its capital stock that he may, within a specified time, reduce the number of shares thus subscribed for, the subscription being held out as *bona fide* for the full amount in order to induce others to subscribe, is void as a fraud on the other subscribers; and the original subscription may be enforced for its full amount between the corporation and the subscriber. *White Mountains* [illegible] v. *Eastman*, 34 *N. H.* 124.

A subscriber who is sued for the amount of his subscription cannot set up as a defense that his subscription was a feigned and fraudulent one, and that the company was a party to the fraud. *Graff* v. *Pittsburgh & S. R. Co.*, 31 *Pa. St.* 489.

A subscription to joint stock is not only an undertaking to the company, but with all other subscribers, and, even if fraudulent as between the parties, is to be enforced for the benefit of the others in interest. *Graff* v. *Pittsburgh & S. R. Co.*, 31 *Pa. St.* 489.

It is no defense to an action to recover the amount of a subscription to stock that the subscription was made at the request of the president of the company, with the understanding that defendant was not to pay for or hold the stock subscribed, and that the same was to be canceled. Such an agreement would be a fraud on the company and on all subsequent subscribers; and while defendant might reap no advantage from it, he would be held to all the responsibilities of a *bona fide* subscriber. *Robinson* v. *Pittsburgh & C. R. Co.*, 32 *Pa. St.* 334.—FOLLOWING Graff *v.* Pittsburgh & S. R. Co., 31 Pa. St. 489.

A subscription to joint stock is not only an undertaking with the company but with all other subscribers, and a subscriber cannot be permitted to set up a secret parol arrangement with the agents of the company by which he may be released from his subscription while his fellow-subscribers continue to be bound. *Miller* v. *Hanover Junction & S. R. Co.*, 87 *Pa. St.* 95.—DISTINGUISHED IN Moore *v.* Hanover Junction & S. R. Co., 4 Am. & Eng. R. Cas. 256, 94 Pa. St. 324.

A secret agreement that a subscription should never be collected, or that it might be discharged in something of less value, is a fraud upon the other stockholders, and payment of the amount subscribed will be enforced without regard to such agreement. *Downie* v. *White*, 12 *Wis.* 176.—FOLLOWED IN Racine County Bank *v.* Ayres, 12 Wis. 512.

A person who has acted in collusion with the directors of a company to defraud it by securing the issue of shares at a discount cannot be heard to set up this fraud for the purpose of making invalid an agreement, valid on its face, whereby he agrees to take and pay for a certain number of shares. *Odessa Tramways Co.* v. *Mendel*, *L. R.* 8 *Ch. D.* 235, 47 *L. J. Ch.* 505, 26 *W. R.* 887, 38 *L. T.* 731; *affirming* 37 *L. T.* 275.

A shareholder is not relieved of his *prima facie* liability to pay for calls, whether a stipulation with the company to return five pounds per share in debentures was or was not illegal by virtue of 7 & 8 Vict. c. 85, § 19, or invalidated by reason of its being beyond the competency of a meeting of the proprietors to adopt. *West Cornwall R. Co.* v. *Mowatt*, 15 *Q. B.* 521, 15 *Jur.* 101, 19 *L. J. Q. B.* 478.

169. Set-off. — A party subscribing to stock executed his note, secured by mortgage, for his subscription; the company guaranteed that his dividends should pay the interest on the note, and that in consideration of the transfer of those dividends the company would pay the interest on the same and indemnify the maker against the payment of interest and principal, but there were no dividends, and the stock was worthless at the maturity of the note. *Held*, that as against the company, on bill to foreclose, the facts could be set up as a defense on the ground of recoupment or equitable set-off, and that the same rule applied to a purchaser of the note and mortgage before maturity. *Haskell* v. *Brown*, 65 *Ill.* 29.

A stockholder in the Clinton & Port Hudson railroad company who holds the bonds and coupons belonging to the series for which his mortgage is pledged may plead the same in compensation of his stock subscription. *Haynes* v. *Kent*, 8 *La. Ann.* 132.

A company with a completed railroad and doing business, but actually insolvent, assigned to D. in payment of a debt an agreement by C. to pay to S. $500 on his subscribing $1000 to the stock of the road, payable on its completion, which agreement had been accepted by S. and the subscription made. When notified of the assignment S. owned $250 in scrip issued by the road, and afterwards he bought more. D. sued on the agreement and averred that S. had refused

to sue C. for the $500, but did not aver that it could have been collected by suit. *Held*, that the assignment was valid; that S. was not bound to sue for the $500 unless it was collectible, and that S. had a right to set off the $250 of scrip, but if his liability in his subscription had matured, he could not set off against D. scrip bought after notice of the assignment. *Dungan* v. *Safford*, 41 *Ohio St.* 15.

170. Statute of limitations.—Each call upon a stock subscriber, lawfully made, creates a distinct cause of action against the stockholder, and a refusal to pay one call does not set the statute of limitations running against the portion of stock remaining uncalled for. *Dorsheimer* v. *Glenn*, 51 *Fed. Rep.* 404, 4 *U. S. App.* 500, 2 *C. C. A.* 309. *Kent County R. Co.* v. *Wilson*, 5 *Houst.* (*Del.*) 49.

It is a settled rule that a stockholder is not liable to suit for the unpaid portions of stock held by him until an authorized call or assessment has been made upon the stock; and this rule applies to assignments of stock, and the limitation begins to run not from the date of the assignment, but from the maturity of the assessment. *Priest* v. *Glenn*, 51 *Fed. Rep.* 400, 4 *U. S. App.* 478, 2 *C. C. A.* 305.

Instalments of subscriptions of stockholders, fixed and required to be paid in by resolutions of the board of directors, cannot be regarded as open accounts, and prescribed against as such. Such instalments may be considered as at least equal to accounts stated. *New Orleans, J. & G. N. R. Co.* v. *Lea*, 12 *La. Ann.* 388.

Subscriptions to stock were made on April 28, 1853, conditional upon the adoption by the company of a particular route. This route was adopted on March 31, 1857. No calls were made for the payment of subscriptions until June 25 following. *Held*, that the statute of limitations did not begin to run until the several calls were due. *Taggert* v. *Western Md. R. Co.*, 24 *Md.* 563.

Where a corporation sues a subscriber for different calls on his stock, and he interposes a plea of the statute of limitations, which is sustained as to part of the calls and judgment is rendered against him for the remainder, payment of the judgment does not establish the fact that he has paid his whole subscription, and he is not entitled to a certificate for the whole amount of stock subscribed for. *Johnson* v. *Albany & S. R. Co.*, 54 *N. Y.* 416; *affirming* 5 *Lans.* 222, *which reverses* 40 *How. Pr.* 193.

In Pennsylvania a lapse of six years is a bar to an action for a subscription, unless the delay be satisfactorily accounted for. *McCully* v. *Pittsburgh & C. R. Co.*, 32 *Pa. St.* 25.—FOLLOWED IN Pittsburg & C. R. Co. *v.* Graham, 36 Pa. St. 77; Pittsburgh & C. R. Co. *v.* Graham, 2 Grant's Cas. (Pa.) 259.

The statutory penalty of one per cent. a month on unpaid instalments, given by Pa. Act of Feb. 19, 1849, § 8, is recoverable from the time of the respective calls, until judgment; it does not cease at the institution of the suit. There is no limitation of time prescribed by that act, within which such statutory penalty must be sued for. *Bavington* v. *Pittsburgh & S. R. Co.*, 34 *Pa. St.* 358.

A person subscribed for stock on June 16, 1847, "provided that the construction of said road is prosecuted," but retained his subscription in his own hands until 1854, when the book containing it, with other subscriptions obtained by him as agent, was delivered to the company. *Held*, that the contract did not take effect, nor did the statute of limitations begin to run, until the delivery of the book. *Pittsburgh & C. R. Co.* v. *Plummer*, 37 *Pa. St.* 413.

171. Uncertainty or irregularity in subscription.—Where the charter of a company appoints commissioners and directs books of subscription to be opened at certain places, but also directs that upon default of payment by stockholders their stock shall be sold, and books opened to supply the deficiency, a subscriber under this latter provision cannot object to pay for his stock because he subscribed for the same at a place where the books were not required to be originally opened. *Hall* v. *Selma & T. R. Co.*, 6 *Ala.* 741.

A subscriber to stock when sued defended on the ground of an uncertainty in the subscription in that it did not appear whether the whole of the subscription was to be expended on one section of the road, or, if divided, how much was to be applied to each section. *Held*, that the uncertainty related to an immaterial matter, and was not a defense. *Agricultural Branch R. Co.* v. *Winchester*, 13 *Allen* (*Mass.*) 29.

172. Unfair settlement with other stockholders. — In an action against a stockholder for his subscription, he cannot object that the directors of the company had released other stockholders; if the re-

lease was under a power it would be valid, if otherwise merely void. *Hall* v. *Selma &* T. R. Co., 6 *Ala.* 741. *Macon &* A. R. Co. v. *Vason*, 57 *Ga.* 314. *New Albany &* S. R. Co. v. *Slaughter*, 10 *Ind.* 218.—FOLLOWING New Albany & S. R. Co. *v.* Fields, 10 Ind. 187.—*Anderson* v. *Newcastle &* R. R. Co., 12 *Ind.* 376. *Armstrong* v. *Danahy*, 75 *Hun* 405, 27 *N. Y. Supp.* 60, 56 *N. Y. S. R.* 743.

On a proper case made, with proper parties, by bill in equity, a stockholder sued for his subscription may compel an equitable adjustment between himself and the other stockholders, by which all the stockholders shall be made to pay equally for their respective shares of stock; but the fact that others were allowed to pay their entire stock in depreciated currency will not absolutely discharge him, especially when the same privilege was accorded to him, and he was urged to avail himself of it. *Macon &* A. R. Co. v. *Vason*, 57 *Ga.* 314.

Allowing a stockholder during the civil war to pay up his entire subscription in depreciated Confederate currency before regular calls were made is illegal; but such act, being *ultra vires* on the part of the directors, will not discharge other stockholders from paying on proper calls. *Macon &* A. R. Co. v. *Vason*, 57 *Ga.* 314.

173. Various unavailable defenses.—Defendant was sued for calls on stock, and defended that after his subscription, and without his knowledge or consent, a certain city was permitted to subscribe for a certain number of shares, and that certain individuals in New York were permitted to subscribe for a large number of shares upon the express understanding that they should have the proxy of the city, which would give to such New York subscribers the control of the road. *Held*, no defense, as both the city and people residing in New York had a right to become stockholders, and the city had a right to give its proxy to whom it might please. *Ryder* v. *Alton &* S. R. Co., 13 *Ill.* 516.

A corporation may make consistent by-laws regulating stock and the manner of voting it; and it is no defense to an action to recover a subscription that a by-law was adopted requiring payment of the first instalment before the stockholder was entitled to vote. *Chandler* v. *Northern Cross R. Co.*, 18 *Ill.* 190.

Where an unconditional subscription is made it is no defense that the road has not been completed and may never be, nor that a certificate of stock has not been tendered the subscriber. *Smith* v. *Gower*, 2 *Duv.* (*Ky.*) 17.

It is not fatal to the validity of a contract of subscription for stock that the person who procured it was at the time duly authorized to do so by the company. It will be sufficient to make it binding on both parties if the company, in a reasonable time thereafter, ratifies the act of its pretended agent. *Walker* v. *Mobile &* O. R. Co., 34 *Miss.* 245.

The mere fact that articles of association misstate the length of a railroad is not a defense, in the absence of fraud, to a suit to recover a subscription for stock. *Troy &* R. R. Co. v. *Kerr*, 17 *Barb.* (*N. Y.*) 581.

One who authorizes the signing of his name as a subscriber to stock cannot avoid liability on his unpaid subscription by showing an agreement between himself and his debtor, unknown to the corporation, binding the debtor to make all the payments. *Williams* v. *Benet*, 34 *So. Car.* 112, 13 *S. E. Rep.* 97.

Where a company gives a notice to a shareholder that if certain calls are not paid by a certain day the shares will be declared forfeited, and the calls are not paid and the defendant afterwards tenders his vote at a meeting of proprietors, which is rejected, but the forfeiture is never confirmed by a meeting of the company as required by its act, the shareholder cannot avail himself of this state of facts as a defense to an action for calls. *Birmingham, B. &* T. J. R. Co. v. *Locke*, 1 *Q. B.* 256, 2 *Railw. Cas.* 867.

g. Waiver of Defenses.*

174. In general.†—Though a subscription be obtained by fraud, the stockholder may waive it by assuming its advantages. *National Park Bank* v. *Nichols*, 2 *Biss.* (*U. S.*) 146.

After having made a subscription to stock plaintiff was induced by an agent of the company to make a further subscription payable in land upon the promise that his cash subscription should not be demanded until the road was completed; but the company proceeded to collect the cash

* See also *post*, **215.**

† Waiver by stockholder of objections to liability, see note, 22 AM. & ENG. R. CAS. 16.

subscription, and was about to enforce collection of a judgment thereon, when plaintiff sued to recover the land, after tendering back the stock received for it. *Held:* (1) that the contract to forbear, being founded upon a valid consideration, might perhaps have been made a defense to the action on the cash subscription, and would have furnished ground for enjoining its collection until the completion of the road; but no such defense having been made, plaintiff was not entitled to a rescission of the land subscription; (2) but the company, having broken its contract, was liable for damages, and the complaint was sufficient to authorize their recovery. *Scarce* v. *Indiana & I. C. R. Co.*, 17 *Ind.* 193; *further appeal* 23 *Ind.* 223.

175. What amounts to a waiver. —Although the provisions of an act incorporating a company necessary to make a person a proprietor are not complied with, one who, by his representations and claim to be registered, precludes himself from taking advantage of such objection, is liable for calls on his shares. *Cheltenham & G. W. U. R. Co.* v. *Daniel*, 2 *Railw. Cas.* 728, 2 *Q. B.* 281. *Birmingham, B. & T. J. R. Co.* v. *Locke*, 1 *Q. B.* 256, 2 *Railw. Cas.* 867.

A subscriber to stock who participates in calling a meeting for permanent organization of the corporation, whereat he is elected a director, and acts as such, thereby waives his right to avoid payment on the ground that the notice of the call was insufficient. *Bucksport & B. R. Co.* v. *Buck*, 68 *Me.* 81, 19 *Am. Ry. Rep.* 10.

The giving, by a subscriber, of his note for the balance of his subscription, taking therefor, from the company, a receipt stipulating that when paid the amount of the note should be applied on his stock, is *prima facie* a waiver of conditions precedent. *Chamberlain* v. *Painesville & H. R. Co.*, 15 *Ohio St.* 225.

A defendant who is a stockholder in a company incorporated under Pa. Act of March 19, 1879, providing for street railways in cities of the second and third class, who has participated in the organization of the company, who has taken stock and acted as a director, cannot set up the unconstitutionality of the law as a defense to a suit to recover subscribed stock. *Weinman* v. *Wilkinsburg & E. L. Pass. R. Co.*, 118 *Pa. St.* 192, 11 *Cent. Rep.* 54, 12 *Atl. Rep.* 288, 20 *W. N. C.* 455.

176. Waiver must be with knowledge.—Until a corporation is organized, a subscription for stock is a mere proposition or agreement to take a specified number of shares in a corporation thereafter to be formed, on condition that the requisite number of shares for the organization of the company shall be filled up by subscription, and the company be legally organized, and is not a binding promise to pay; but the subscriber may waive these conditions by knowingly attending meetings of the company, participating in its organization, or by doing other acts indicating a consent to become a shareholder before the conditions have been complied with; but in order for such acts to be a waiver, it must clearly appear that the subscriber acted with knowledge that the conditions had not been complied with. *Fairview R. Co.* v. *Spillman*, 23 *Oreg.* 587, 32 *Pac. Rep.* 688.

177. Subscriber, when estopped by his acts. —If a subscriber to stock acquiesces in the progress of the work, by payment of his subscription, assessed or otherwise, he cannot afterwards object, either to the failure originally to get subscribers to the whole stock, or to a material amendment of the charter; but the fact that he merely pays his assessments to have the route surveyed is not sufficient to show such acquiescence. And where the question of acquiescence has been fairly submitted to the jury, and has been passed upon by them, with evidence enough to sustain the verdict, the appellate court will not interfere. *Memphis Branch R. Co.* v. *Sullivan*, 57 *Ga.* 240.—DISTINGUISHING *May v.* Memphis Branch R. Co., 48 Ga. 109.

A subscriber for shares in a corporation may, by his acts, be estopped from denying the legality of assessments upon his shares on the ground that all the shares are not taken up. *New Hampshire C. R. Co.* v. *Johnson*, 30 *N. H.* 390.

An original shareholder in a company having, after the passing of 16 Vict. c. 51, paid the calls made on his shares before the act was passed, and voted at a meeting of shareholders, is precluded from claiming the repayment of his instalments under the fourth clause of the act. *Barrow* v. *Ontario, S. & H. R. Co.*, 11 *U. C. Q. B.* 124.

One who has agreed to take stock for the purpose of enabling the company colorably to comply with the "Railway Act," and has paid the first assessment thereon with the

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understanding that a contract whereby he might reimburse himself should be given to him, cannot, in an action for unpaid balance on the stock, deny being a stockholder. *Port Whitby & P. P. R. Co.* v. *Jones*, 31 *U. C. Q. B.* 170. — DISTINGUISHED IN Port Dover & L. H. R. Co. *v.* Grey, 36 U. C. Q. B. 425.

7. *Instructions. Judgment.*

178. Instructions. — In an action to recover subscriptions to stock, an instruction that upon the finding of certain facts plaintiff is entitled to recover, but omitting the material facts of the proceedings of the corporation calling for the instalments and notice to defendant of these calls, is erroneous. No matter how clear the evidence may have been to prove these omitted facts, it was necessary for the jury to pass upon it. *Maltby* v. *Northwestern Va. R. Co.*, 16 *Md.* 422.

The court submitted to the jury, first, what was the purpose of a charter of a corporation, and second, whether that purpose had been changed by a supplement to the original act, with a view to perpetrate a fraud on a subscriber to the stock. *Held*, that this was not error. *Southern Pa. I. & R. Co.* v. *Stevens*, 87 *Pa. St.* 190.

179. Judgment, and how enforced. — A summary remedy against defaulting stockholders given to a corporation by its charter is no part of its corporate franchises, and may be altered or modified by the legislature at pleasure. *Ex parte Northeast & S. W. Ala. R. Co.*, 37 *Ala.* 679, *Ala. Sel. Cas.* 608.

Alabama Stay Law Act of Feb. 8, 1861, which prohibits the rendition of judgment at the return term of any "suit, writ, summons, complaint, or bill," applies to a summary proceeding by notice and motion on the part of a railroad company against a delinquent stockholder, although its charter authorizes the rendition of judgment in its favor at the return term of the notice, provided it has been served twenty days prior thereto. *Ex parte Northeast & S. W. Ala. R. Co.*, 37 *Ala.* 679, *Ala. Sel. Cas.* 608.

A railroad charter provided that for non-payment of assessments the directors might order the treasurer to sell such shares at auction, and that the delinquent subscriber should be held accountable for the balance, if the shares should sell for less than the assessments. The directors voted that the president and treasurer be a committee to collect arrearages and enforce such collection by sales or otherwise. *Held*, that a sale under this vote was void; that the directors could not delegate the power of ordering sales to a committee, and that an order to the treasurer must be absolute and not in the alternative. *York & C. R. Co.* v. *Ritchie*, 40 *Me.* 425.

A charter authorized the company to sell the shares of delinquent subscribers, and made the subscribers liable for the difference between the proceeds of the sale and the amount due from them. The charter and by-laws required that subscribers should be notified of assessments thirty days before the order of the directors to sell the shares, that the sale should be by public auction, at a certain post office, and that the treasurer should give to the subscriber a notice in hand signed by the treasurer, or by a director in his behalf. *Held*: (1) that a notice of assessment thirty days before the sale was not sufficient; (2) that a sale otherwise than by public auction or at any other place than the post office was invalid; (3) that a notice of sale given to a subscriber in hand not signed by the treasurer or a director was insufficient. *Lewey's Island R. Co.* v. *Bolton*, 48 *Me.* 451.

When the charter of a company authorizes the sale of stock of a shareholder to pay unpaid assessments, such sale is not valid if it is not for a legal assessment or if it includes any illegal assessment. *Lewey's Island R. Co.* v. *Bolton*, 48 *Me.* 451.

A general resolution of a company declaring stock forfeited for non-payment of instalments must declare to the stockholder that his specific stock is forfeited, otherwise it will not be valid. *Johnson* v. *Albany & S. R. Co.*, 40 *How. Pr.* (*N. Y.*) 193; *reversed in* 5 *Lans.* 222, *which is affirmed in* 54 *N. Y.* 416.

Before the passage of any statute relating to forfeiture of stock by reason of non-payment of assessments, and when the only legislative provision in reference to the matter was contained in plaintiff's charter to the effect that "the directors may require payment of the sums subscribed to the capital stock at such times, and in such proportions, and on such conditions, as they shall deem best, under the penalty of forfeiture of all previous payments thereon," the proceeding by forfeiture was cumulative, and

coexisted with the right to sue for the assessments. In declaring a forfeiture of stock the company must adopt a course of proceeding reasonable and just to the stockholders. It was not necessary that the notice of the conditions on which the stock would be forfeited should be issued when the calls for the assessments were made; a declaration of forfeiture, made Aug. 15, of all stock on which assessments should remain unpaid Sept. 20 following, and requiring immediate notice of such declaration to be given to all delinquents, is reasonable. Under such a declaration a sale of the stock is not necessary to complete the forfeiture, and a stockholder whose stock has been thus forfeited is thereby released from any further liability upon his subscription; but a forfeiture will not take place unless the corporation gives reasonable notice to the delinquent stockholder that his stock will be forfeited unless by a specified time the overdue assessments are paid. *Rutland & B. R. Co.* v. *Thrall*, 35 *Vt.* 536.

IV. FORFEITURE FOR NON-PAYMENT.

180. Power to enforce forfeiture, generally. — A corporation has no inherent power to forfeit or sell the shares of stock held by a delinquent stockholder. That is not a common-law remedy, and can only be exercised when it is expressly conferred by statute. *Budd* v. *Multnomah St. R. Co.*, 15 *Oreg.* 413, 15 *Pac. Rep.* 659.

The charter of a street railway provided that if a subscriber failed to pay any instalment of stock called for for six months, the directors might declare the shares forfeited. A subscriber failed to pay the third call. *Held*, that after lapse of six months the directors might declare the stock forfeited without further notice or proceedings against the stockholder, and equity would not grant relief against such forfeiture. *Germantown Pass. R. Co.* v. *Fitler*, 60 *Pa. St.* 124.

181. Option to declare forfeiture or sue on subscription. — A subscriber to stock cannot rescind his subscription by forfeiting the payment already made. The right of forfeiture belongs exclusively to the corporation, to be used at its election. It may resort to the common-law remedy of action on the express promise to pay the amount of the subscription. *Klein* v. *Alton & S. R. Co.*, 13 *Ill.* 514.

The right to take a forfeiture of stock to a company does not destroy or interfere with the common-law remedy of enforcing payment of stock subscribed, and the right to take a forfeiture is a privilege to be exercised for the benefit of the company. *Grats* v. *Redd*, 4 *B. Mon.* (*Ky.*) 178.

A clause in an act of incorporation authorizing a forfeiture of stock and previous payments in cases of non-payment of calls confers a cumulative remedy, and does not deprive the company of the right to proceed by action for the recovery of subscriptions. *Troy T. & R. Co.* v. *M'Chesney*, 21 *Wend.* (*N. Y.*) 296.—DISAPPROVED IN New Hampshire C. R. Co. *v.* Johnson, 30 N. H. 390.—*Western R. Co.* v. *Avery*, 64 *N. Car.* 491. *North Eastern R. Co.* v. *Rodrigues*, 10 *Rich.* (*So. Car.*) 278.

Nor is the company limited to the remedy by forfeiture, although the promise be expressed in the subscription to be upon pain of forfeiting, etc., and consequently plaintiff may declare upon such contract as upon an absolute promise. *Troy T. & R. Co.* v. *M'Chesney*, 21 *Wend.* (*N. Y.*) 296.

182. When stock must be sold before suit for assessments.—If a person subscribes for shares in a corporation and in the terms of his subscription makes a promise to pay assessments thereon, he is liable to an action for all legal assessments, before resort is had to a sale of the shares under the charter. But where he only agrees to take a specified number of shares, and makes no promise to pay assessments, the shares must be sold to pay the assessments before an action can be maintained. *New Hampshire C. R. Co.* v. *Johnson*, 30 *N. H.* 390.—APPROVING South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 479; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23; Central Turnpike Corp. *v.* Valentine, 10 Pick. 147. DISAPPROVING Troy T. & R. Co. *v.* M'Chesney, 21 Wend. (N. Y.) 296; Northern R. Co. *v.* Miller, 10 Barb. (N. Y.) 260; Selma & T. R. Co. *v.* Tipton, 5 Ala. 787; Beene *v.* Cahawba & M. R. Co., 3 Ala. 660.

A railroad company was incorporated to construct a road from St. John to the United States line, with $2,000,000 capital, the company to proceed to locate and build the road when $50,000 were paid in. The directors were to make assessments on the shares from time to time as needed, and in case of a failure to pay the shares were to

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be sold at public auction, the shareholder to be liable therefor in case of a deficiency. Afterwards the charter was amended so as to provide (1) that subscribers to stock should be liable the same as if the whole capital had been subscribed, and the $50,000 paid in, and as if notices of assessment had been regularly given; (2) that notices of assessments might be published in a newspaper for two months, and if not paid, the company might sue and recover "in the same manner as if the calls * * * had been regularly made" in accordance with the act of incorporation. *Held*, that the amendatory act was not *ultra vires* under the British North America Act, 1867, § 92, subsec. 10, limiting the powers of provincial legislatures, as the road only extended "to" the United States line. *European & N. A. R. Co.* v. *Thomas*, 14 *New Brun.* 42.

In such case it was also *held*, that an action of debt could not be maintained under the act of incorporation for assessments of stock, but that the proceeding by sale of the shares must be adopted, it appearing that the object of the amendment, as shown by its preamble, was not to alter the remedy given by the act of incorporation, but to remove other difficulties. *European & N. A. R. Co.* v. *Thomas*, 14 *New Brun.* 42.

183. Sale of stock after failure to collect by suit.—A subscriber refused to pay the assessments on his shares, and the company, instead of declaring them forfeited, procured subscriptions from other persons to the full amount of the capital stock. *Held*, that it could not sell the shares and sue the subscriber for the difference between the assessment and the sum for which the shares were sold, under Mass. St. ch. 63, § 9. *Athol & E. R. Co.* v. *Prescott*, 110 *Mass.* 213.

A stock company, not having express power granted to declare a forfeiture of stock for non-payment, may sue for the amount of subscription to stock, and on failure to collect full amount subscribed may collect residue by sale of stock subscribed for. *Chase* v. *East Tenn., V. & G. R. Co.*, 4 *Am. & Eng. R. Cas.* 349, 5 *Lea* (*Tenn.*) 415.

Va. Code of 1873, ch. 57, gives to a company no lien on paid-up shares to secure payment of unpaid subscriptions for other shares; and the sale of such paid-up shares for such purpose by the company is unauthorized by the statute, and is a nullity. *Shenandoah Valley R. Co.* v. *Griffith*, 13 *Am & Eng. R. Cas.* 120, 76 *Va.* 913.

184. Proceedings for forfeiture must follow the statute strictly.—Where a company obtains judgment against one of its stockholders for calls upon his subscription, it cannot be enjoined by a court of chancery from enforcing the judgment on allegations that the work on the road was not progressing in the manner prescribed in the charter, or that the company contemplated a departure from the route or a change in the *termini* designated therein. *Ex parte Booker*, 18 *Ark.* 338.

Where the charter under which a subscription is made provides that subscriptions should be collected without relief, etc., and suit is brought upon the subscription after a consolidation with another compa judgment is properly rendered without .. lief, etc. *Hayworth* v. *Junction R. Co.*, 13 *Ind.* 348.

In an action to recover the whole amount of a subscription payable in instalments, the company may recover an instalment payable without any proviso or conditions, though it should fail in proving the right to the other instalments. *St. Louis & C. R. R. Co.* v. *Eakins*, 30 *Iowa* 279.

When a statute prescribes the terms on which shares of stock may be sold for the non-payment of assessments and the shareholder be held to pay the balance if the shares are not sold for a sum sufficient to pay the assessment, those terms are conditions precedent, and unless they are strictly complied with the sale is illegal and the shareholder not chargeable. *Portland, S. & P. R. Co.* v. *Graham*, 11 *Metc.* (*Mass.*) 1.—EXPLAINED IN Kennebec & P. R. Co. *v.* Jarvis, 34 Me. 360.

Section 11 of the act incorporating the Wilmington & Raleigh railroad company, in relation to delinquent stockholders, does not authorize a judgment against a defaulting stockholder without his appearance or without process to call him into court. *Wilmington & R. R. Co.* v. *Baker*, 3 *Dev. & B.* (*N. Car.*) 79.

Where a subscriber to stock assigns for the benefit of creditors before the stock is all paid up, a judgment against him for the balance, obtained after the assignment, entitles the company to share in a distribution of the fund in the assignee's hands. *Pittsburgh & S. R. Co.'s Appeal*, 2 *Grant's Cas.* (*Pa.*) 151.

Where one subscribes to stock payable in lumber to a corporation, already fully organized, it seems that no judgment for money should be had against such subscriber, at least until it is shown that he has failed to comply with his contract, according to its terms, after reasonable opportunity so to do. *Nettles* v. *Marco*, 33 *So. Car.* 47, 11 *S. E. Rep.* 595.

185. Notice of sale.—The non-payment of calls upon subscriptions for stock, if notice of the calls and demand of payment be made, will, without other notice, warrant a forfeiture of the stock under Ind. Rev. St. 1881, § 3896. *Hill* v. *Nisbet*, 100 *Ind.* 341.

A notice that shares of stock will be sold for non-payment of assessments on a day fixed, and by an auctioneer named, who is and has long been an auctioneer in the place at which the notice bears date, is insufficient if it does not express the place of sale. *Lexington & W. C. R. Co.* v. *Staples*, 5 *Gray* (*Mass.*) 520.

In such case three days' notice of the time and place of sale is unreasonably short, and therefore insufficient, if the proprietor resides in a remote part of another state. *Lexington & W. C. R. Co.* v. *Staples*, 5 *Gray* (*Mass.*) 520.

186. Effect of forfeiture and sale, generally. — The right of action and the power to forfeit shares for non-payment of calls conferred by 8 & 9 Vict., c. 16, are not alternative but cumulative remedies; accordingly, the defendant in an action for calls cannot plead that the shares had been declared forfeited. *Great Northern R. Co.* v. *Kennedy*, 7 *D. & L.* 197, 4 *Ex.* 417. *Inglis* v. *Great Northern R. Co.*, 1 *Macq. H. L. Cas.* 112, 16 *Jur.* 895.

A stockholder whose stock is forfeited is not relieved from the payment of a note given by him for stock, although there may, after the time when his stock was forfeited, have been made a material alteration in the charter without his assent. *Mitchell* v. *Rome R. Co.*, 17 *Ga.* 574.

Although a forfeiture of stock is a satisfaction of the debt, and, when the right to forfeit has been exercised, no action to recover the subscription for the stock so forfeited can be maintained by the company, yet a mere threat, made in the call, that the stock will be forfeited at a future day if payment be not then made, will not bar an action to recover the subscription, especially if it appear that there was no actual forfeiture. *Macon & A. R. Co.* v. *Vason*, 57 *Ga.* 314.

187. Action for deficiency.—By Me. Special Laws of 1846, ch. 369, § 5, delinquent subscribers or stockholders in a certain company were made accountable for the balance if their shares should sell for less than the assessments due thereon, with the interest and cost of sale. *York & C. R. Co.* v. *Pratt*, 40 *Me.* 447.

In an action under Mass. Rev. St. ch. 39, § 53, to recover of a stockholder the amount of a deficiency, where his shares had been sold for non-payment of assessments, for less than sufficient to pay the same, plaintiffs were ordered by the court "to file a copy of the contract of subscription for stock on which said action was brought," and accordingly filed a copy of a written contract of subscription, and the court ordered the copy so filed to be made part of the record. *Held*, that the action was not brought on the contract of subscription; that said contract was inadvertently made part of the record; and that the omission in the declaration to allege performance of the conditions precedent of said contract could not be taken advantage of by demurrer. *Troy & G. R. Co.* v. *Newton*, 1 *Gray* (*Mass.*) 544. — APPROVED IN Pacific R. Co. *v.* Seely, 45 Mo. 212. FOLLOWED IN Amherst & B. R. Co. *v.* Watson, 4 Gray 61.

A sale of shares for non-payment of several assessments, one of which has been illegally levied, is void, and the corporation cannot recover the amount of the deficiency in the price obtained to pay the assessments, in an action on Mass. Rev. St. ch. 39, § 53. *Stoneham Branch R. Co.* v. *Gould*, 2 *Gray* (*Mass.*) 277.

A declaration, in an action by a railroad corporation, which sets forth defendant's written subscription for a certain number of shares in its stock, and the sale of such shares for non-payment of assessments, for less than enough to pay the same, and that defendant owes the amount of the deficiency, although it does not state that defendant became a stockholder, is a declaration upon Mass. Rev. St. ch. 39, § 53, and not upon the contract of subscription, and need not aver performance of the conditions precedent of the contract. *Amherst & B. R. Co.* v. *Watson*, 4 *Gray* (*Mass.*) 61. —FOLLOWING Troy & G. R. Co. *v.* Newton, 1 Gray (Mass.) 544.

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When a defendant is sued as a stockholder in a railroad corporation for the sum remaining due upon an assessment upon his shares, after they are sold for non-payment of the assessment, it is competent and sufficient, for the purpose of showing him to be such stockholder and liable for the assessment, to give evidence that he signed a subscription paper for shares before the corporation was organized, that he attended the meeting of the stockholders for the organization of the corporation, and that he wrote and distributed votes, and himself voted for directors. *Lexington & W. C. R. Co.* v. *Chandler*, 13 *Metc.* (*Mass.*) 311.—DISTINGUISHING Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23, 9 Pick. 187; Central Turnpike Corp. *v.* Valentine, 10 Pick. 142; Newburyport Bridge Prop'rs *v.* Story, 6 Pick. 45, *n.*—DISTINGUISHED IN Peoria & R. I. R. Co. *v.* Preston, 35 Iowa 115; Troy & B. R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297.

188. Suit to set aside forfeiture.—After a corporation had made an assignment a stockholder refused to pay an instalment of stock on the ground that the call was made by the directors instead of the assignee, and the stock was declared forfeited. At the time the stock was worthless. Three years afterwards it was valuable, and the stockholder filed a bill to set aside the forfeiture. *Held*, that equity would not grant relief. *Germantown Pass. R. Co.* v. *Fitler*, 60 *Pa. St.* 124.—FOLLOWED IN Freeman *v.* Stine, 15 Phila. (Pa.) 37.

V. SUBSCRIPTIONS UPON CONDITIONS.

1. *In General.**

189. Right to receive, binding effect, etc.—On acceptance by a company, by entry on its records, of conditional subscriptions, they become binding, and the subscriber becomes a stockholder. Notice of acceptance is not necessary before suit. *New Albany & S. R. Co.* v. *McCormick*, 10 *Ind.* 499.

A conditional subscription to stock is a continuing offer, which is final and absolute when accepted. *Taggart* v. *Western Md. R. Co.*, 24 *Md.* 563.

Conditional subscriptions are not against public policy, and may be received when not forbidden by charter, and on the performance of the conditions they become absolute. *Chamberlain* v. *Painesville & H. R. Co.*, 15 *Ohio St.* 225. *Ashtabula & N. L. R. Co.* v. *Smith*, 15 *Ohio St.* 328.—DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170. FOLLOWED IN Mansfield, C. & L. M. R. Co. *v.* Stout, 26 Ohio St. 241. QUOTED IN Armstrong *v.* Karshner, 47 Ohio St. 276.

The weight of authority is that a party who makes a conditional subscription to stock is bound, if the condition is ultimately performed, unless there is an express revocation by him; but this question is not authoritatively determined in this case. *Lowe* v. *Edgefield & K. R. Co.*, 1 *Head* (*Tenn.*) 659.

A special and conditional subscription to the stock of a railway corporation may be enforced by the company on proof of its acceptance of the subscription and compliance with the terms thereof. *Stanstead, S. & C. R. Co.* v. *Brigham*, 17 *Low. Can.* 54.

190. How construed.—A subscription to stock provided that subscribers might pay in doing earthwork in the construction of the road, if the same was bid off at a public letting, or by taking so much at private letting of any portion not otherwise let as should be wanting to make up the amount of the engineer's estimate. The company was to arrange that each subscriber might work on his own land so far as might be, and under the direction of an engineer. *Held*, that an advertisement for proposals to do the work was a "public letting," and that a letting by auction was not necessarily contemplated. *Eppes* v. *Mississippi, G. & T. R. Co.*, 35 *Ala.* 33.

Conditional subscriptions to the capital stock of corporations should not be encouraged; and therefore stipulations in such contracts will, when of doubtful import, be construed as independent covenants rather than as conditions. *Paducah & M. R. Co.* v. *Parks*, 86 *Tenn.* 554, 8 *S. W. Rep.* 842.—APPROVING Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755; North Mo. R. Co. *v.* Winkler, 29 Mo. 318; McMillen *v.* Maysville & L. R. Co., 15 B. Mon. (Ky.) 218; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Miller *v.* Pittsburgh & C. R. Co., 40 Pa. St. 237;

*Conditional subscriptions to stock of railroad companies, see note, 44 AM. & ENG. R. CAS. 256.

Chamberlain *v.* Painesville & H. R. Co., 15 Ohio St. 225. DISTINGUISHING Curtiss *v.* Lake Ontario Shore R. Co., 80 N. Y. 219; Nashville & N. W. R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574.

Defendant, a resident of Montpelier, subscribed for 100 shares of $100 each. At a legal meeting of the commissioners of the corporation, of whom he was one, held Dec. 20, 1869, defendant, in the presence of said commissioners, annexed the following written condition to his subscription: "Condition that good and responsible individuals in Montpelier subscribe fifty thousand dollars within one year from above date, and a list of subscribers, and amount of each, given me Jan. 19, 1870." *Held*, that the true meaning of said condition was that the amount of defendant's subscription was to be counted towards the $50,000 named therein. *Montpelier & W. R. R. Co.* v. *Langdon*, 45 *Vt.* 137.

At said meeting, after the condition was annexed as aforesaid, defendant agreed that if plaintiff would procure $40,000 of subscriptions from individuals in Montpelier it should be a compliance with said condition; and thereupon said commissioners accepted defendant's subscription, with said condition annexed. Plaintiff afterwards, and before the time mentioned in the condition, relying upon defendant's subscription and his agreement, at great trouble and expense, procured from good and responsible individuals in Montpelier subscriptions to the amount of $40,700 besides defendant's subscription, whereof defendant was duly notified. *Held*, that defendant was thereby estopped from claiming that by the terms of said condition the amount of his subscription was not embraced in said $50,000. *Montpelier & W. R. R. Co.* v. *Langdon*, 45 *Vt.* 137.

191. Conditions precedent and subsequent. — Defendant signed a paper reciting that he agreed to take the number of shares set opposite his name, but following his signature was a statement that it was to be expended between a certain river and the east line of the state. Afterwards defendant accepted the office of director and acted as such. *Held*, that he must have intended to become a stockholder at once, and that the words following his signature were not intended as a condition precedent upon the performance of which he should become a member, but as simply a direction as to where the amount of his subscription should be expended. But if the words did constitute a condition precedent, the condition was waived by his acting as director. *Lane* v. *Brainerd*, 30 *Conn.* 565.

Notes given by a subscriber for stock, each note being given for an instalment of his subscription, and each being payable on completion of a twenty-mile section of the road, "ready for the cross-ties, trestles, and bridges," of which completion publication by the board of directors in a newspaper was to be conclusive notice, were mature and payable so soon as such publication was made, although the notes described the railroad as one which was to have a certain privilege, and although such privilege had not yet been secured. The securing of such privilege was not a condition precedent to payment for the stock. The specification of the privilege was part of the description of the railroad as it was to be ultimately, but not as it was to be at maturity, and on payment of the subscriptions to the capital stock. *Johnson* v. *Georgia Midland & G. R. Co.*, 39 *Am. & Eng. R. Cas.* 236, 81 *Ga.* 725, 8 *S. E. Rep.* 531.

Though it is specified in the notes that the road is to be operated independently of a certain existing railroad, this relates to what is to be done after the notes are paid, not before. *Johnson* v. *Georgia Midland & G. R. Co.*, 39 *Am. & Eng. R. Cas.* 236, 81 *Ga.* 725, 8 *S. E. Rep.* 531.

Though, to procure the subscription, the corporation contracted that a side track would be constructed upon the premises or "at the place" of the subscriber, this stipulation contemplated that the side track would be constructed after the payment, there being no agreement that its construction was to be a condition precedent. *Johnson* v. *Georgia Midland & G. R. Co.*, 39 *Am. & Eng. R. Cas.* 236, 81 *Ga.* 725, 8 *S. E. Rep.* 531.

192. Condition as to amount of, and intervals between, calls.—A subscription to stock made and accepted on the express condition that "not more than ten per cent. shall be required [to be paid] at any one call, nor shall calls be made more frequently than once in sixty days" is not controlled by a previous resolution of the directors requiring the instalment of five dollars due upon each share of stock at the time of making the subscription to be paid at once, and ten *per centum* or five dollars

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on each share subscribed to be paid on the 15th of each month following, until the whole amount shall be paid. *Mansfield, C. & L. M. R. Co.* v. *Pettis*, 26 *Ohio St.* 259, 13 *Am. Ry. Rep.* 380.

193. Necessity of performance on part of company. — A subscription to stock, conditioned to be paid when the sum of $5000 is raised for a certain purpose, is a conditional contract and need not be paid before condition performed. *Chase* v. *Sycamore & C. R. Co.*, 38 *Ill.* 215.

A person subscribing conditionally to stock is not to be considered a stockholder, nor as liable on the subscription, until the company has performed the condition upon which his undertaking depends. When that is done he becomes a stockholder by force of the agreement of the parties, and the subscription becomes absolute. *Evansville, I. & C. S. L. R. Co.* v. *Shearer*, 10 *Ind.* 244.

Me. Special Law of 1869, ch. 206, merely purports to afford a remedy when the "terms and conditions of the subscription have been complied with"; it does not purpose to make a contract for the parties where none had previously existed, nor would it have been competent for the legislature to make such contract had its object been to do so. *Belfast & M. L. R. Co.* v. *Unity*, 62 *Me.* 148.

Where a conditional subscription to stock is made before the election of directors, and, after such election, the condition is performed, the subscription takes effect at the time of performance. The first instalment then becomes payable, and the subscriber is liable to assessment for the residue. *Ashtabula & N. L. R. Co.* v. *Smith*, 15 *Ohio St.* 328.

194. Sufficiency of performance.— Defendant, an individual, agreed in writing to pay a certain sum to a company, on condition that trains be running within one mile of a specified place within a fixed time, and a depot be located within one mile of a certain post-office. On the day specified a passenger train ran to within 200 yards of the depot. *Held*, that this was a substantial compliance with the contract and the defendant was liable. *Chicago, D. & M. R. Co.* v. *Schewe*, 45 *Iowa* 79.

A subscription to stock was "on condition that in the judgment of the directors * * * a sufficient amount is subscribed * * * to grade and bridge the road, including right of way; * * * otherwise these subscriptions shall be void." The directors passed a resolution that in their "judgment * * * sufficient stock had been subscribed," etc. *Held*, that if the board acted in good faith in passing the resolution, the condition was performed. *Cass* v. *Pittsburg, V. & C. R. Co.*, 80 *Pa. St.* 31.

Evidence that the actual cost of grading and bridging the right of way was much in excess of the amount subscribed was not admissible for the defendant in a suit for his subscription. The *bona fides* of the directors' judgment was to be tested, not by the event, but by what was before their minds when the resolution was passed. *Cass* v. *Pittsburg, V. & C. R. Co.*, 80 *Pa. St.* 31.

195. Remedy of subscriber for non-performance by company. — A conditional subscription was paid, by the transfer of land to the company, before the condition was performed, and the company failed to construct the road according to the condition, but transferred the land to an innocent purchaser. *Held*, in a suit by the subscriber against the company, that the measure of damages would be the value of the land at the time it was transferred to the company. *Jewett* v. *Lawrenceburgh & U. M. R. Co.*, 10 *Ind.* 539.—DISTINGUISHED IN Evansville, I. & C. S. L. R. Co. *v.* Dunn, 17 Ind. 603; Parks *v.* Evansville, I. & C. S. L. R. Co., 23 Ind. 567.

The complaint alleged that the company, after failing to perform such condition, appointed commissioners to settle with plaintiff and others similarly situated, who, after an examination on behalf of the company, executed and delivered to plaintiff an agreement that the company should refund the amount paid on the subscription, with interest. *Held*, that plaintiff might prove the amount of such conditional stock subscribed by others, the amount paid in, the acts of the commissioners in awarding repayment of such amounts to other conditional subscribers, and the payment by the company of the sums so awarded. *Jewett* v. *Lawrenceburgh & U. M. R. Co.*, 10 *Ind.* 539.

196. Turning conditional into absolute subscription.—One who has subscribed to stock on conditions may, with the assent of the company, make his subscription absolute, and a note given payable absolutely, in lieu of such conditional obligation, will be presumed to have been given on sufficient consideration. *Henderson & N. R. Co.* v. *Moss*, 2 *Duv.* (*Ky.*) 242.

If a condition upon which a part of the subscription is payable has been performed, and a subscriber gives his note, unconditionally, for the whole, payable at a future day, the postponement of payment of that part then due is a sufficient consideration for a promise to pay the residue before it would have been due by the original terms. *Henderson &c. N. R. Co.* v. *Moss*, 2 *Duv.* (*Ky.* 242.

197. Rescission or modification. —A subscription to stock cannot be rescinded so as to affect the rights of corporation creditors while the corporation is insolvent; but when the subscription is conditional, and while the corporation is solvent, it may be reduced and modified according to the terms of the condition; and such modification, acquiesced in at the time by all parties, will not, after the lapse of fifteen years, be set aside. *Putnam* v. *New Albany*, 4 *Biss.* (*U. S.*) 365.—APPROVING Mann *v.* Cooke, 20 Conn. 178. FOLLOWING Bell *v.* Mobile & O. R. Co., 4 Wall. (U. S.) 598.

198. Waiver of conditions. — A promissory note given for a conditional subscription of stock is a waiver of the condition. *O'Donald* v. *Evansville, I. &c. C. S. L. R. Co.*, 14 *Ind.* 259.—FOLLOWED IN Anderson *v.* Evansville, I. & C. S. L. R. Co., 14 Ind. 388; Baker *v.* Evansville, I. & C. S. L. R. Co., 14 Ind. 363.

Where a subscription payable in land is made upon a condition precedent, such condition is waived by executing an absolute deed and receiving the stock subscribed for, before any act on the part of the corporation indicating its intention to comply with the condition. *Parks* v. *Evansville, I. &c. C. S. L. R. Co.*, 23 *Ind.* 567.—DISTINGUISHING Jewett *v.* Lawrenceburg & U. M. R. Co., 10 Ind. 539. FOLLOWING Evansville, I. & C. S. L. R. Co. *v.* Dunn, 17 Ind. 603.

A company may show, by the acts and declarations of the party who made a conditional subscription, that there has been a release or waiver of the conditions the fulfilment of which entitled the company to recover at law, and it is error to refuse testimony of such character. *Hanover Junction &c. S. R. Co.* v. *Haldeman*, 82 *Pa. St.* 36, 15 *Am. Ry. Rep.* 442.—FOLLOWED IN Moore *v.* Hanover Junction & S. R. Co., 4 Am. & Eng. R. Cas. 256, 94 Pa. St. 324.

The officiating as a judge of an election of an incorporated company is a waiver of any alleged condition attached to the subscription for its stock and renders such subscription absolute. *Pittsburgh &c. S. R. Co.* v. *Proudfit*, 2 *Pittsb.* (*Pa.*) 85.—FOLLOWING Livingston *v.* Pittsburgh & S. R. Co., 2 Grant's Cas. (Pa.) 219.

2. *Validity of Conditions.*

199. In general.*—A railroad charter authorized the company to organize and proceed to construct its road when $200,000 should be subscribed; but the corporators made their subscriptions conditional upon the whole amount required for completion of the road being subscribed. *Held*, that this condition was not inoperative, as repugnant to the charter. *Ridgefield &c. N. Y. R. Co.* v. *Brush*, 43 *Conn.* 86, 11 *Am. Ry. Rep.* 18.—DISTINGUISHING Cabot & W. S. Bridge *v.* Chapin, 6 Cush. (Mass.) 50.

Conditional subscriptions to stock may be valid. *New Albany &c. S. R. Co.* v. *McCormick*, 10 *Ind.* 499.

Defendant subscribed for stock subject to certain conditions, one of which was that no assessment should be made until enough was subscribed to complete the road to a certain city, except enough to make a preliminary survey. The subscription was less in amount than the actual cost, and much less after deducting certain invalid conditional subscriptions. *Held*, that defendant's subscription was invalid. *Belfast &c. M. L. R. Co.* v. *Cottrell*, 66 *Me.* 185, 19 *Am. Ry. Rep.* 35.

N. Y. General Railroad Act of 1848 confers no power to make conditional subscriptions, and such a thing is contrary to public policy. A condition annexed to a subscription to pay interest to each subscriber until the completion of the road is illegal and void; so is a condition imposing an unauthorized limitation upon the power to call in stock, conferred on the directors by the statute. *Troy &c. R. Co.* v. *Tibbits*, 18 *Barb.* (*N. Y.*) 297.—APPLIED IN Re Rochester, H. & L. R. Co., 50 Hun 29, 18 N. Y. S. R. 654, 2 N. Y. Supp. 457. FOLLOWED IN Craig *v.* Andes, 15 Am. & Eng. R. Cas. 662, 93 N. Y 405.

A subscription is not invalid because it contains conditions that it shall not be payable until needed for the construction of a certain portion of a railroad, and that the

*Validity of conditional subscriptions to stock, see note, 81 AM. DEC. 398.

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amount paid shall be applied solely to the construction of that portion, and shall draw interest until a certain portion of the road is completed. *Milwaukee & N. I. R. Co.* v. *Field*, 12 *Wis.* 340.—FOLLOWED IN Racine County Bank *v.* Ayres, 12 Wis. 512.

A conditional subscription is not invalid if the condition itself is not of such a character as to make the agreement void on the ground of public policy. *Racine County Bank* v. *Ayres*, 12 *Wis.* 512.—FOLLOWING Fox River Valley R. Co. *v.* Shoyer, 7 Wis. 365; Milwaukee & N. I. R. Co. *v.* Field, 12 Wis. 340.

A stipulation on the part of the company that the amount paid on a subscription shall bear interest until dividends shall be declared does not render it invalid. *Racine County Bank* v. *Ayres*, 12 *Wis.* 512.—FOLLOWING Milwaukee & N. I. R. Co. *v.* Field, 12 Wis. 341.

200. Conditional subscriptions made prior to organization.— Under Oreg. Code, § 3221, requiring corporate articles to be filed and a charter obtained before any stock is subscribed, a subscription to stock before organization is only an agreement to take stock in a corporation which is to be organized; hence such subscribers may attach conditions to their subscriptions, and the subscriptions after organization will not be deemed absolute, nor the conditions void. *Fairview R. Co.* v. *Spillman*, 23 *Oreg.* 587, 32 *Pac. Rep.* 688.—DISTINGUISHING Burke *v.* Smith, 16 Wall. U. S.) 396; Caley *v.* Philadelphia & C. County R. Co., 80 Pa. St. 367; Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 172; Pittsburgh & S. R. Co. *v.* Biggar, 34 Pa. St. 455.

Conditions attached to subscriptions to stock by the commissioners appointed to receive them preparatory to the procurement of a charter are not binding. *Bedford R. Co.* v. *Bowser*, 48 *Pa. St.* 29.—DISTINGUISHED IN Bell's Gap R. Co. *v.* Christy, 79 Pa. St. 54.

But in such case the subscription is valid and binding, and the condition null and void. *Boyd* v. *Peach Bottom R. Co.*, 90 *Pa. St.* 169.

Where subscriptions are made to the stock of a corporation previous to, and for the purpose of procuring, a charter, any conditions annexed thereto, whether written or parol, are void. But after the organization of the company a condition is binding, and ordinarily this is so though it rest in parol only, where except for such condition the subscription would not have been made, and provided the rights of co-subscribers are not affected thereby. *McCarty* v. *Selingsgrove & N. B. R. Co.*, 87 *Pa. St.* 332.

201. —— subsequent to organization.—Subscriptions made before a company is organized must be unconditional. But after the organization the company may stipulate with subscribers that they may pay in any manner mutually agreed on; and it can enforce a subscription only according to its conditions. *Pittsburgh & C. R. Co.* v. *Stewart*, 41 *Pa. St.* 54.

After the approval of an act of assembly incorporating a company, conditional subscriptions to the capital stock of the company are valid, and this though made before letters patent are issued, the company having afterwards fulfilled conditions necessary to their issuance. *Hanover Junction & S. R. Co.* v. *Grubb*, 82 *Pa. St.* 36, 15 *Am. Ry. Rep.* 442.—DISTINGUISHING Bavington *v.* Pittsburgh & S. R. Co., 34 Pa. St. 358.

After the organization of a tramway corporation, and the full payment of the minimum amount of stock as provided by the charter, a stockholder, under a resolution to extend the road, and for that purpose, signed an agreement to increase his stock subscription, payable partly in lumber and partly in money. He accordingly advanced more than the amount payable in money, and also made other advances; after which the directors abandoned the proposed extension, released such stockholder from his agreement, and recognized the advances so made as a debt; and this debt was subsequently reduced to judgment. *Held*, that the action of the board of directors was legal, and that a receiver of the corporation was not entitled to recover any part of the subscription so conditionally made after the organization of the company, and after the debts of the company had been contracted. *Nettles* v. *Marco*, 33 *So. Car.* 47, 11 *S. E. Rep.* 595.—QUOTING Flagg *v.* Manhattan R. Co., 10 Fed. Rep. 413.

202. Parol conditions.— A parol condition to a subscription of stock will not, if violated, invalidate the subscription, because it forms no part of the written contract of the parties. *Cunningham* v. *Edgefield & K. R. Co.*, 2 *Head* (*Tenn.*) 23.

203. Effect of vagueness or impossibility of performance.—Defend-

ant subscribed for stock of a corporation, on condition that a certain proposition made by him should be accepted by the company but this proposition was so general in its terms that it could only be treated as the basis of a contract, which when drawn up was so variant from the proposition that it was repudiated by defendant. *Held*, that no action could be maintained on the subscription, though the company had accepted the proposition. *Oldtown & L. R. Co.* v. *Veazie*, 39 *Me.* 571.

A subscription for stock contained a stipulation that the subscriber might forfeit his stock after paying one third of the amount, provided notice be given to the company prior to a date named which was five days before the subscription was made. *Held*, that such notice being impossible, the condition really never existed. *Racine County Bank* v. *Ayres*, 12 *Wis.* 512.

3. *Certain Amount of Stock to be Subscribed.*

204. Such condition valid. — Defendant subscribed for certain shares of stock upon condition that his subscription should not be binding until the aggregate sum of $800,000 in *bona fide* subscriptions should be taken. Subsequently, by agreement between him and the company, the total of such aggregate subscriptions was reduced to $700,000. *Held*, that this did not convert his subscription into a mere agreement to subscribe, nor render it invalid. *Emmitt* v. *Springfield, J. & P. R. Co.*, 31 *Ohio St.* 23, 16 *Am. Ry. Rep.* 266.

Defendant filed a plea that the express condition of his subscription for the shares sued on was that $100,000 should be subscribed, applicable wholly to the construction of the road from Port Dover to Woodstock, before any calls should be made in respect of his shares; that he never waived this condition, and that said sum had not been subscribed. The company was incorporated to build a road from Port Dover to Woodstock with power to extend the same to Stratford. *Held*, good. It was competent for the company to receive subscriptions of stock to be applied to the main line and the extension separately, provided the condition was expressed in the subscription, and was not a secret qualification. *Port Dover & L. H. R. Co.* v. *Grey*, 36 *U. C. Q. B.* 425. —DISTINGUISHING Port Whitby & P. P R. Co. *v.* Jones, 31 U. C. Q. B 170

205. How construed — Rights of subscriber. — Where the whole amount of the stock of a corporation is not fixed by its charter, but has been fixed by a resolution or by-law, it is not necessary to the validity of a subscription made thereafter that the whole amount thus fixed should be subscribed for. *Kennebec & P R. Co.* v. *Jarvis*, 34 *Me.* 360. — DISTINGUISHED IN Somerset & K. R. Co. *v.* Cushing, 45 Me. 524. QUOTED IN Hoagland *v.* Cincinnati & Ft. W. R. Co., 18 Ind. 452; Bucksport & B. R. Co. *v.* Buck, 65 Me. 536.

Defendant subscribed for stock upon condition that not less than the minimum sum required by the charter should be subscribed. *Held*, that it was not competent for him to show that certain shares were subscribed by persons of no pecuniary responsibility, and reputed not to be responsible, in the absence of any evidence of bad faith on the part of the company. *Penobscot R. Co.* v. *White*, 41 *Me.* 512.

In such case the declarations of a stockholder whose subscription is alleged to be fraudulent, made long after the company was organized, are not admissible upon the question whether the company acted in good faith at the time of its organization. *Penobscot R. Co.* v. *White*, 41 *Me.* 512.

The capital stock of a company was to consist of not less than $100,000, nor more than $1,200,000; the road to be from Bangor to Bucksport, and then to Ellsworth (forty miles). The corporators accepted the charter and chose directors, among whom was defendant, who was afterwards chosen president, and authorized to purchase land and issue scrip therefor. Defendant with others signed a subscription book reciting that: "We, the subscribers, * * * bind ourselves and our heirs to pay the sum written against our names, as called for by the treasurer hereafter to be elected, same being part of the capital stock, for the purpose of constructing a railroad from Bucksport to Bangor [eighteen miles], * * * said road to be built under the provisions of a charter entitled," etc. "No subscription shall be binding until the sum of $100,000 shall have been subscribed by good and responsible parties." Defendant subscribed $15,000; the aggregate subscription, including that of the town of Bucksport, amounted to $234,500. A directors' meeting, defendant being present, voted that the subscription of defendant and others be accepted

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upon the conditions therein stated. The road was built from Bucksport to Bangor. *Held*, in a suit against defendant for his subscription, that the action was maintainable; that defendant's liability did not depend upon the number of shares, or upon any specific and fixed capital, but upon the terms of his agreement. *Bucksport &c. R. R. Co.* v. *Buck*, 65 *Me.* 536, 9 *Am. Ry. Rep.* 293. —DISTINGUISHING Somerset & K. R. Co. *v.* Cushing, 45 Me. 524; Somerset R. Co. *v.* Clarke, 61 Me. 380. QUOTING Kennebec & P. R. Co. *v.* Jarvis, 34 Me. 360.

Defendant subscribed to stock, by an agreement which recited that the state had resolved to take two fifths of the stock of plaintiff corporation, when three fifths had been taken by private individuals, with the proviso that "if a sufficient subscription is not obtained to secure the subscription of the state, within twelve months from the 1st of February, 1837, each of us may, if we think proper, withdraw his subscription and be entitled to receive back whatever sum may have been advanced thereon within twelve months from the said date." Defendant paid a part of his subscription after February 1, 1838. *Held*, that he was bound to pay the remainder of his subscription, unless he should show that the required amount had not been subscribed to entitle the company to the state's subscription, and that in consequence thereof he had elected, within a reasonable time after the expiration of the twelve months, to withdraw his subscription. *Wilmington &c. R. R. Co.* v. *Robeson*, 5 *Ired.* (*N. Car.*) 391.

206. Necessity of performance.— In an action on a subscription conditioned upon a certain amount being subscribed, the plaintiff must show affirmatively that the amount named had been subscribed before suit. *Galena &c. S. W. R. Co.* v. *Ennor*, 116 *Ill.* 55, 4 *N. E. Rep.* 762.

A subscription to take a certain number of first mortgage bonds, containing a clause that it is not to be binding unless 100 of such bonds are subscribed for, is not binding until 100 of the bonds are so subscribed. *Galena &c. S. W. R. Co.* v. *Ennor*, 116 *Ill.* 55, 4 *N. E. Rep.* 762.

Where a subscription to stock is conditioned that the company shall not enter into any contract for the construction of its road until a certain number of shares are taken, the books of the directors are competent evidence to show the fulfilment of the condition, if the directors had authority to act. But such condition is a condition precedent, and the company cannot enforce the collection of the subscription until it has complied with the conditions. *Penobscot &c. R. Co.* v. *Dunn*, 39 *Me.* 587.

A subscription paper which provides that assessments may be laid "when 3000 shares have been subscribed" does not authorize the laying of an assessment until the stipulated amount has been unconditionally subscribed, payable in cash. *Troy &c. R. Co.* v. *Newton*, 8 *Gray* (*Mass.*) 596.—DISTINGUISHED IN Boston, B. & G. R. Co. *v.* Wellington, 113 Mass. 79. QUOTED IN Ridgefield & N. Y. R. Co. *v.* Brush, 43 Conn. 86.

Such a provision does not include a subscription, by a contractor for building a railroad, of a certain number of shares, "being a portion of" a sum which, by his contract, was to be paid to him in stock at par, or, in case of any stock being issued by the corporation below par, then at the rate of the lowest issue. *Troy &c. R. Co.* v. *Newton*, 8 *Gray* (*Mass.*) 596.

A party subscribing on condition that a certain amount of stock be subscribed cannot be made liable until it is shown that this has been complied with, and that the instalments were subsequently called in before suit brought. But an error in making the call before the liability accrued may be corrected by a subsequent call after the condition was fulfilled and before suit brought. *Philadelphia &c. W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

207. What amounts to performance.— An agreement to subscribe for stock upon a stipulated condition is not binding unless the condition is complied with. So where a subscription is made on condition that $150,000 shall be secured before the corporation is organized, the subscriber is not bound where an organization is effected upon a subscription of $130,000. *Santa Cruz R. Co.* v. *Schwarts*, 53 *Cal.* 106.

Defendant subscribed for stock on condition that no assessment should be made above two per cent. until the estimated cost of the road should be subscribed. Defendant was active in soliciting subscriptions, became a director, and acted in different meetings of stockholders and directors taking steps toward letting contracts for the construction of the road, and making assessments as much as forty per cent. upon

stock; but it did not appear that he voted for such assessments. *Held*, that he was not estopped thereby from showing that the condition imposed had not been complied with and that the subscription was not binding. *Ridgefield & N. Y. R. Co.* v. *Reynolds*, 46 *Conn.* 375.

Otherwise, it seems, if defendant had voted for the assessments. *Ridgefield & N. Y. R. Co.* v. *Reynolds*, 46 *Conn.* 375.

Defendant and others signed an agreement to pay to a street-car company a certain sum of money, on condition that the company would purchase a certain lot and erect its depot thereon. The sum required to purchase the lot was $2000, which was known before the contract was made. Of this amount only $600 were subscribed, the balance being made up in cash contributions. *Held*, that an action on the contract could be maintained. *Springfield St. R. Co.* v. *Sleeper*, 121 *Mass.* 29.

Defendant subscribed for stock in a New Hampshire corporation, upon the condition that the subscribers should not be liable for their subscriptions until 2000 shares should be taken in cash or its equivalent. Afterwards another company was chartered in Massachusetts, with power to unite with the New Hampshire company; and a town in Massachusetts was empowered to subscribe for a certain amount of stock in the Massachusetts corporation, which it did. Afterwards a union was formed between the two corporations. Without counting in the subscription of the town 2000 shares were not taken. *Held*, that, inasmuch as the Massachusetts corporation was not in existence at the time of the subscription, there was no latent ambiguity in the contract as to what railroad was meant, and parol evidence was therefore not admissible to show that the parties understood and intended by it the united enterprise; that the condition upon which the subscription was made had not been performed, and defendant was not liable. *Monadnock R. Co.* v. *Felt*, 52 *N. H.* 379, 2 *Am. Ry. Rep.* 186.

208. Waiver of performance. — When it is a condition precedent in a contract for the subscription to stock that other stock, to a given amount, shall have been taken, that condition is waived by the conduct of the party in paying the first instalment on the subscription, voting the whole stock at an election for officers, and acting as an officer in the corporation under that election. *Dayton & C. R. Co.* v. *Hatch*, 1 *Disney* (*Ohio*) 84.

In a subscription to stock, a condition that it was not to be binding until $500,000 were subscribed is, to that extent, waived by a proviso that a section of the road, beginning at the village of W., and ending at the village of P. or C., might be built when 2000 shares of the par value of $100 each should be subscribed. *Woonsocket Union R. Co.* v. *Sherman*, 8 *R. I.* 564.

4. *Portion of Road to be Built or Graded.*

209. Validity.—A stipulation in a railroad charter that certain subscriptions for stock shall be applied to the construction of the road between designated places does not invalidate the subscriptions. *Milwaukee & N. I. R. Co.* v. *Field*, 12 *Wis.* 340.—FOLLOWED IN Racine County Bank *v.* Ayres, 12 Wis. 512.

210. How construed. — An agreement to subscribe for one share of stock, and to pay therefor the sum of $100, on demand, "provided the same is not to be paid, or any part thereof, until said road is graded between certain points within one year from date," is an agreement to pay the company $100 on demand, after the prescribed conditions are fulfilled, and not an agreement to pay what may be the market value of a share of stock. *North & S. R. Co.* v. *Winfree*, 51 *Ga.* 318.

Where a subscriber to stock agrees to take a certain number of shares when the road reaches a designated point, when the road reaches that point the subscription becomes absolute and is payable on demand, and no further act of subscription is necessary in order to convert the original conditional subscription into an absolute obligation. *Webb* v. *Baltimore & E. S. R. Co.*, 54 *Am. & Eng. R. Cas.* 202, 77 *Md.* 92, 26 *Atl. Rep.* 113.

An agreement to pay a certain sum to the order of a company "in six months after the first cars run over the road from" one specified point to another inside the contemplated *termini* does not postpone the period of payment until after the completion of the whole road. *Toledo & A. A. R. Co.* v. *Johnson*, 55 *Mich.* 456, 21 *N. W. Rep.* 888.—FOLLOWED IN Gardner *v.* Walsh, 95 Mich. 505.

Defendant subscribed to stock to be paid when the road was completed. The company, being unable to complete the road,

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duly executed its deed purporting to sell and transfer its roadbed, right of way, subscriptions, and other property to another company, which completed the road, and was afterwards consolidated with still another company. *Held*, that neither section 3300 nor section 3409 of Ohio Rev. St. conferred authority to sell and transfer the subscription of defendant, and no ownership in the subscription passed to the grantee company by virtue of the deed; and the subscription being conditional, the grantee company did not, by performing the condition precedent named in the subscription, make absolute the liability of the subscriber. *Toledo, C. & St. L. R. Co.* v. *Hinsdale*, 45 *Ohio St.* 556, 15 *N. E. Rep.* 665.—DISTINGUISHING Mansfield, C. & L. M. R. Co. *v.* Stout, 26 Ohio St. 241. QUOTING Thomas *v.* West Jersey R. Co., 101 U. S. 71. — DISTINGUISHED IN Armstrong *v.* Karshner, 47 Ohio St. 276.

A subscription to stock, the payment of which is dependent upon the completion of a part of the road, may be enforced against the subscriber after the company has fully complied with the condition, although when the subscription was made the company had not expended ten *per centum* of its authorized capital in the construction of its road, nor obtained actual *bona fide* subscriptions to its capital stock to the amount of twenty *per centum* thereof. Though such subscription when made was, under Ohio Rev. St. § 3298, unauthorized, it nevertheless constituted a continuing offer of the subscriber to pay the amount subscribed, upon the performance of the conditions therein contained, which, when not withdrawn before the conditions were fully complied with, became an absolute subscription, and payment thereof cannot be defeated on the ground that the company was without corporate capacity to receive it. *Armstrong* v. *Karshner*, 44 *Am. & Eng. R. Cas.* 238, 47 *Ohio St.* 276, 24 *N. E. Rep.* 897.— QUOTING Ashtabula & N. L. R. Co. *v.* Smith, 15 Ohio St. 336; Mansfield, C. & L. M. R. Co. *v.* Stout, 26 Ohio St. 254.—FOLLOWED IN Lesher *v.* Karshner, 47 Ohio St. 302.

Defendant subscribed to capital stock, and promised to pay the amount "when the track of the road should be laid ready for the running of cars" between certain designated places. The subscription contained a further condition that it should be payable when the road was completed "on the within terms." *Held*, that this did not mean that the whole road must be completed before the subscription was payable, but only the portion between the designated places. *Lesher* v. *Karshner*, 47 *Ohio St.* 302, 24 *N. E. Rep.* 882.

A subscription for stock provided that the money should be expended in the construction of the road between designated places, and that the subscription should not be binding until the whole road between the places should be under contract. *Held*, that this was not merely a general description of the road, requiring the whole of it to be put under contract before the subscription was payable, but that it created an express condition to the validity of the subscription, that the road should be put under contract as designated. *Connecticut & P. R. R. Co.* v. *Baxter*, 32 *Vt.* 805.

Such subscription provided that the money should be expended in constructing the road from S. to "Derby Line." *Held*, that the term "Derby Line," in the absence of any evidence as to its meaning, except the subscription itself, and the fact that the charter fixed the northern terminus of the road in the north line of Derby, must be construed to mean the north line of the town of Derby; but defendant having shown that the words "Derby Line" in common usage meant a village of that name in Derby, it became a question of fact for the jury whether the expression meant the north line of Derby, or the village named Derby Line. *Connecticut & P. R. R. Co.* v. *Baxter*, 32 *Vt.* 805.

211. Necessity of performance.— A subscription was made to stock, one part of which was payable when the road should be graded through certain precincts named, and the remainder when the road was finished, but it was expressly declared that the consideration for the subscription was the construction of the road through the precincts. *Held*, that the subscribers were not liable for the first instalment without an allegation in the complaint that the company had finished, or offered to finish, the road. *Gray* v. *Hinton*, 2 *McCrary* (*U. S.*) 167, 7 *Fed. Rep.* 81.

But independently of other considerations, such contract shows no mutuality. There is nothing to bind the company to complete the railroad; and the objection of the want of mutuality can only be avoided by a complete performance of the contract. A part performance does not have that

effect. *Gray* v. *Hinton*, 2 *McCrary* (*U. S.*) 167, 7 *Fed. Rep.* 81.

A subscription to be paid on demand made at any time after the company's road should be graded to a point within five miles of a village named, the subscription to be in force only until a certain date, is invalid after that date, without performance of the condition, and cannot be enforced. *Galena & S. W. R. Co.* v. *Ennor*, 116 *Ill.* 55, 4 *N. E. Rep.* 762.

Where the construction of a railroad within a certain time is the essential inducement upon which an individual donates land to a company or subscribes to its stock, an extension of the time by the legislature will not discharge the corporation from its obligation. *Henderson* v. *San Antonio & M. G. R. Co.*, 17 *Tex.* 560.

212. Sufficiency of performance.— If a subscription is subject to a condition that a railroad shall be completed and in operation between certain points by a day named, it will be sufficient to show performance of those conditions, and it is not necessary that the road should, on that day, furnish such facilities for receiving and discharging freight and passengers as could be expected of an established railroad, to make the party liable on his subscription. Proof that a depot was not built, nor was a station agent appointed for such place by the day named, will not necessarily defeat a recovery on the subscription. *Ogden* v. *Kirby*, 79 *Ill.* 555.

A right of action on a contract of subscription promising to pay a certain sum "as soon as the cars shall run to B. upon a completed railroad from W.," will not be defeated by the fact that the company building the road does not own the rolling stock by which it is operated. *Courtright* v. *Deeds*, 37 *Iowa* 503.—APPROVED IN Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97.

A note given for the purpose of aiding in the construction of a railroad and in consideration of the benefits to be derived therefrom, and payable when the road is constructed and the cars are running thereon between designated points, is payable when that condition is performed, although the remainder of the road is not built when suit is brought. *Gardner* v. *Walsh*, 95 *Mich.* 505, 55 *N. W. Rep.* 355.—FOLLOWING Stowell *v.* Stowell, 45 Mich. 364; Toledo & A. A. R. Co. *v.* Johnson, 55 Mich. 456.

A subscription to stock provided that the company's road should be completed and put into operation to a specified town on or before a certain date. It appeared that the road was graded to said town by said time, but was only completed to a connection with another road one mile south of the town, over which other road plaintiff's road was put into operation for four months from the date named, after which time plaintiff used its own roadway, which, in the meantime, had been fully constructed and prepared for operation and use. *Held*, that there was a fair and substantial compliance by plaintiff with its contract, which is all that was required. *Missouri Pac. R. Co.* v. *Tygard*, 22 *Am. & Eng. R. Cas.* 54, 84 *Mo.* 263, 54 *Am. Rep.* 97.—APPROVING Courtright *v.* Deeds, 37 Iowa 503; State ex rel. *v.* Hastings, 24 Minn. 78; Stockton & V. R. Co. *v.* Stockton, 51 Cal. 334; Jackson *v.* Stockbridge, 29 Tex. 394. REVIEWING State ex rel. *v.* Clark, 23 Minn. 422.

Where stock is subscribed for with a proviso that the "road shall be built" in a specified locality, the permanent location of the road in the place designated is a sufficient compliance with the condition to make the subscriber liable for calls on his subscription. *Warner* v. *Callender*, 20 *Ohio St.* 190.

Railroad companies incorporated under the laws of Ohio are not required to construct first-class railroads before they can collect subscriptions to their capital stock, unless the subscription contains a stipulation to that effect. *Armstrong* v. *Karshner*, 44 *Am. & Eng. R. Cas.* 238, 47 *Ohio St.* 276, 24 *N. E. Rep.* 897.

When a note contains a condition that a railroad must be completed to a certain point within a given time, the condition must be substantially complied with; and where the issue as to whether the road was completed or not was fairly put to the jury, and they found that it was, and there was evidence to sustain the verdict, it will not be disturbed, although it was proved that the road was not in complete running order for passengers and freight. *Jackson* v. *Stockbridge*, 29 *Tex.* 394.—APPROVED IN Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97.

213. Conditions precedent.— A subscription to stock contained the condition that a certain town be made a point on the road, that the road be put under con-

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tract in one year from a certain date, and that the stock was not to be called for faster than five per cent. a month, and no call to be made until a certain part of the road had been put under contract. *Held:* (1) that putting the road under contract within the time and with the conditions specified was a condition precedent to the right of the company to recover; (2) that a completion of the road by the time named without the letting of the contract was not a compliance with the condition. *Burlington & M. R. R. Co.* v. *Boestler*, 15 *Iowa* 555.—DISTINGUISHED IN Davis *v.* Cobban, 39 Iowa 392.

A subscription to stock contained a stipulation that the money should be paid "in instalments of five per cent. so long as the work should be in actual progress," but if the company named should fail to construct the road, then the amount subscribed should be paid on the same terms and conditions to any other company which would grade and tie a road between the points designated. *Held*, that the grading and tieing were not conditions precedent to the payment of the subscription. *Iowa Northern C. R. Co.* v. *Bliobenes*, 41 *Iowa* 267.

A note given to aid in the construction of a railroad provided that the note should become due if the road was constructed and the cars were running from the starting point to an intermediate point within two years. *Held*, that it was not a condition precedent to liability on the note that the road should be constructed to the charter terminus. *Merrill* v. *Reaver*, 50 *Iowa* 404.

214. Revocation of offer.—An offer in writing to subscribe to stock, conditioned upon the construction of the road along a designated route, is revocable, at the option of the party making such offer, at any time before its delivery to and acceptance by the company; and the death of the party before such delivery and acceptance works such revocation. *Wallace* v. *Townsend*, 25 *Am. & Eng. R. Cas.* 20, 43 *Ohio St.* 537, 3 *N. E. Rep.* 601.

215. Waiver.*—Defendant subscribed for stock, payable on certain conditions, one of which was that the road should be built to F. prior to a certain date. Subsequently he gave notes for the amount, payable on the happening of the conditions, except the one above specified. *Held*, that the omitted condition was thereby waived. *Slipher* v. *Earhart*, 83 *Ind.* 173.—QUOTING Taylor *v.* Fletcher, 15 Ind. 80.

* See also *ante*, **134, 174-177.**

*5. Stations and Depots to be Constructed.**

216. Validity.—A subscription to railroad stock is not invalid because made payable upon condition that a depot be located in a particular part of a town. *Racine County Bank* v. *Ayres*, 12 *Wis.* 512. —APPROVED IN Pacific R. Co. *v.* Seely, 45 Mo. 212.

217. How construed.—A contract between a corporation and individuals that the former will construct a depot at a certain place, and that upon its construction the individuals will pay to the corporation a certain sum of money, is negotiable by indorsement so as to vest the title thereof in each successive indorsee. *Vannoy* v. *Dupres*, 72 *Ind.* 26.

Where such a contract has been assigned by the receiver of the road, and a suit is brought thereon by an assignee, the authority of the receiver to make such assignment is involved in the question of the execution of the assignment, and can be put in issue only by a denial under oath. *Vannoy* v. *Dupres*, 72 *Ind.* 26.

Before suit could be brought to enforce payment under the contract, defendants were entitled to notice of the completion of the depot. *Vannoy* v. *Dupres*, 72 *Ind.* 26.

Defendant subscribed for stock on condition that a depot be located within three fourths of a mile of the corporate limits of a town. *Held*, that in determining the distance the measurement should be in a straight line between the corporate limits and the depot. *Courtwright* v. *Strickler*, 37 *Iowa* 382.—FOLLOWING Cedar Falls & M. R. Co. *v.* Rich, 33 Iowa 113.—*Missouri Pac. R. Co.* v. *Tygard*, 22 *Am. & Eng. R. Cas.* 54, 84 *Mo.* 263, 54 *Am. Rep.* 97.

Under a contract of subscription of the character above mentioned, the jury was properly instructed that the point from which measurement is to be made, in order to determine whether the depot is built within the distance prescribed, must be the corporate limits of the town, without regard

* Agreements to locate station, see note, 38 AM. & ENG. R. CAS. 714.

Action on subscriptions for stock accompanied by a written agreement by company to construct and maintain railroad and depot at a designated place, see 52 AM. & ENG. R. CAS. 34, *abstr.*

to buildings or improvements. *Courtwright* v. *Strickler*, 37 *Iowa* 382.

Certain persons entered into an agreement in the following form: "We, the subscribers, bind and obligate ourselves to subscribe to the capital stock of the North Missouri railroad company the sums set opposite our names, one half the amount to be paid in six months, and one half in twelve months from this date, on condition that a depot is located on the lands of John F. Diggs, which adjoin High Hill. This subscription is made to comply with the terms on which the directors of said company have made the location of a depot on said Diggs's land." *Held*, that this was a subscription *in præsenti*, and not a mere agreement to subscribe in future, and that the subscription became absolute upon the location of the depot at the designated place. *North Mo. R. Co.* v. *Miller*, 31 *Mo.* 19.

A company being about to construct its road through a town, the citizens, including plaintiff, agreed to subscribe $150,000 (of which plaintiff agreed to pay $500), and also to furnish suitable depot grounds. The company undertook to complete its road in one year. Subsequently the citizens provided depot grounds which proved unsuitable, and it was thereupon agreed that they should buy other grounds, and that the amount paid therefor by each citizen should be credited on his subscription to the company in full satisfaction *pro tanto* of such subscription. Plaintiff paid his whole $500 to buy depot grounds, the title to which afterwards became vested in the company. Subsequently, the company having failed to complete its road within the time stipulated, plaintiff brought suit against it to recover his $500. *Held:* (1) that there was no new contract substituted for the old one, and that the company was not released from its obligation to complete the road in the time specified; (2) that plaintiff was entitled to recover. *Texas & P. R. Co.* v. *Fitch*, 12 *Am. & Eng. R. Cas.* 312, 2 *Tex. Unrep. Cas.* 257.

218. Sufficiency of performance. —A subscription list, signed to aid in the construction of a railroad, provided that a certain payment should be made when the road intersected with another "at Wheatland" and "has been permanently located to and within the limits of the town of Wheatland, with a station at the same." *Held*, that a construction of the road through the town and of the depot just outside of its limits was not a compliance with the terms of the contract. *Davenport & St. P. R. Co.* v. *O'Connor*, 40 *Iowa* 477.

The fact that the committee to whom the subscription list had been intrusted, with directions to turn it over to the company whenever they became satisfied that the latter had complied with its conditions, did in fact deliver it in the exercise of their discretion does not render the contract binding upon subscribers. *Davenport & St. P. R. Co.* v. *O'Connor*, 40 *Iowa* 477.

An agreement between plaintiff company and the citizens of a city stipulated that certain subscription notes should remain in the hands of W. until a certain designated right of way had been secured, when the notes should be "turned over" to plaintiff, who thereupon should enter into an absolute contract for the construction of an extension of its line, upon certain specified conditions; and that it would not locate a depot on such extension within seven miles of the city. *Held:* (1) that W. was authorized, without further direction from the parties, to deliver the notes to plaintiff; (2) that a failure to incorporate in the last contract the condition respecting the location of the depot would not constitute a defense to an action upon one of the subscription notes, when in fact the condition had been complied with by plaintiff. *Burlington, C. R. & M. R. Co.* v. *Palmer*, 42 *Iowa* 222.

219. Conditions precedent. — A subscription was made for shares of railroad stock, payable at such times and in such instalments as the directors might prescribe, provided that the road be "permanently located" on a specified route, and that "a freight house and depot be built" at a point named. *Held*, that the subscription became absolute upon the permanent location of the road in accordance with the terms of the agreement. The provision in relation to the erection of the buildings being a stipulation merely, its performance was not a condition precedent to the right to collect the subscription. *Chamberlain* v. *Painesville & H. R. Co.*, 15 *Ohio St.* 225.—APPROVED IN Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389. DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170. FOLLOWED IN Ashtabula & N. L. R. Co. *v.* Smith, 15 Ohio St. 328.

A subscription to stock was payable, one fourth when the road was finished to a

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certain county line, and the remainder in four equal instalments of four months as the work progressed through the county, with a proviso that a depot should be located at a specified point in the county. The road was completed to the county line, and while it progressed through the county all the instalments except the last fell due, and all but two were paid. The company then became insolvent and abandoned the work before it was completed and before the last instalment was due, and the depot was not erected. Assignees of the subscription sued, and a defense of the failure of the company to perform the conditions imposed was interposed. *Held:* (1) that the completion of the road to the county line was a condition precedent to the payment of the first or any subsequent instalment; (2) that it was a condition precedent to the payment of any instalment after the first that the work on the road should be progressing within the county at the time it fell due. Consequently the last instalment was not recoverable. *Paducah & M. R. Co.* v. *Parks*, 86 *Tenn.* 554, 8 *S. W. Rep.* 842.

In such case the stipulation as to the erection of a depot was not a condition, but an independent covenant, a breach of which would not defeat a recovery of the instalments, but was ground for compensation in damages. *Paducah & M. R. Co.* v. *Parks*, 86 *Tenn.* 554, 8 *S. W. Rep.* 842.

6. *Particular Route to be Followed or Place Reached.**

220. Validity.—Public policy does not prohibit voluntary contributions to railroads for purposes of construction, or render void a contract based upon the consideration that the road shall be located in or through a certain locality, unless the public interest is to be sacrificed by it. *Berryman* v. *Cincinnati Southern R. Co.*, 14 *Bush* (*Ky.*) 755.—REVIEWING Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458.—APPROVED IN Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97.

But where officers of such corporation undertake to receive donations for their own private use, or make contracts by which they are to be paid for using an influence that will or may locate a line of railroad in a particular locality, such contracts will be held void as against public policy. *Berryman* v. *Cincinnati Southern R. Co.*, 14 *Bush* (*Ky.*) 755.—REVIEWING Fuller *v.* Dame, 18 Pick. (Mass.) 472; Holladay *v.* Patterson, 5 Oreg. 177; Pacific R. Co. *v.* Seely, 45 Mo. 212.

All contracts for stock made subsequent to the formation of the company, in consideration of a particular location, when complied with by the company, will be as binding on both parties as if the contract had been absolute and unconditional. *Taggart* v. *Western Md. R. Co.*, 24 *Md.* 563.

If it be conceded that there was a sufficient consideration to support a subscription conditioned that the road be located in a particular manner, it was still invalid as against public policy. It was the duty of the company to locate its road on a route most advantageous to the public. *Dix* v. *Shaver*, 14 *Hun* (*N. Y.*) 392.

An agreement "to take $1000 in stock" in a railroad "if it comes near enough to the town of Weston to suit the convenience of said town" is binding, and upon the condition being performed the subscription becomes absolute. *Mansfield, C. & L. M. R. Co.* v. *Brown*, 26 *Ohio St.* 223, 13 *Am. Ry. Rep.* 341.—FOLLOWED IN Mansfield, C. & L. M. R. Co. *v.* Stout, 26 Ohio St. 241.

Defendant signed a subscription paper binding himself to pay to a company a certain amount of money if its road should be constructed to a certain station within six months. The company proposed to extend its road to the station named for a bonus of $25,000, but only $23,000 was raised, which was rejected by the company. Thereupon defendant gave notice that he withdrew his subscription, but afterwards the company agreed to construct the road for the $23,000. *Held*, that defendant was bound by his subscription. *Buchill* v. *Lott*, 4 *Tex. App.* (*Civ. Cas.*) 70, 15 *S. W. Rep.* 413.

221. How construed.—A clause in a subscriber's note that "the line of said railroad shall be located and shall run from the court house in McDonough a distance not greater than the distance from said court house to the present site of the East Tennessee, Virginia & Georgia railroad depot" is ambiguous, and is for submission to the jury, to say whether the understanding of the parties was that the distance should be taken literally as expressed, or only substantially with reference to the convenience of the citizens and the public. *Weems* v.

* Subscription conditioned on location, see notes, 16 AM. & ENG. R. CAS. 439; 9 *Id.* 606.

Georgia Midland & G. R. Co., 84 *Ga.* 356, 11 *S. E. Rep.* 503.

Defendant signed a writing agreeing to pay money to a company when a railroad should be built by it and cars should be run between designated places in certain counties; and that if the company should not construct the road between the places to within one fourth of a mile of one of the places and also to another city in another county within one year, the obligation should be void. *Held*, that there could be no recovery unless the road was constructed to both places within the time. *Moore* v. *Campbell*, 111 *Ind.* 328, 9 *West. Rep.* 827, 12 *N. E. Rep.* 495.

Defendant and others signed a paper which recited the building of a proposed railroad between designated places in consideration of a right of way being secured and a local subscription of $3000 a mile, and each agreed to give a note to the company for the amount set opposite his name. The company was not then organized nor the line of the road fixed. *Held*, that proof of the circumstances attending the agreement might be given, and that the company might show that owing to highlands near a city it had been contemplated by the parties that the road should not be built to its corporate limits, but that the line of a previously constructed road was to be used for some distance; and the nature of the ground might be shown as a reason why a particular route could not be chosen. *Detroit, L. & L. M. R. Co.* v. *Starnes*, 38 *Mich.* 698.—FOLLOWING Phelps *v.* Whitaker, 37 Mich. 77; Detroit *v.* Robinson, 38 Mich. 108.

A subscription to stock provided that it should be void "unless said company locate its road" on a certain route. A second subscription was made on condition that "said road shall be located" on said route. Subsequently the directors voted that the road "be and the same is hereby located" on said route, but the road was constructed on another route which was not nearly so favorable to the subscriber. *Held:* (1) that the word "locate" meant to construct the road, and that the subscription was avoided by the abandonment of the first route; (2) the conditional subscriber having never been a stockholder and member of the company, or having ceased to be so on the violation of the condition, the payments made by him before the change of location could be recovered back. *Nashville & N. W. R. Co.* v. *Jones*, 2 *Coldw.* (*Tenn.*) 574.—DISTINGUISHED IN Paducah & M. R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. Rep. 842.

222. Such subscription made before organization deemed an absolute one.—Where a person makes a contract in writing to take stock in a company, under the authority of commissioners, it is not competent for him to prove by parol that he made such subscription on a condition as to the location of the road which had not been complied with. *North Carolina R. Co.* v. *Leach*, 4 *Jones* (*N. Car.*) 340.—DISTINGUISHING Twidy *v.* Saunderson, 9 Ired. (N. Car.) 5; Manning *v.* Jones Busb. (N. Car.) 368; Daughtry *v.* Boothe, 4 Jones 87.—REFERRED TO IN McRae *v.* Atlantic & N. C. R. Co., 5 Jones Eq. 395.

A commissioner appointed to receive subscriptions to stock subscribed for shares in his own name, and united with the other commissioners in a certificate to the governor, on which letters patent were issued, that the subscriptions "were in all respects made and taken in good faith, and agreeably to the provisions and requirements of the acts of assembly and the laws of the commonwealth." *Held*, that he was estopped, in an action to recover such subscription, from showing that it was made on a condition that had not been complied with in locating the road. *Bavington* v. *Pittsburgh & S. R. Co.*, 34 *Pa. St.* 358.—DISTINGUISHED IN Hanover Junction & S. R. Co. *v.* Grubb, 82 Pa. St. 36.

Such conditional subscription is to be deemed an absolute one, in an action to recover the same; for the condition is a fraud upon the commonwealth, as well as upon the unconditional subscribers. *Bavington* v. *Pittsburgh & S. R. Co.*, 34 *Pa. St.* 358.

A subscription to stock, under Pa. Act of February 19, 1849, made to commissioners, before the organization of the company, upon condition that the road should be located on a special route, is to be deemed an absolute subscription, without reference to the condition. *Pittsburgh & S. R. Co.* v. *Biggar*, 34 *Pa. St.* 455.—OVERRULING McConahy *v.* Center & K. Turnpike Road Co., 1 P. & W. (Pa.) 426.

The commissioners have no power to receive any other than unconditional subscriptions, but such conditional subscription is not a nullity. It is the condition that is

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illegal; the subscription is single and absolute. *Pittsburgh &c. S. R. Co.* v. *Biggar*, 34 *Pa. St.* 455. *Pittsburg &c. S. R. Co.* v. *Woodrow*, 3 *Phila.* (*Pa.*) 271.—QUOTING AND DISTINGUISHING Irvin *v.* Susquehanna & P. Turnpike Co., 2 P. & W. (Pa.) 466.

223. Necessity of performance.—Where a subscription is made upon a condition as to route, the subscriber is not a stockholder, and consequently not liable upon his agreement, until the condition is performed; and whether it has been performed is a question of fact. *Jewett* v. *Lawrenceburgh &c. U. M. R. Co.*, 10 *Ind.* 539.

224. What is a sufficient compliance with the condition.*—A subscription to stock was conditioned that the railroad should be located on a given line which should be evidenced by an order of the board of directors. There was no evidence of such order, but the road had in fact been so built, and the subscriber knew it. *Held*, that other evidence was admissible to show the location, and that the actual construction of the road was the best evidence of a compliance with the condition. *Moore* v. *New Albany &c. S. R. Co.*, 15 *Ind.* 78.

Where a subscription is made to the capital stock of a railroad upon condition that the final location of the road shall be upon a certain route, the permanent location of the road is that adopted by the directors. *Smith* v. *Allison*, 23 *Ind.* 366.

The contract sued on agreed to donate and pay to a company a certain amount when it should have completed its railroad through Morgan county and have the same ready for the running of cars, "provided, always, that said railroad be located and made as nearly as practicable on the grade of the Indianapolis branch of the New Albany and Salem railroad from Indianapolis to Gosport, making Mooresville, Brooklyn, Centerton, and Paragon points." *Held*, that when the company had built its road through Morgan county ready for the running of cars, and had made the places named points on the road, defendant was liable to pay the amount agreed to be donated, and it was not necessary that the old grade of the branch road should have been occupied further than to make these places points. *Branham* v. *Record*, 42 *Ind.* 181.

A subscription to stock made upon condition "that the line of the road shall be located and built within one mile of the post office, in the village of Three Rivers," is assessable when the road is finally located within one mile thereof, although not yet constructed. *Swartwout* v. *Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.—APPROVING Chamberlain *v.* Painsville & H. R. Co., 15 Ohio St. 225.

Where the condition to a subscription is that the road should "pass through" a given locality, the permanent location of the road, without its construction, on the route designated, is a compliance with the condition. *Ashtabula &c. N. L. R. Co.* v. *Smith*, 15 *Ohio St.* 328.—FOLLOWING Chamberlain *v.* Painesville & H. R. Co., 15 Ohio St. 225.—*Mansfield, C. &c. L. M. R. Co.* v. *Stout*, 26 *Ohio St.* 241, 13 *Am. Ry. Rep.* 361.—QUOTED IN Armstrong *v.* Karshner, 47 Ohio St. 276.—*Woonsocket Union R. Co.* v. *Sherman*, 8 *R. I.* 564.—DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170.

After a company had been organized, a question arose among the stockholders as to which of two routes should be adopted. Defendant, to induce the company to take the route he desired, agreed to subscribe a certain number of shares, provided that route was taken. The company took that route. *Held*, that this fact alone fixed the liability of defendant on his contract to take the shares subscribed, whatever might have been the terms of the original subscriptions. *Spartanburg &c. U. R. Co.* v. *DeGraffenreid*, 12 *Rich.* (*So. Car.*) 675.—REVIEWING North Eastern R. Co. *v.* Rodrigues, 10 Rich. 278.

225. What is not a sufficient compliance.—Defendant agreed to pay a certain sum to a company on condition that by a certain time it would build and equip a railroad and run a train over it between given points "on the east line" of defendant's land. In suing on the contract the complaint alleged the building of the road between the points within the time and the running of the train, but recited that the track was constructed as near as practicable on the east line of defendant's land, "and at all points within fifty feet of said east line," but alleged no reason for not building on the line, and no waiver of the condition. *Held*, that the complaint was bad on demurrer. *Crane* v. *Indiana N. &c. S. R. Co.*, 59 *Ind.* 165.

*Subscription conditioned on building of road between two points. What is compliance, see note, 30 AM. & ENG. R. CAS. 245.

In an action upon a subscription in the form of a note, to aid a railroad, it is competent for defendant to show, by the subscription papers and by the declarations of the agent who procured the note, that the railroad was to be built between certain points. The leasing of a part of the road between two points is not a compliance with the contract to construct a road between said points. *Lawrence* v. *Smith*, 9 *Am. & Eng. R. Cas.* 604, 37 *Iowa* 701, 11 *N. W. Rep.* 674.

Where defendant subscribes to stock, with the agreement that the road should be constructed within 500 feet of his mill, and it is afterward changed to about 1200 feet, in an action to recover his subscription it is competent for him to show that the change was a material one as to him. *Moore* v. *Hanover Junction & S. R. Co.*, 4 *Am. & Eng. R. Cas.* 256, 94 *Pa. St.* 324.—DISTINGUISHING Miller *v.* Hanover Junction & S. R. Co., 87 Pa. St. 95. FOLLOWING Hanover Junction & S. R. Co. *v.* Grubb, 82 Pa. St. 36; Caley *v.* Philadelphia & C. County R. Co., 80 Pa. St. 363.

226. Conditions precedent.—Where there is a stipulation in the body of the subscription for a particular enterprise, as for the building of a road to a particular place, or for its location on a specified route, such stipulation forms a condition precedent, and unless strictly complied with by the corporation the party subscribing will be absolved from his obligation to pay. *Martin* v. *Pensacola & G. R. Co.*, 8 *Fla.* 370.

Where parties sign a subscription reciting that if a certain railroad shall be permanently located and constructed through a city they will pay the sums set opposite their names, to be used and applied in acquiring a right of way, such contract will be enforced. The completion of the road is not a condition precedent to the payment of the money. *Berryman* v. *Cincinnati Southern R. Co.*, 14 *Bush* (*Ky.*) 755.—APPROVED IN Paducah & M. R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. Rep. 842.

Where a person subscribes to stock upon condition that the road shall "pass" over a certain designated route, it is not a condition precedent to the subscription that the company shall actually construct and complete the road along the line designated; it is sufficient if the road be thus permanently located. *North Mo. R. Co.* v. *Winkler*, 29 *Mo.* 318.—REVIEWING McMillan *v.* Maysville & L. R. Co., 15 B. Mon. (Ky.) 234.—APPROVED IN Paducah & M. R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. Rep. 842. DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170.

A subscription was made to railroad stock on condition that the company should "locate and construct" the road along a certain route. The road was located on the route, but the company suspended before it was constructed. In an action to recover several calls of the subscription—*held*, that the condition meant that the road should be located as named, and constructed as fast as the means of the company would permit, and, the construction of the road not being a condition precedent, plaintiff could recover. *Miller* v. *Pittsburgh & C. R. Co.*, 40 *Pa. St.* 237.—APPROVED IN Green *v.* Dyersburg, 2 Flipp. (U. S.) 477; Paducah & M. R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. Rep. 842. DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170; Pittsburg & C. R. Co. *v.* Allegheny County, 63 Pa. St. 126.

A subscription to stock was made payable whenever the road should be located or established to a certain city. The company bound itself to build and equip the road within a twelvemonth. The subscriber declined to pay when requested, on the ground that it was a physical impossibility to complete the road within the contract time. *Held*, that the completion of the road was not a condition precedent to the right to demand payment of the subscriptions; and especially is this so where the road at the time of the refusal to pay was in process of *bona fide* construction, and the failure to complete it within the time contracted is accounted for, and the road completed before bringing suit. *Seley* v. *Texas & St. L. R. Co.*, 2 *Tex. App.* (*Civ. Cas.*) 66.—APPROVING Miller *v.* Pittsburgh & C. R. Co., 40 Pa. St. 237; Front St., M. & O. R. Co. *v.* Butler, 50 Cal. 574. DISTINGUISHING Henderson *v.* San Antonio & M. G. R. Co., 17 Tex. 560.

227. Remedy of subscriber on non-performance by company.—Plaintiff subscribed $500 to the stock of a railroad, to be paid when the road was constructed through his county, which was to be within one year. Plaintiff and other persons who had subscribed agreed to fur-

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nish to the company certain depot grounds, and at the request of the company plaintiff's subscription was paid in procuring such grounds, before the road was built, the grounds being deeded to the company. The company failed to build the road within the time agreed and plaintiff sued to recover back the amount of his subscription. It appeared that the road was not built at the time of the trial, some six years after the subscription was made. *Held*, that plaintiff had not waived conditions precedent and was entitled to recover. *Texas & P. R. Co.* v. *Fitch*, 12 *Am. & Eng. R. Cas.* 312, 2 *Tex. Unrep. Cas.* 257.

228. Revocation of offer.—Defendant subscribed to the stock of a railroad on condition that the road be located in a specified manner, the subscription to be paid when the road should be graded. Subsequently the road was sold under a foreclosure sale, and the purchasers thereafter consolidated with still another company, and the road was located and graded according to the original subscription. *Held*, that the subscription was a mere offer on the part of defendant, which could be retracted at any time before acceptance; and as there had been no acceptance by the original company, it was not within the power of a subsequent company to accept, as there was no privity of contract between it and defendant. *Dix* v. *Shaver*, 14 *Hun* (*N. Y.*) 392.

229. Waiver. — Defendant subscribed for stock on condition that the railroad be built on a certain route, but afterwards gave his note with no mention of any condition. *Held*, that the note amounted to a new contract and was a waiver of the condition. *Evansville, I. & C. S. L. R. Co.* v. *Dunn*, 17 *Ind.* 603.—DISTINGUISHING Jewett *v.* Lawrenceburgh & U. M. R. Co., 10 Ind. 539.—DISTINGUISHED IN Parker *v.* Thomas, 19 Ind. 213. FOLLOWED IN Evansville, I. & C. S. L. R. Co. *v.* Wampler, 19 Ind. 347; Parks *v.* Evansville, I. & C. S. L. R. Co., 23 Ind. 567.

But the giving of unconditional notes for such subscription does not waive the performance of a condition precedent unless so intended by the parties; and the failure of such performance may be pleaded in bar of a recovery on the notes. *Parker* v. *Thomas*, 19 *Ind.* 213. — DISTINGUISHING Evansville, I. & C. S. L. R. Co. *v.* Dunn, 17 Ind. 603.

VI. SUBSCRIPTIONS BY OTHER COMPANIES.

230. Such subscriptions generally ultra vires.—A company chartered for the purpose of building and maintaining a railroad between designated points, with general power to purchase and hold personal estate of any character whatever, is not authorized to become a stockholder in a railroad running from the starting point of the first road to a different place. Such purchase is wholly beyond the purpose of the charter. *Central R. Co.* v. *Collins*, 40 *Ga.* 582. —REVIEWING East Anglian R. Co. *v.* Eastern Counties R. Co., 7 Eng. L. & Eq. 505; Wiswall *v.* Greenville & R. Plank Road Co., 3 Jones Eq. (N. Car.) 183; Colman *v.* Eastern Counties R. Co., 4 Railw. Cas. 513; Mayor, etc., of Macon *v.* Macon & W. R. Co., 7 Ga. 221; Munt *v.* Shrewsbury & C. R. Co., 3 Eng. L. & Eq. 149.—REVIEWED IN Memphis & C. R. Co. *v.* Woods, 44 Am. & Eng. R. Cas. 257, 88 Ala. 630, 7 So. Rep. 108.

A railroad corporation cannot become a stockholder in another railroad corporation for the purpose of controlling the business of the latter, or the election of its officers, unless such power is given by statute. *Pearson* v. *Concord R. Corp.*, 13 *Am. & Eng. R. Cas.* 102, 62 *N. H.* 537, 13 *Am. St. Rep.* 590.

Under the general railroad law a corporation cannot, in its own name, subscribe for stock or be a corporator; nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock. *Central R. Co.* v. *Pennsylvania R. Co.*, 31 *N. J. Eq.* 475; *reversed on another point in* 32 *N. J. Eq.* 755.—FOLLOWED IN Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. Rep. 486.

A banking corporation chartered under the laws of New York has no power to subscribe for the stock of a railroad corporation. *Nassau Bank* v. *Jones*, 20 *Am. & Eng. R. Cas.* 637, 95 *N. Y.* 115.

An incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another company. A subscription so made is *ultra vires* and void. *Valley R. Co.* v. *Lake Erie Iron Co.*, 46 *Ohio St.* 44, 1 *L. R. A.* 412, 18 *N. E. Rep.* 486.—FOLLOWING Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

231. What corporations have the power.* — An incorporated literary institution which, by its charter, has power to contract, and buy and sell real and personal property for the purpose of "sustaining and carrying on said institution of learning, and not otherwise" and which, under the power thus conferred, owns and operates a large and valuable farm, has, by fair implication, the power to do anything reasonably calculated to add to the value of its property, or to the value of the large industry thus created. Therefore a subscription by the corporation to aid in building a railroad which is highly beneficial to the institution in various ways, and adds largely to the value of its property, is not *ultra vires*. *Louisville & N. R. Co.* v. *St. Rose Lit. ary Soc.*, 91 *Ky.* 395, 15 *S. W. Rep.* 1065.

In Virginia a law giving authority to a bank to subscribe for railroad stock is constitutional, and the subscription is valid. *Goddin* v. *Crump*, 8 *Leigh* (*Va.*) 120.

232. Purchase by one road of stock subscriptions of another.—One railroad corporation, merely from having bought the roadbed of another, with intent to complete the road, has no right to purchase the vendor's stock subscriptions and enforce them against the subscribers. *West-End Narrow-Gauge R. Co.* v. *Dameron*, 4 *Mo. App.* 414.—DISTINGUISHING Daniels *v.* St. Louis, K. C. & N. R. Co., 62 Mo. 43. REVIEWING Pacific R. Co. *v.* Seely, 45 Mo. 212. —FOLLOWED IN Sommer *v.* Pacific R. Co., 4 Mo. App. 586.

SUBSEQUENT PURCHASERS.

Right of, to sue elevated railway company, see ELEVATED RAILWAYS, **85–90.**

SUBSIDY BONDS.

Application of earnings to payment of, see UNION PACIFIC R. CO., **10.**
Of Central Pacific R. Co., see CENTRAL PACIFIC R. CO., **2.**

SUBSTANTIAL DAMAGES.

Generally, see DAMAGES, **15.**

SUBSTITUTED ROAD.

Acceptance of, see TURNPIKES, **3.**

SUBSTITUTED SERVICE.

Of process, see PROCESS, **43.**

SUBSTITUTION.

Of new contract in place of former one, see CONTRACTS, **79.**
— — party to action, see ABATEMENT, **17.**
— — petitioner in condemnation proceedings, see EMINENT DOMAIN, **256.**
— — road for highway used by railroad, see STREETS AND HIGHWAYS, **195–207.**
— parties, see PARTIES TO ACTIONS, **15.**
— — on appeal, see EMINENT DOMAIN, **933.**
— purchaser as a party pendente lite, see ELEVATED RAILWAYS, **90.**
— receiver as defendant, see RECEIVERS, **136.**
— trustees under deed of trust, see DEEDS OF TRUST, **13.**

SUBWAY COMMISSIONERS.

Consent of, to placing poles and wires in streets, see ELECTRIC RAILWAYS, **12.**

SUFFICIENCY.

Of evidence, generally, see EVIDENCE, **264–299.**
— — in actions for injuries to employés, see EMPLOYÉS, INJURIES TO, **603–622.**
— fences, see FENCES, **75–81.**

SUITS.

By and against corporations, see CORPORATIONS, **17–20.**
Relative to liability for collision, see COLLISIONS, **1.**

SUMMARY PROCEEDINGS.

For the collection of taxes, see TAXATION, **325.**

SUMMONING.

Jurors, see TRIAL, **27.**
— under English compulsory purchase laws, see EMINENT DOMAIN, **1181.**

SUMMONS.

Form and sufficiency generally, see PROCESS, **10.**
In condemnation proceedings, see EMINENT DOMAIN, **301, 302.**
— ejectment suits, see EJECTMENT, **22.**
— suits against foreign corporations, see FOREIGN CORPORATIONS, **25.**
Of jurors to assess land damages, see EMINENT DOMAIN, **530–533.**

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* Power of corporation to hold stock in another company, see notes, 13 AM. & ENG. R. CAS. 119; 36 AM. ST. REP. 134.

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SUNDAY.

Limited ticket expiring on, see TICKETS AND FARES, 93.
Navigation of canals on, see CANALS, 4.
Procuring signatures to petition in aid of railway on, see MUNICIPAL AND LOCAL AID, 85.
Traveling on, as a defense to action for causing death, see DEATH BY WRONGFUL ACT, 161.
— — — — — — carrier of passengers, see CARRIAGE OF PASSENGERS, 557.

1. Validity of Sunday contracts, generally.*—Where a corporation issues bonds payable either in money or in shares of stock at or before maturity at the election of the holder, and the bonds on their face mature on Sunday, they mature in fact on the Saturday before, and a holder cannot exercise his option on the following Monday. *Chaffee* v. *Middlesex R. Co.*, 146 *Mass.* 224, 6 *N. Eng. Rep.* 59, 16 *N. E. Rep.* 34.

A railroad aid subscription signed on Sunday is *prima facie* void, and if the company has not acted on it in good faith and without knowledge of the defect, it must be ratified by delivery on a week-day. *Saginaw, T. & H. R. Co.* v. *Chappell*, 22 *Am. & Eng. R. Cas.* 16, 56 *Mich.* 190, 22 *N. W. Rep.* 278.

The fact that it was signed and delivered on Sunday renders void a written agreement whereby the owners of land consent to the laying of a railway track thereon and release all claim for damages. *Smith* v. *Chicago, M. & St. P. R. Co.*, 83 *Wis.* 271, 50 *N. W. Rep.* 497, 53 *N. W. Rep.* 550.

2. —— contracts of carriage.†— A Virginia statute made it a criminal offense to be found laboring on the Sabbath day at any trade or calling, except in household or other work of necessity or charity, but excepted the transportation of mails and passengers and their baggage. A railroad company received goods from a connecting carrier on Sunday, which it placed in a warehouse where they were destroyed during the day. The connecting carrier paid for the goods and sued the railroad company. *Held*, that the company, having received the goods, was bound to keep them in safe custody until they could be transported on the following day. To take care of them on the Sabbath day was a work of necessity, and therefore not unlawful. *Powhatan Steamboat Co.* v. *Appomattox R. Co.*, 24 *How.* (*U. S.*) 247.

It is the duty of the court to notice the days of the week on which particular days of the month fall. So a court knows that the 28th day of July, 1878, was Sunday, without an averment to that effect in a complaint. *So held*, on demurrer to a complaint against a carrier for not forwarding cattle, which averred merely the day of the month and the year without averring that the day was Sunday. *Philadelphia, W. & B. R. Co.* v. *Lehman*, 6 *Am. & Eng. R. Cas.* 194, 56 *Md.* 209, 40 *Am. Rep.* 415.

A Maryland statute forbids all persons to work or to do any bodily labor on the Lord's day, commonly called Sunday, except works of necessity and charity. A railroad company received stock as a common carrier on Sunday, and was sued for delay in not shipping it until the next day. The action was founded upon the common-law duty and liability of the company as a common carrier, and not upon any special contract. *Held*, that its obligation was to carry according to its public profession, and the conveniences at its command; and if it failed to do so it was liable. The Sunday law had no application. *Philadelphia, W. & B. R. Co.* v. *Lehman*, 6 *Am. & Eng. R. Cas.* 194, 56 *Md.* 209, 40 *Am. Rep.* 415.

Even upon the supposition that plaintiffs were violating the law in having their cattle transported on a Sunday, defendant could not avail itself of such infraction of the law by plaintiffs as a defense to an action for the consequences of a wrong or negligence of its own. *Philadelphia, W. & B. R. Co.* v. *Lehman*, 6 *Am. & Eng. R. Cas.* 194, 56 *Md.* 209, 40 *Am. Rep.* 415.

In the regular division of time Sunday embraces all the twenty-four hours next ensuing midnight of the Saturday preceding. So an averment that stock was delivered to a carrier on a certain day at four o'clock in the afternoon is sufficient, when the day is Sunday, to show that the delivery was on Sunday. *Philadelphia, W. & B. R. Co.* v. *Lehman*, 6 *Am. & Eng. R. Cas.* 194, 56 *Md.* 209, 40 *Am. Rep.* 415.

It seems that a carrier has a right to contract for the carriage of passengers on Sunday, and is not required, before receiving

* Construction of statutes on the observance of the Sabbath, see note, 5 AM. & ENG. R. CAS. 42.

† Effect of Sunday laws in the operations of railroads, see notes, 23 AM. & ENG. R. CAS. 434; 18 *Id.* 481.

them, to ascertain the purposes for which they are traveling; and having entered into such a contract, without knowledge that the purpose of the other party is unlawful, he cannot escape from liability for a negligent performance of the contract on that ground. He cannot take the benefit of the contract and be exempted from its responsibilities. *Carroll* v. *Staten Island R. Co.*, 58 *N. Y.* 126, 7 *Am. Ry. Rep.* 25, 9 *Am. Ry. Rep.* 486; *affirming* 65 *Barb.* 32.

The police authorities of a city have a right to prevent an express company from transporting domestic freights on Sunday, but not such as are interstate, as the control of interstate commerce is reserved to congress and cannot be conferred upon a state by an assertion of the police power. *Dinsmore* v. *New York Board of Police*, 12 *Abb. N. Cas.* (*N. Y.*) 436.

A contract made on Sunday to secure decent burial for the dead and to procure the presence of parents of the deceased is, in contemplation of law, a contract to do a work of necessity and charity, and therefore valid. *Gulf, C. & S. F. R. Co.* v. *Levy*, 12 *Am. & Eng. R. Cas.* 90, 96, 59 *Tex.* 542, 46 *Am. Rep.* 269.

3. Legal business.—An injunction may issue on Sunday to prevent irreparable injury, where necessity demands it. This rule applied to a case where a railroad, alleged to be insolvent, was proceeding to construct its track on a street on Sunday, without authority, to avoid the process of court. *Langabier* v. *Fairbury, P. & N. W. R. Co.*, 64 *Ill.* 243.

Where a town board of supervisors is authorized by law to issue bonds in aid of a railroad only upon the presentation of a petition therefor signed by a certain number of taxpayers of the town, the procuring and affixing of such signatures on Sunday is "business," and is unlawful, and confers no authority upon the supervisors to issue such bonds. *De Forth* v. *Wisconsin & M. R. Co.*, 5 *Am. & Eng. R. Cas.* 28, 52 *Wis.* 320, 9 *N. W. Rep.* 17, 38 *Am. Rep.* 737.

The fact that plaintiff affixed his signature to such petition on Sunday will not prevent him from obtaining an injunction against the issue of the bonds by the supervisors on the ground that the required number of signatures were not affixed on any secular day. *De Forth* v. *Wisconsin & M. R. Co.*, 5 *Am. & Eng. R. Cas.* 28, 52 *Wis.* 320, 9 *N. W. Rep.* 17, 38 *Am. Rep.* 737.

In such case the complaint for an injunction need not aver that the persons who signed the petition on Sunday were not of the class described in Wis. Rev. St. § 4596, as persons "who conscientiously believe that the seventh day or any other day of the week ought to be observed as the Sabbath." *De Forth* v. *Wisconsin & M. R. Co.*, 5 *Am. & Eng. R. Cas.* 28, 52 *Wis.* 320, 9 *N. W. Rep.* 17, 38 *Am. Rep.* 737.

4. Traveling on Sunday, generally.*—The fact that plaintiff received an injury on Sunday will not prevent a recovery therefor. *Louisville, N. A. & C. R. Co.* v. *Frawley*, 28 *Am. & Eng. R. Cas.* 308, 110 *Ind.* 18, 9 *N. E. Rep.* 594.—FOLLOWED IN Louisville, N. A. & C. R. Co. *v.* Buck, 38 Am. & Eng. R. Cas. 152, 116 Ind. 566, 19 N. E. Rep. 453, 2 L. R. A. 520.

A railroad cannot escape liability for injury to a person by showing that he was injured while returning from work on Sunday, in violation of law. *Illinois C. R. Co.* v. *Dick*, 91 *Ky.* 434, 15 *S. W. Rep.* 665.

The facts that the exercises of a spiritualist camp meeting included a show to which an admittance fee was charged, and that some of the speakers declared that they would throw away the Bible in their search after truth, are not conclusive that a person who traveled on Sunday to attend the meeting did so unlawfully; and the question whether he traveled except from necessity or charity is for the jury. *Feital* v. *Middlesex R. Co.*, 109 *Mass.* 398, 6 *Am. Ry. Rep.* 300.

One who travels on Sunday for the sole purpose of visiting a friend whom he knows to be sick, and may be in need of assistance, with the intention of rendering such assistance as is necessary, is engaged in a work of charity; and if he be injured by a carrier while so traveling he is entitled to a submission to the jury, though he offers no evidence on the ground of his belief that his friend was in need of assistance. *Doyle* v. *Lynn & B. R. Co.*, 118 *Mass.* 195, 9 *Am. Ry. Rep.* 277.

It is not easy to define, as a matter of law, what state of facts will make traveling an act of necessity or charity, within the exception in the Massachusetts Lord's-day Act, or when the plaintiff's own illegal conduct

* See also DEATH, ETC., **161**.
Violation of Sunday laws. Works of charity or necessity, see note, 6 AM. & ENG. R. CAS. 220.

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can be said to be a direct, rather than a remote, cause contributing to the injury wherefor he sues. The first of these questions is to be determined, to a great extent, by considerations of moral fitness and propriety; the last by the evidence in each case bearing upon the complicated relations of cause and effect. *Smith* v. *Boston & M. R. Co.*, 120 *Mass.* 490.

Traveling on Sunday to make a social visit is not within the statute which prohibits "any play, game, or recreation" on that day. *Corey* v. *Bath*, 35 *N. H.* 530.

The mere fact that plaintiff was traveling on Sunday is not ground for a nonsuit in an action against one who negligently injures him where there is nothing to show that he was not on an errand of necessity or charity. *Baldwin* v. *Barney*, 12 *R. I.* 392. —APPROVING Philadelphia, W. & B. R. Co. *v.* Philadelphia & H. de G. Steam Towboat Co., 23 How. (U. S.) 209; Kerwhacker *v.* Cleveland, C. & C. R. Co., 3 Ohio St. 172. DISAPPROVING Smith *v.* Boston & M. R. Co., 120 Mass. 490.

And a recovery in such case could not be defeated on the ground that plaintiff must affirmatively show himself free from contributory negligence, where the Sunday traveling was not the efficient cause of the collision which caused the injury. *Baldwin* v. *Barney*, 12 *R. I.* 392.

Even if plaintiff was driving on Sunday in violation of law, defendant could not show the illegality of his act as a defense. *Baldwin* v. *Barney*, 12 *R. I.* 392.

5.——as passengers on cars or boats.* —To deprive a party of redress because of his own illegal conduct the illegality must have contributed to the injury. Therefore, the mere fact that one who has been injured through the negligence of another was, when he received the injury, returning from work he had been doing on Sunday in violation of the Sunday law, will not deprive him of redress, as the same injury would have happened upon any other day under the same circumstances and conditions. *Illinois C. R. Co.* v. *Dick*, 91 *Ky.* 434, 15 *S. W. Rep.* 665.

Riding upon Sunday for exercise, and for no other purpose, is not a violation of the statute in relation to the observance of the Lord's day. The statute was not intended as an arbitrary interference with the comfort and conduct of individuals, when necessary to the promotion of health in walking or riding in the open air for exercise. *Sullivan* v. *Maine C. R. Co.*, 41 *Am. & Eng. R. Cas.* 195, 82 *Me.* 196, 19 *Atl. Rep.* 169.

Mass. St. of 1877, ch. 232, enacting that the provisions of the Gen. St. ch. 84, § 2, "prohibiting traveling on the Lord's day, shall not constitute a defense to an action against a common carrier of passengers for any tort or injury suffered by a person so traveling," does not apply to an action brought after it went into effect for an injury received before its enactment. *Bucher* v. *Fitchburg R. Co.*, 6 *Am. & Eng. R. Cas.* 212, 131 *Mass.* 156, 41 *Am. Rep.* 216. —DISTINGUISHING Robbins *v.* Holman, 11 Cush. (Mass.) 26; George *v.* Reed, 101 Mass. 378.

Plaintiff received word from his sister that she was sick at a distance from home, and needed assistance in returning. He wrote to her suggesting that she get a friend to accompany her, but if she could not he would meet her and accompany her. He started to travel to the place where he expected mail, to see if it would be necessary to render the assistance, and also to attend to some secular business, but was injured through the negligence of the carrier on Sunday while *en route*. *Held*, that merely going to see if he would be called upon to render assistance to his sister was not in itself a work of charity, and he could not recover. *Bucher* v. *Fitchburg R. Co.*, 6 *Am. & Eng. R. Cas.* 212, 131 *Mass.* 156, 41 *Am. Rep.* 216.

The New Jersey statute prohibiting traveling and worldly employment on the Christian Sabbath provides that it shall be lawful for any railroad company in the state to run one passenger train each way over its road on Sunday for the accommodation of the citizens of the state. *Held*, that a passenger on such a train might recover for an injury resulting from the negligence of the company, though he was not traveling for necessity or charity. *Smith* v. *New York, S. & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 399, 46 *N. J. L.* 7.—FOLLOWED IN Southern Pac. Co. *v.* Lafferty, 57 Fed. Rep. 536.

The fact that plaintiff had been traveling on Sunday, in violation of the statute, will not prevent a recovery against the carrier for an injury received while leaving its

* See also CARRIAGE OF PASSENGERS, 557.
Recovery for injury to passenger or employé as affected by Sunday laws, see notes, 2 L. R. A. 521; 18 AM. & ENG. R. CAS. 403.

depot grounds at the place of destination. *Delaware, L. & W. R. Co.* v. *Trautwein*, 41 *Am. & Eng. R. Cas.* 187, 52 *N. J. L.* 169, 7 *L. R. A.* 435, 13 *N. J. L. J.* 72, 19 *Atl. Rep.* 178.

A violation of the duty of a carrier to carry a passenger safely renders it liable, and such liability cannot be avoided by the fact that the injured person was traveling on Sunday, in violation of the statute. *Carroll* v. *Staten Island R. Co.*, 65 *Barb.* (*N. Y.*) 32; *affirmed in* 58 *N. Y.* 126.—DISTINGUISHING Smith *v.* Wilcox, 24 N. Y. 353.

Neither will the fact that the contract for transportation was made on Sunday relieve the carrier from such liability. *Carroll* v. *Staten Island R. Co.*, 65 *Barb.* (*N. Y.*) 32; *affirmed in* 58 *N. Y.* 126.—QUOTING Merritt *v.* Earle, 29 N. Y. 120.

Carriers who provide the means of travel on Sunday, and receive persons on board, are liable for personal injuries suffered by them from the negligence of the carrier notwithstanding the statute prohibiting, or making unlawful, ordinary travel on Sunday. *Landers* v. *Staten Island R. Co.*, 13 *Abb. Pr. N. S.* (*N. Y.*) 338; *reversed in* 53 *N. Y.* 450, 14 *Abb. Pr. N. S.* 346.—APPLYING Mohney *v.* Cook, 26 Pa. St. 342. DISAPPROVING Way *v.* Foster, 1 Allen (Mass.) 408; Stanton *v.* Metropolitan R. Co., 14 Allen 485. EXPLAINING AND QUOTING Harrison *v.* Marshall, 4 E. D. Smith (N. Y.) 271; Nodine *v.* Doherty, 46 Barb. 59. QUOTING AND DISAPPROVING Philadelphia, W. & B. R. Co. *v.* Philadelphia & H. de G. Steam Towboat Co., 23 How. (U. S.) 218.

The statute was intended to encourage the quiet and proper observance of the Sabbath, and does not apply to a case where peaceable persons, needing recreation and fresh air for the health of themselves or their children, go upon a ferryboat for a short excursion. Such persons are not traveling within the meaning of the statute. *Landers* v. *Staten Island R. Co.*, 13 *Abb. Pr. N. S.* (*N. Y.*) 338; *reversed in* 53 *N. Y.* 450, 14 *Abb. Pr. N. S.* 346.—QUOTING Smith *v.* Wilcox, 24 N. Y. 353; Miller *v.* Roessler, 4 E. D. Smith 234.

It was not the intention or policy of the statute to protect carriers of passengers from liability for mismanagement in carrying passengers on Sunday. A carrier is bound to use the highest degree of care and skill for the protection of its passengers. *Landers* v. *Staten Island R. Co.*, 13 *Abb. Pr. N. S.* (*N. Y.*) 338; *reversed in* 53 *N. Y.* 450, 14 *Abb. Pr. N. S.* 346.

One violating the statute prohibiting travel upon Sunday (1 N. Y. Rev. St. 628, § 70) is not without the protection of the law. The carrier owes to him the same duty as if he were lawfully traveling, and is responsible for a failure to perform it, the same in the one case as in the other. *Carroll* v. *Staten Island R. Co.*, 58 *N. Y.* 126, 7 *Am. Ry. Rep.* 25, 9 *Am. Ry. Rep.* 486; *affirming* 65 *Barb.* 32.—DISTINGUISHING Northrup *v.* Foot, 14 Wend. 248; Watts *v.* Van Ness, 1 Hill 76; Smith *v.* Wilcox, 24 N. Y. 353. FOLLOWING Philadelphia, W. & B. R. Co. *v.* Philadelphia & H. de G. Steam Towboat Co., 23 How. (U. S.) 218. QUOTING Mohney *v.* Cook, 26 Pa. St. 342.

The fact that a person was traveling for pleasure on Sunday does not affect his right to recover for an injury received on a street railway through the negligence of the company's servant. *Knowlton* v. *Milwaukee City R. Co.*, 16 *Am. & Eng. R. Cas.* 330, 59 *Wis.* 278, 18 *N. W. Rep.* 17.

6. Injuries at crossings.—A company was sued for running its train against a wagon on a highway crossing and killing the occupants thereof. The collision occurred on Sunday. It was urged that the company had no right to run its trains on Sunday, but there was no evidence to show that those driving in the wagon had any right to drive on the highway on Sunday. *Held*, that the fact that the collision occurred on Sunday had no effect on the rights of the parties. *Morris* v. *Chicago, M. & St. P. R. Co.*, 26 *Fed. Rep.* 22.

Plaintiff was traveling on a highway to ascertain whether a house which he had hired, and into which he expected to move, had been cleaned, and was injured in crossing a railroad track. *Held*, that he was not traveling for necessity or charity, and could not recover. *Smith* v. *Boston & M. R. Co.*, 120 *Mass.* 490.—DISAPPROVED IN Baldwin *v.* Barney, 12 R. I. 392.

A party traveling upon a highway upon the Sabbath, either from necessity or for pleasure or business, who is injured by a collision with a train at a crossing, is not barred from recovery against the company for its negligence from the fact that the injury occurred on Sunday. *Van Auken* v. *Chicago & W. M. R. Co.*, 96 *Mich.* 307, 55 *N. W. Rep.* 971.—QUOTING Sharp *v.* Evergreen Tp., 67 Mich. 443.

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7. Injuries to employes.* — Where a brakeman is killed while in the discharge of duty, through the negligence of the company in failing to furnish safe appliances, the company cannot defeat a recovery by showing that he was at work at the time in violation of the Sunday law. *Louisville, N. A. & C. R. Co.* v. *Buck*, 38 *Am. & Eng. R. Cas.* 152, 116 *Ind.* 566, 19 *N. E. Rep.* 453, 2 *L. R. A.* 520, 28 *Am. L. Reg.* 148.—FOLLOWING Louisville, N. A. & C. R. Co. *v.* Frawley, 110 Ind. 18.

A conductor of a street-car who is performing the ordinary duties of his employment on Sunday is both laboring and traveling in violation of Mass. Gen. St. ch. 84, §§ 1, 2; and if, while standing on the step on the side of an open car, he is injured by being struck by a car of another corporation passing on a parallel track, his illegal acts necessarily contribute to cause his injury, and preclude his maintaining an action therefor, notwithstanding the statute of 1877, ch. 232. *Day* v. *Highland St. R. Co.*, 15 *Am. & Eng. R. Cas.* 150, 135 *Mass.* 113. — FOLLOWING McGrath *v.* Merwin, 112 Mass. 467.

An engineer performing the ordinary duties of his employment on Sunday is laboring in violation of Mass. Pub. St. ch. 98, § 2 (unless the running of the train on which he is employed is a work of necessity or charity), and if he is injured by a defect in the track, his illegal act contributes to his injury and precludes his recovering therefor. *Read* v. *Boston & A. R. Co.*, 140 *Mass.* 199, 4 *N. E. Rep.* 227.

In such case plaintiff testified that the train was made up of box and stock cars; that there was stock on the train; that there was no convenience for feeding and watering stock at the place of departure; that he did not know how they were to be fed and watered there. *Held*, that there was not sufficient evidence that plaintiff was engaged in a work of "necessity" or "charity" within the above statute. *Read* v. *Boston & A. R. Co.*, 140 *Mass.* 199, 4 *N. E. Rep.* 227.

Where a track repairer is injured while at work on the Sabbath day, and he is required to work on that day, the mere fact that the accident occurred on Sunday will not release the company from liability. *Johnson* v. *Missouri Pac. R. Co.*, 23 *Am. & Eng. R. Cas.* 429, 18 *Neb.* 690, 26 *N. W. Rep.* 347.

* Injuries to employés on Sundays, see notes, 38 AM. & ENG. R. CAS. 161; 23 *Id.* 434.

8. Injuries to animals. — Where an animal is killed by a train run on Sunday, the liability of the company is to be determined by the same rules as if the accident had occurred upon any other day. *Tingle* v. *Chicago, B. & Q. R. Co.*, 60 *Iowa* 333, 14 *N. W. Rep.* 320.

9. Duty to refrain from running trains on Sunday.*—The fine provided by Iowa Code, § 4072, is the only penalty which a company incurs for running its trains on Sunday. *Tingle* v. *Chicago, B. & Q. R. Co.*, 60 *Iowa* 333, 14 *N. W. Rep.* 320.

The making by a company of ordinary repairs of its track is not a work of necessity within the meaning of Ky. Gen. St. ch. 29, art. 17, § 10, which provides that no work shall be done on the Sabbath day "except the ordinary household offices or other work of necessity or charity." Where, however, any part of a track is suddenly rendered unsafe on the Sabbath day, and delay might endanger the safety of passengers or freight, the company may repair the track without violating the statute. *Louisville & N. R. Co.* v. *Com.*, 92 *Ky.* 114, 17 *S. W. Rep.* 274.

Early on Sunday morning the fire department of a town ran a hose across a railroad track; it was cut in two by a gravel train of the company, and the town sued the company. *Held:* (1) that plaintiff was not a trespasser on the track; (2) that those in charge of the hose had a right to expect that no trains would be run on that day; (3) that if the running of the train on Sunday in violation of law was the direct cause of the injury, the action could be maintained without further proof of negligence. *Hyde Park* v. *Gay*, 120 *Mass.* 589.

10. Running street-cars on Sunday.—The running of street-cars in a city on Sunday is a work of necessity. *Augusta & S. R. Co.* v. *Rens*, 55 *Ga.* 126.

Under the Massachusetts statutes one who travels on Sunday merely to make a visit to a stranger, without any occasion of necessity or charity, is traveling unlawfully, and cannot recover from a street-car company that negligently injures him. *Stanton* v. *Metropolitan R. Co.*, 14 *Allen* (*Mass.*) 485. —DISAPPROVING Philadelphia, W. & B. R. Co. *v.* Philadelphia & H. de G. Steam Towboat Co., 23 How. (U. S.) 218. — DISAPPROVED IN Landers *v.* Staten Island R. Co.,

* Sunday laws as affecting right to run trains, see note, 14 L. R. A. 194.

13 Abb. Pr. N. S. (N. Y.) 338. FOLLOWED IN Bucher *v.* Cheshire R. Co., 34 Am. & Eng. R. Cas. 389, 125 U. S. 555.

A street-car which is run on Sunday for the purpose of accommodating the public generally and earning money from any one who may see fit to travel on it is run in violation of Mass. Gen. St. ch. 84, §§ 1, 2, although some of the passengers may be traveling lawfully. *Day* v. *Highland St. R. Co.*, 15 *Am. & Eng. R. Cas.* 150, 135 *Mass.* 113.

The running of street-cars on Sunday is a violation of law; but equity will not enjoin such running at the suit of individuals, where the bill and proofs show nothing except a violation of law, without any special pecuniary damage to complainants. *Sparhawk* v. *Union Pass. R. Co.*, 54 *Pa. St.* 401.

Chancery will not enjoin the performance of acts for which damages may not be recovered at law. So an injunction will not lie to restrain the running of street-cars on Sunday where the injury complained of is only mental or spiritual. *Sparhawk* v. *Union Pass. R. Co.*, 54 *Pa. St.* 401.

The running of street-cars on Sunday will not be enjoined at the suit of individuals, though it be unlawful, where the only damages shown are mental or spiritual, which are not cognizable in the courts. *Sparhawk* v. *Union Pass. R. Co.*, 54 *Pa. St.* 401.

Defendant company was incorporated under the Street Railway Act (Ont. Rev. St. 1887, c. 171), which authorized it to construct and operate (on all days except Sundays) a street railway. *Held*, that an action by the crown would not lie to restrain defendant from operating the road on Sunday, the restriction against its doing so being at most an implied one, and no substantial injury to the public or any interference with proprietary rights being shown. *Attorney-General* v. *Niagara Falls, W. P. & C. Tramway Co.*, 18 *Ont. App.* 453; *affirming* 19 *Ont.* 624.—APPROVING Attorney-General *v.* Great Eastern R. Co., 11 Ch. D. 449. REVIEWING Attorney-General *v.* Ely, H. & S. L. R. Co., 4 Ch. 194.

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Effect of, as a defense to action for injury to employés, see EMPLOYÉS, INJURIES TO, 558.
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Authority of, to employ physician, see MEDICAL SERVICES, 12.
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Whether fellow-servant or vice-principal of other employés, see FELLOW-SERVANTS, 355-365.

1. Power to bind the company, generally.*—An assistant superintendent of a company, authorized to employ a station agent, must be held to have the authority to agree on said agent's salary or compensation. *Alabama G. S. R. Co.* v. *Hill*, 76 *Ala.* 303.—QUOTING Alabama & T. R. R. Co. *v.* Kidd, 29 Ala. 221.

Where railroad companies are required by statute to fence their tracks, and inasmuch as they can only act by officers or agents, the general superintendent of a road will be presumed to be clothed with authority to bind the company by contract to fence its track. *New Albany & S. R. Co.* v. *Haskell*, 11 *Ind.* 301.—FOLLOWED IN Cincinnati, I., St. L. & C. R. Co. *v.* Davis, 126 Ind. 99. REVIEWED IN Louisville, E. & St. L. R. Co. *v.* McVay, 98 Ind. 391.

No officer of a corporation, unless specially authorized, has power to bind the corporation, except in the discharge of his ordinary duties. It is not part of the ordinary duties of the superintendent of a railroad to represent the corporation in judicial proceedings. So a superintendent cannot bind his corporation by an affidavit to remove a suit to a federal court, in the absence of special authority to make such affidavit. *Mahone* v. *Manchester & L. R. Corp.*, 111 *Mass.* 72.—QUOTED IN Quigley *v.* Central Pac. R. Co., 11 Nev. 350.

* Liability of company for contracts made by president superintendent, division superintendent, and general agents or managers, see note, 20 L. R. A. 696.

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While investigating an accident on a street-car, an agent of the company's superintendent applied to one who had seen something of the accident, and asked him to make a statement. The witness said that he could not make such statement without going on the ground and verifying the facts, to which the superintendent's agent consented. The witness went, made the statement, which was used, and upon failure to receive payment sued the company for time spent in going to the place of the accident and for making the statement. *Held*, that the question of the agent's authority so to employ him was for the jury, and that, being authorized to go to the place of the accident, the witness might recover if he had believed it necessary to go in order to make a correct statement, even though the jury might be satisfied that it was not actually necessary. *Lovejoy* v. *Middlesex R. Co.*, 128 *Mass.* 480.

Where plaintiff is in possession of a railroad platform used, under a contract, for storage purposes, and the company has given notice to terminate the contract, the general superintendent of the road has the power to withdraw the notice, and let the lease stand; and it is error to reject evidence concerning a conversation between plaintiff and the superintendent touching the matter. *Patrick* v. *Richmond & D. R. Co.*, 26 *Am. & Eng. R. Cas.* 78, 93 *N. Car.* 422.

A general superintendent of a company has authority to permit a contractor, planting hedges for the company at its stations, to place the live plants in a piece of ground at one of such stations; such authority need not be under seal. *Taff Vale R. Co.* v. *Giles*, 2 *El. & Bl.* 822, 18 *Jur.* 510, 23 *L. J. Q. B.* 43.

It is within the scope of the authority of the general superintendent of a railway company to refuse to give up on demand goods left with the company in the course of its trade as a common carrier; if such refusal is unreasonable, the company is guilty of conversion. *Taff Vale R. Co.* v. *Giles*, 2 *El. & Bl.* 822, 18 *Jur.* 510, 23 *L. J. Q. B.* 43.

2. —— by listing property for taxation.—Where a company is sued to recover a tax, and avers in its answer that its superintendent furnished the assessor with a written statement of the real estate belonging to the company, it cannot, on the trial, be heard to dispute the authority of its agent to give a list of its property, nor to deny that the property contained in the list belonged to the company. *People* v. *Stockton & C. R. Co.*, 49 *Cal.* 414.

Such statement of property furnished to an assessor is binding on the corporation, and justifies the assessor in adopting it as a correct statement of the property belonging to the company. *People* v. *Stockton & C. R. Co.*, 49 *Cal.* 414.

3. —— by negligence or tortious acts.—If the superintendent of a company is clothed with the power and authority of the board of directors, so far as regards the control and management of the trains and all the arrangements connected therewith, he is the immediate representative of the company, and the company is liable for an injury resulting from the negligence or improper order of the superintendent, just as much as if such order had emanated directly from an act of the company in its corporate capacity. *Washburn* v. *Nashville & C. R. Co.*, 3 *Head* (*Tenn.*) 638.

4. Duty to pay engineer's estimates –Where an estimate, signed by the engineer who made it, is presented to the superintendent of a railway, it is his duty as disbursing officer, under the terms of the contract, to pay it. He has no right or power to control the engineer, nor can he inquire into the propriety of the data upon which the calculations are made. The duty of the superintendent is ministerial, and having no power to withhold payment, the estimate is a voucher for disbursement which must be allowed. *Com.* v. *Clarkson*, 3 *Pa. St.* 277.

5. Compensation. — If a superintendent, at the request of his company, before work is commenced in the field, performs services not technically within the line of a superintendent's duty, it will be presumed that in rendering them he acted in his capacity as superintendent. *Bee* v. *San Francisco & H. B. R. Co.*, 46 *Cal.* 248, 7 *Am. Ry. Rep.* 504.

If there is no special agreement fixing the amount a superintendent shall receive for his services as superintendent, he is entitled to recover the value of such services. *Bee* v. *San Francisco & H. B. R. Co.*, 46 *Cal.* 248, 7 *Am. Ry. Rep.* 504.

A. was employed as superintendent of a railroad, at a fixed salary, the employment to be terminated by three months' notice in

writing. The corporation leased its railroad for a long term of years to another corporation, of which lease A. had notice; and, upon his representation that he had accepted his position supposing it to be permanent, and that the lease would be a damage to him for which he ought to be compensated, the corporation which employed him voted to pay to him a certain sum as extra compensation whenever the lessee should take possession of the road. The lessee took possession on a certain day, and the corporation paid to A. the sum so voted, and also his regular salary up to that day. *Held*, in an action by A. against the corporation for three months' salary from the date when the lessee took possession, that it was error in the presiding judge, who tried the case without a jury, to rule that, as matter of law, A. was entitled to recover, without passing upon the question of fact whether A., by accepting the extra compensation voted, had not waived his right to the three months' notice provided for in the contract of employment. *Nashua & L. R. Corp.* v. *Paige*, 15 *Am. & Eng. R. Cas.* 120, 135 *Mass.* 145.

Where one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is in general bound to pay the full amount of wages for the whole amount of time. *So held*, where the party was employed as superintendent of a railroad for one year at a salary of $1500, and after two months' service was discharged and remained without employment during the whole of the contract period subsequent to his discharge, having given notice to the company that he was ready to continue in its service. *Costigan* v. *Mohawk & H. R. Co.*, 2 *Den.* (*N. Y.*) 609.

6. Dismissal—Resignation.—The superintendent of a railroad received a letter from the president stating that he had written to the second vice-president to assume charge of the road, and added "I presume you will prefer to retire by means of a resignation," and he was further directed to confer with the second vice-president and to turn over all papers in his office. The next day he called on the second vice-president, who informed him that he had received a copy of the letter with further instructions to take charge of the office and its books and papers, and he at once left the service and the second vice-president took immediate charge. On the following day he wrote to the president, tendering his resignation, to take effect at once. *Held*, that the letter of the president operated as a positive and peremptory dismissal; and the letter on the next day did not show that he voluntarily resigned, nor could it be construed as acquiescing in his dismissal. *Cumberland & P. R. Co.* v. *Slack*, 45 *Md.* 161.

In such case the company claimed that after his employment the superintendent was accustomed to be intoxicated, and thereby became unfit for the performance of his duties. No evidence was offered to sustain this charge until the case had closed on both sides, when the company called a witness who had already been on the stand, and had been examined by the company, and proposed to prove by him the alleged intoxication. *Held*, that the evidence was properly excluded. The evidence should have been offered at the proper time, especially as the company was the plaintiff and had the opening and closing. *Cumberland & P. R. Co.* v. *Slack*, 45 *Md.* 161.

The company further charged that the superintendent failed to discharge his duty by failing to collect a balance due the company from a certain station agent, and in failing to report such deficiency to the company. The superintendent gave uncontradicted evidence that he had made every effort to collect, but that he could not collect and had no authority to bring suit. *Held*, that it was not error for the court to instruct the jury that there was no evidence that the dismissal was for sufficient cause. *Cumberland & P. R. Co.* v. *Slack*, 45 *Md.* 161.

In such case the company claimed, among other items, that the superintendent was liable for $953, a deficiency in his cash account. *Held*, that the superintendent was not liable for the money unless he had received it; it was therefore proper for the court to modify an instruction asked by the company which recited that the jury were authorized to find from certain facts that the superintendent had received the money, so as to make it read that the facts would furnish proper evidence for the consideration of the jury as to whether the money had been received. *Cumberland & P. R. Co.* v. *Slack*, 45 *Md.* 161.

Where a superintendent is sued after his dismissal for a balance alleged to be in his

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hands from his cash account, and for moneys that it was claimed he should have collected from agents, a balance due him for salary until the end of the year, which he claims because he was wrongfully discharged, is a proper set-off, under Md. Code, art. 75, §§ 12, 13. *Cumberland & P. R. Co.* v. *Slack*, 45 *Md.* 161.

7. Action for unlawful discharge.—In an action against an express company for wrongfully discharging plaintiff as assistant superintendent of the company, and to recover the balance of a year's salary claimed to be due to him, his declaration to the general superintendent, after being notified of his dismissal, that he intended to hold defendant responsible for his year's salary, is not admissible in evidence. *Adams Exp. Co.* v. *Trego*, 35 *Md.* 47.

If a person employed by the year as an assistant superintendent of a company, at a stated salary, payable monthly, engages in another business in competition with, and calculated seriously to injure, that of the company, and being notified by the company that he must discontinue said business, refuses to do so, and is discharged at the expiration of six months, and paid for his services at the stipulated price, up to the time of his discharge, he cannot recover the balance of the year's salary. *Adams Exp. Co.* v. *Trego*, 35 *Md.* 47.

8. Acting superintendent.—Two railroad companies entered into a certain contract relating to their joint occupancy of a new passenger station; and it was provided that the reasonable expense to one of the companies for doing certain work should be determined by the superintendent and another person. Before the time of making the determination the office of superintendent was abolished and his duties assigned to the president. *Held*, that he was the proper person to join in such determination. *Connecticut River R. Co.* v. *Williston*, 16 *Gray* (*Mass.*) 64.

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1. In general. — Taxation is an equal division of public expense. *State* v. *United States & C. Exp. Co.*, 60 *N. H.* 219.

The question of the taxation of lands, where there is no exemption in the grant, is governed by the laws of the state. *White* v. *Burlington & M. R. R. Co.*, 5 *Neb.* 393.

Although an incorporated company has not for thirty years been charged with taxes upon its property, the court will nevertheless sustain the right to tax, if it be a legal one, when the subject is finally brought to its attention. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217. — REVIEWING *O'Neal v. Virginia & M. Bridge Co.*, 18 Md. 1.

Whether the tax which railroads pay under N. J. Railroad Taxation Act is appropriated to state purposes alone, or to state, county, and municipal purposes, is a matter which does not concern them. All taxes, whether levied for state, county, or municipal purposes, are state taxes — they can be imposed by no other authority than that of the state. The state appropriates the proceeds to what purposes it sees fit; but however the proceeds may be appropriated, every tax is a state tax. *State Board of Assessors* v. *Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1, 2 *Atl. Rep.* 789.

2. Taxation distinguished from right of eminent domain.—While the right to take private property for public use is conditioned upon making compensation, the taxing power is not thus limited. *Stewart* v. *Polk County*, 30 *Iowa* 9. *Slack* v. *Maysville & L. R. Co.*, 13 *B. Mon.* (*Ky.*) 1.

When private property is taken under the taxing power, the taxpayer receives his just compensation in the protection which gov-

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ernment affords to his life, liberty, and property, and in the increased value of his possessions resulting from the use to which the government applies the money raised by the tax. *Norris* v. *Waco*, 57 *Tex.* 635.

3. The purpose must be a public one.—The right of taxation cannot be exercised in aid of strictly private enterprises, such as manufacturing enterprises. *Citizens' S. & L. Assoc.* v. *Topeka*, 20 *Wall.* (*U. S.*) 655. — APPLIED IN Consolidated Channel Co. *v.* Central Pac. R. Co., 51 Cal. 269.

The legislature, and not the judiciary, is to determine what is a public use for purposes of taxation. *Talcott* v. *Pine Grove Tp.*, 1 *Flipp.* (*U. S.*) 120.

4. Scope and extent of the power.* —A railroad was chartered when a general law was in force reserving to the state the power to amend, alter, or repeal charters, and amendments thereto, unless the act granting the charter or amendment excepted it from the operation of the general law. Subsequently the charter was amended, exempting the company's stock and real estate from taxation during the continuance of the charter, but this amendment contained no provision exempting it from the operation of the general law. *Held*, that it was competent for the state afterwards to amend its Constitution and laws so as to tax said stock and real estate. *Tomlinson* v. *Jessup*, 15 *Wall.* (*U. S.*) 454, 3 *Am. Ry. Rep.* 201.—QUOTED IN State *v.* Maine C. R. Co., 66 Me. 488; People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173.

The fact that some railroads cannot be constitutionally taxed beyond a specified percentage upon their annual income does not hinder the legislature from taxing all other companies *ad valorem* upon their property, the former being also taxed up to the limit established by their charters. *Atlanta & F. R. Co. v. Wright*, 87 *Ga.* 487, 13 *S. E. Rep.* 578.—REVIEWED IN Columbus Southern R. Co. *v.* Wright, 89 Ga. 574.

It is discretionary with the legislature to determine whether corporations shall be taxed only on their tangible property, on the amount of their capital stock paid in, on the amount of their gross receipts, or, as under Ill. Act of 1872, on the value of their tangible property and on the fair cash value of their capital stock, including their franchise, over and above the assessed value of their tangible property, subject to the limitation that it shall be directed by general law, uniform as to the class upon which it operates. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561. — QUOTED IN Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 54 Am. & Eng. R. Cas. 227, 133 Ind. 625, 33 N. E. Rep. 432.

There is no legal principle which prevents the state from imposing taxes according to the wants of its treasury, on every corporation enjoying its franchises from the government or passing through the state, unless restrained by some clear constitutional provision; and the state has this power without regard to the residence or citizenship of the stockholders. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 386.

Taxes can only be levied upon such property as the legislature shall prescribe, and then only by a uniform rule; but it is the "rule," and not the property, which is required by the Constitution to be "uniform." The legislature has power to prescribe not only the property to be taxed, but the rule by which it must be taxed, and the only limitation upon that power is that the rule so prescribed shall be uniform. The power to prescribe what property shall be taxed necessarily implies the power to prescribe what property shall be exempt. *Wisconsin C. R. Co.* v. *Taylor County*, 1 *Am. & Eng. R. Cas.* 532, 52 *Wis.* 37, 8 *N. W. Rep.* 833.—QUOTING Chicago, B. & Q. R. Co. *v.* Iowa, 94 U. S. 155; Missouri River, Ft. S. & G. R. Co. *v.* Morris, 7 Kan. 210; Francis *v.* Atchison, T. & S. F. R. Co., 19 Kan. 303; Louisville & N. A. R. Co. *v.* State ex rel., 25 Ind. 180.—QUOTED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310, 51 N. W. Rep. 386

5. Its limits, generally.—A state has no power, by taxation or otherwise, to retard, impede, or in any manner control the operations of congress in establishing the U. S. Bank. *M'Culloch* v. *Maryland*, 4 *Wheat.* (*U. S.*) 316. — DISTINGUISHED IN Central Pac. R. Co. *v.* State Board of Equalization, 13 Am. & Eng. R. Cas. 256, 60 Cal. 35; Com. *v.* Erie R. Co., 62 Pa. St. 286. QUALIFIED IN Union Pac. R. Co. *v.* Lincoln County, 1 Dill. (U. S.) 314. QUOTED IN People *v.* Central Pac. R. Co., 43 Cal. 398; State *v.* Baltimore & O. R. Co., 34 Md. 344.

The state of Indiana cannot tax that portion of the gross receipts of an Illinois

* Scope of the power to tax railroads, see note, 33 AM. & ENG. R. CAS. 446.

corporation in its treasury in Illinois which was earned in doing business in Indiana. The taxing power cannot be exercised on persons and property beyond the territory or jurisdiction of the state. *Indiana ex rel.* v. *Pullman Palace Car Co.*, 13 *Am. & Eng. R. Cas.* 307, 11 *Biss.* (*U. S.*) 561, 16 *Fed. Rep.* 193.

6. Constitutional limitations.* — The provisions of Cal. Constitution, art. 13, treating of revenue and taxation are not conditions upon the continued existence of railroad corporations. *San Mateo County* v. *Southern Pac. R. Co.*, 8 *Sawy.* (*U. S.*) 238, 13 *Fed. Rep.* 722; *writ of error dismissed in* 116 *U. S.* 138, 6 *Sup. Ct. Rep.* 317.

The California legislature, March 4, 1864, amended a former statute, relating to the improvement and protection of wharfs, docks, and water front in the city and county of San Francisco. It was objected that the statute was invalid because it attempted to exempt a portion of the commerce from the burden of the cost thereof, and was therefore in conflict with the provision of the state Constitution requiring taxation to be equal and uniform. *Held*, that while it was not competent for the legislature to exempt a portion and tax the remainder, the statute was not open to such construction. *People* v. *San Francisco & A. R. Co.*, 35 *Cal.* 606.

A constitutional provision that all property subject to taxation is to be taxed according to its value does not limit the state's power of taxation to taxation of property, and a tax on railroad companies according to their income is valid. *Charlotte, C. & A. R. Co.* v. *Gibbes*, 31 *Am. & Eng. R. Cas.* 464, 27 *So. Car.* 385, 4 *S. E. Rep.* 49.

The limitation imposed by Texas Constitution of 1876 on the power of counties to levy taxes applies only to the erection of public buildings. For the purpose of paying the interest and providing a sinking fund to satisfy any indebtedness existing at the adoption of the Constitution, counties are authorized to levy, assess, and collect taxes to the necessary amount. *Texas & P. R. Co.* v. *Harrison County*, 54 *Tex.* 119.

7. Legislative restrictions.† — The charter of a short railroad which was largely in a city provided that the city might impose an annual tax of $1 on every $100 of the gross earnings of the company, which should be in full and in lieu of all taxation by the city on the railway, its rolling stock, equipment, and appendages. *Held*, that the city could not constitutionally impose any further taxes. *Mobile & S. H. R. Co.* v. *Kenkerly*, 74 *Ala.* 566.

Where two railroad companies are consolidated under authority of a statute, so as to form a new corporation, such new corporation becomes subject to the general taxing power of the legislature, without regard to any limitations of the taxing power contained in the charters of the former companies, where the new company is created without any restriction upon the legislature to change, modify, or destroy its charter. *State* v. *Atlantic & G. R. Co.*, 60 *Ga.* 268.—DISTINGUISHING Central R. & B. Co. *v.* State, 54 Ga. 401.

The charter of a city gave to it the power to raise taxes for its own use and benefit, provided the laws passed for the purpose should not be repugnant to the Constitution and laws of the state or of the United States. *Held*, that the proviso did not limit the power of the city to tax only such subjects as were taxed by the state. *Orange & A. R. Co.* v. *Alexandria City Council*, 17 *Gratt.* (*Va.*) 176.

8. Judicial restrictions.*—Mo. Rev. St. 1879, § 6798, provides that the county courts are empowered to levy taxes, not to exceed the constitutional rate, for state purposes, including its funded and bonded debt and the tax for current county expenditures and for schools. Section 6799 provides that no other tax for any purpose shall be assessed and levied except upon the consent of the circuit court, upon petition filed for that purpose. *Held*, that a county court had no power to levy a tax to pay interest on railroad aid bonds without the consent of the circuit court. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 87 *Mo.* 236. *State ex rel.* v. *Missouri Pac. R. Co.*, 92 *Mo.* 137. *State ex rel.* v. *Wabash, St. L. & P. R. Co.*, 97 *Mo.* 296, 10 *S. W. Rep.* 434.—QUOTED IN State ex rel. *v.* Hannibal & St. J. R. Co., 113 Mo. 297.

But the above decisions seem to be in conflict with the decisions of the supreme court of the United States. That court has

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* Limitation of taxing power of state, see note, 2 L. R. A. 189.

† Restriction of power of taxation by legislation, see note, 12 AM. & ENG. R. CAS. 634.

As affecting existing contracts, see note, 16 AM. & ENG. R. CAS. 677.

* Judicial restriction of taxing power, see note, 12 AM. & ENG. R. CAS. 635.

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held that when a debt of a municipality has been conclusively established its payment is not restricted to any species of property or revenues, nor subject to any conditions. *United States* v. *New Orleans*, 98 *U. S.* 381. *Wolff* v. *New Orleans*, 12 *Am. & Eng. R. Cas.* 625, 103 *U. S.* 358.

And where a remedy by taxation exists by statute when the indebtedness is created, it cannot be taken away by a subsequent judicial construction of the statute; and the federal court in construing the statute will refuse to follow state decisions which have the effect of impairing contracts. *Butz* v. *Muscatine*, 8 *Wall.* (*U. S.*) 575.

9. Surrender of the power to tax.—The taxing power of the state, being of vital importance and an essential attribute of sovereignty, is never presumed to be relinquished, unless an intention to relinquish it is expressed in clear and unambiguous terms. *Louisville, C. & L. R. Co.* v. *Com.*, 10 *Bush* (*Ky.*) 43.

Where a statute provides that street railways shall be constructed only with the consent of the municipal authorities "and upon such terms and conditions as said authorities may from time to time prescribe," and municipal authorities enter into a contract with a company agreeing to accept a percentage of its gross receipts in lieu of all city taxes, except a land tax, the city is bound thereby and cannot collect an additional tax on the company's personal property, especially where the tax paid is more than the regular assessment. *Detroit* v. *Detroit City R. Co.*, 39 *Am. & Eng. R. Cas.* 538, 76 *Mich.* 421, 43 *N. W. Rep.* 447.

A Pennsylvania statute authorized a New York company to build its road through the former state, provided that the company should pay annually the sum of $10,000, and subjected the stock of the company, equal to the cost of construction of that part of the road, to a tax as other similar property. *Held*, not a surrender of the right to impose a tax on tonnage. *Erie R. Co.* v. *Com.*, 66 *Pa. St.* 84.—RECONCILING New York & E. R. Co. *v.* Sabin, 26 Pa. St. 242; Gordon *v.* Appeal Tax Court, 3 How. (U. S.) 133.—DISTINGUISHED IN Erie R. Co. *v.* Pennsylvania, 21 Wall. (U. S.) 492.

The fact that a railroad company is bound by its charter to pay into the state treasury a certain sum annually does not imply the surrender, on the part of the state, of the power to tax it by a general law applicable to all corporations. *Erie R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 368.

10. Power to increase taxes.—The mere imposition of taxes upon the property of a corporation, at the time a charter is granted or afterwards, will not authorize the assumption that the legislature has contracted that no additional taxation shall be imposed either on the property owned by the corporation at the time of the grant or upon that afterwards acquired. *Louisville, C. & L. R. Co.* v. *Com.*, 10 *Bush* (*Ky.*) 43.

The legislature may repeal a temporary rate of taxation and impose another and higher rate or additional taxes, by virtue of the state sovereignty over the whole subject of taxation, unless there has been some express contract in limitation of the power upon a consideration deemed to be a part of the value of the grant of a charter. *St. Joseph* v. *Hannibal & St. J. R. Co.*, 39 *Mo.* 476.

The charter of a railway provided that any municipality through which the road might pass might by by-law exempt the company and its property from taxation, in whole or in part. Under this authority a township passed a by-law that the real property of the company in the township be rated at twelve dollars per acre, which rating should not be increased for fifty years. *Held*, in the absence of anything to show that the company had altered its position, or done anything that it would not otherwise have done, that the township could repeal the by-law at any time. *In re Great Western R. Co.*, 23 *U. C. C. P.* 28.

11. Delegation of the power, generally.—Georgia Act of February 28, 1874 (Laws of 1874, p. 107), which requires railroad companies to return the value of their property to the comptroller-general, to be taxed as the property of other citizens, gives no authority to local or municipal bodies to tax the property of such companies. *Savannah* v. *Atlantic & G. R. Co.* 3 *Woods* (*U. S.*) 432.

Georgia Constitution of 1877, which abolishes all laws exempting property from taxation does not thereby impose any tax. Until the legislature authorizes a tax none can be collected, and then only the particular tax authorized. *Savannah* v. *Atlantic & G. R. Co.*, 3 *Woods* (*U. S.*) 432.

Iowa Revision, § 3275, confers no independent power of taxation, and does not require municipal corporations to levy a

judgment tax in excess of the maximum rate of taxation established by statute. (Cole, J., dissenting.) *Iowa R. Land Co.* v. *Sac County*, 39 *Iowa* 124, 9 *Am. Ry. Rep.* 46. —FOLLOWING Iowa R. Land Co. *v.* Soper, 39 Iowa 112.

The power of taxation is conferred by the legislature, and when the method of taxation is also prescribed, that must be pursued. *Iowa R. Land Co.* v. *Sac County*, 39 *Iowa* 124, 9 *Am. Ry. Rep.* 46.

12. —— to counties. — (1) *In general.* Ala. Act approved February 9, 1870, which attempted to relieve railroad corporations from county taxes, having been held unconstitutional (Perry County *v.* R. R. Co., 58 Ala. 546), their liability for such taxes during the years 1869 to 1875, while that statute was supposed to be in force, necessarily follows, if proper proceedings were had by the officers to whom the duties were by law confided to ascertain and fix the amount of their respective liabilities. *Perry County* v. *Selma, M. & M. R. Co.*, 7 *Am. & Eng. R. Cas.* 298, 65 *Ala.* 391. —APPROVED IN State ex rel. *v.* Hannibal & St. J. R. Co., 113 Mo. 297.

The special legislation of Georgia as to the taxation of railroads virtually excludes counties and municipal corporations from levying a tax for county and municipal purposes upon them and the appurtenances necessary to maintain and operate them, by making no provision for levying and collecting such tax. *Houston County* v. *Central R. Co.*, 72 *Ga.* 211.—FOLLOWING Albany *v.* Savannah, F. & W. R. Co., 71 Ga. 158.—FOLLOWED IN Atlanta *v.* Georgia Pac. R. Co., 74 Ga. 16.

(2) *In Kentucky.*—The law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for state revenue, and cannot be a fit subject for local taxation by separate counties through which it passes. *Applegate* v. *Ernst*, 3 *Bush* (*Ky.*) 648.—DISTINGUISHED IN Ludlow *v.* Cincinnati Southern R. Co., 7 Am. & Eng. R. Cas. 231, 78 Ky. 357, Louisville & N. R. Co. *v.* Hopkins County, 37 Am. & Eng R. Cas. 400, 87 Ky. 605, 9 S. W. Rep. 497. FOLLOWED IN Louisville & N. R. Co. *v.* Warren County Court, 5 Bush 243. QUOTED AND FOLLOWED IN Graham *v.* Mt. Sterling Coal-road Co., 14 Bush 425. REVIEWED AND CRITICISED IN Franklin County Court *v.* Louisville & N. R. Co., 25 Am. & Eng. R. Cas. 535, 84 Ky. 59.

Since the passage of Ky. Act of March 17, 1876, "to make taxation equal and uniform," there can be no question as to the liability of railroads for county taxes. *Louisville & N. R. Co.* v. *Com.*, 85 *Ky.* 198, 3 *S. W. Rep.* 139.

Under the law, as construed prior to Ky. Act of March 17, 1876, expressly subjecting railroads to local taxation, railroads were not subject to taxation by counties unless expressly authorized by statute. Therefore, neither an act passed in 1865, authorizing a tax to be levied on all property of Marion county "liable to taxation for state revenue," nor an act passed in 1869, authorizing a tax to be levied on the taxable property in said county "listed and taxed under the revenue laws of this state," authorizes the taxation of a road by the county for the years 1866 to 1875, as the railroads of the state, at the time of the passage of those acts, were not taxed under the general revenue laws of the state, but were taxed specifically upon a certain value per mile. *Com.* v. *Louisville & N. R. Co.*, 37 *Am. & Eng. R. Cas.* 418, 89 *Ky.* 134, 9 *S. W. Rep.* 805.

(3) *In Virginia.* — The Constitution of Virginia does not authorize county authorities to assess property for taxation and levy taxes upon it independently of the action of the legislature. They can only levy a tax upon such property as by law is assessed with state taxes in the county; nor can they levy a tax on the real estate of railroads in the county, either for county, township, school, or road purposes. *Virginia & T. R. Co.* v. *Washington County*, 30 *Gratt.* (*Va.*) 471.—QUOTING Missouri River, Ft. S. & G. R. Co. *v.* Morris, 7 Kan. 210. REVIEWED IN Baltimore & O. R. Co. *v.* Koontz, 77 Va. 698.—*Baltimore & O. R. Co.* v. *Koontz*, 77 *Va.* 698.—REVIEWING Virginia & T. R. Co. *v.* Washington County, 30 Gratt. 471.

By Va. Act of 1879-80, ch. 106, § 1, the legislature for the first time empowered the supervisors to levy a tax on the real estate of railroad companies whose roads pass through their county, prescribing that such tax should be equal to the tax imposed upon other property for county and school purposes, and based upon the assessment per mile of the same property made by the state for its purposes. *Baltimore & O. R. Co.* v. *Koontz*, 77 *Va.* 698. *Shenandoah Valley R. Co.* v. *Clarke County Sup'rs*, 78 *Va.* 269.

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County authorities are not authorized by the Constitution of Virginia, independently of the action of the legislature, to assess railroad or other property for taxation and county levies. *Shenandoah Valley R. Co.* v. *Clarke County Sup'rs*, 78 *Va.* 269.

Va. Act of February 27, 1880, took effect from its passage, and empowered the board of supervisors of a county to levy on a railroad a tax for the tax year beginning on the fourth Monday in July of that year. *Prince George County* v. *Atlantic, M. & O. R. Co.*, 87 *Va.* 283, 12 *S. E. Rep.* 667.

County supervisors are authorized to levy a tax on railroad property in their county at any time after the passage of Va. Act of February 27, 1880, based on the state assessment made previous to that act; and where the levy recites that fact, it will be presumed legal. *Norfolk & W. R. Co.* v. *Smyth County*, 87 *Va.* 521, 12 *S. E. Rep.* 1009.

Where, during a foreclosure suit, such tax is paid and its payment is approved by the court, purchasers of the railroad who were parties to the suit cannot recover the tax as illegally levied. *Norfolk & W. R. Co.* v. *Smyth County*, 87 *Va.* 521, 12 *S. E. Rep.* 1009.

13. —— to cities.—(1) *In general.*—Ill. Const. art. 9, § 1, authorizing the general assembly to tax persons or corporations owning or using franchises, does not exclude all other taxes, and the general assembly may authorize municipalities to tax such persons or corporations. *Huck* v. *Chicago & A. R. Co.*, 86 *Ill.* 352, 17 *Am. Ry. Rep.* 419.—FOLLOWED IN Hopkins *v.* Taylor, 87 Ill. 436.

Taxation by a local corporation for a local purpose, and tending to promote local prosperity, is within the scope of the corporate powers of cities, when sanctioned by the legislative authority, though not consented to by each individual to be affected thereby, as the will of the majority is to govern when the matter is referred to the decision of those to be affected. *Talbot* v. *Dent*, 9 *B. Mon.* (*Ky.*) 526.

A city may be constituted a taxing district and as such authorized to impose a tax upon property in the district for local purposes, such as for schools and railroads, although the same property may not be subject to taxation for ordinary city purposes, for the reason that it derives no benefit, actual or presumed, from the city government; and it is not essential to the validity of such a tax by the city as a taxing district that a particular piece of property sought to be taxed should derive a benefit from the improvement or enterprise for which the tax is imposed. *Henderson Bridge Co.* v. *Henderson*, 90 *Ky.* 498, 14 *S. W. Rep.* 493.—REVIEWING McFerran *v.* Alloway, 14 Bush. (Ky.) 581.

Where a municipal corporation has, in the due exercise of a power conferred upon it by the legislature, assessed and levied a tax upon certain property within its limits, the legislature may, by an act retrospective in its terms, and which takes effect before such tax becomes due, annul the assessment so made, and vest in another body the power to make the assessment for that year. *State ex rel. v. St. Louis, K. C. & N. R. Co.*, 79 *Mo.* 420; *affirming* 9 *Mo. App.* 532.

Every grant of the power of taxation to a municipal or other subordinate body must be strictly construed. And municipal officers must show, in the words of the charter, a warrant for whatsoever authority they assume to exercise. *Lynchburg* v. *Norfolk & W. R. Co.*, 80 *Va.* 237.

Where the charter of a city limited its right to impose taxes upon all property within the city to that "taxable for territorial and county purposes," the city had no right to impose taxes upon a railroad whose property was exempted by territorial law. *Columbia & P. S. R. Co.* v. *Chilberg*, 6 *Wash.* 612, 34 *Pac. Rep.* 163.

(2) *In Georgia.*—A provision in a Georgia statute that the property of railroad corporations shall "be taxed as other property of the people of the state," and providing a method for the collection of state taxes, does not authorize municipal taxation of such property. (Miller, J., dissenting.) *Savannah* v. *Jesup*, 9 *Am. & Eng. R. Cas.* 573, 106 *U. S.* 563, 1 *Sup. Ct. Rep.* 512.

A municipal corporation cannot exercise any power not granted by the legislature, nor can it exercise the power which the state has reserved to itself. So where the legislature has expressly provided a method of taxing railroad property by the state, but has provided no method by which municipal corporations may tax such property, such power does not exist. *Albany* v. *Savannah, F. & W. R. Co.*, 71 *Ga.* 158.—FOLLOWED IN Houston County *v.* Central R. Co., 72 Ga. 211; Atlanta *v.* Georgia Pac. R. Co., 74 Ga. 16.

The property of railroad companies in Georgia, used in carrying on their usual and ordinary business, is not subject to municipal taxation, nor liable to be sold for nonpayment of such a tax. *Atlanta* v. *Georgia Pac. R. Co.*, 74 *Ga.* 16.—FOLLOWING Albany *v.* Savannah, F. & W. R. Co., 71 Ga. 158; Houston County *v.* Central R. Co., 72 Ga. 211; Savannah, F. & W. R. Co. *v.* Morton, 71 Ga. 24.—*Augusta City Council* v. *Central R. Co.*, 78 *Ga.* 119.

(3) *In Iowa.*—The city of Davenport has no power under its charter, art. 5, § 1, to levy taxes for municipal purposes upon railroad rolling stock, when the company has its principal place of business and a portion of its road within the corporate limits of said city, such rolling stock being used by the corporation along the line of the road beyond as well as within the city. *Davenport* v. *Mississippi & M. R. Co.*, 16 *Iowa* 348. —DISAPPROVED IN Dubuque *v.* Illinois C. R. Co., 39 Iowa 56. FOLLOWED IN Dubuque & S. C. R. Co. *v.* Dubuque, 17 Iowa 120; Dunlieth & D. Bridge Co. *v.* Dubuque, 32 Iowa 427. REVIEWED IN Iowa Homestead Co. *v.* Webster County, 21 Iowa 221.—*Dubuque & S. C. R. Co.* v. *Dubuque*, 17 *Iowa* 120.—FOLLOWING Davenport *v.* Mississippi & M. R. Co., 16 Iowa 348.

The supreme court being equally divided upon the question as to the power of a city to levy taxes upon the real property of a railroad corporation situated within its limits, the judgment of the court below stands affirmed by operation of law. *Davenport* v. *Mississippi & M. R. Co.*, 16 *Iowa* 348. *Dubuque & S. C. R. Co.* v. *Dubuque*, 17 *Iowa* 120.

The property of railroad companies is not exempt from taxation by cities, under chapter 196, acts of the twelfth general assembly, providing for a tax of one *per centum* on the gross earnings of all railroads "in lieu of all taxes." Said act is confined in its operation to state and county taxes. (Cole, J., dissenting.) *Dunlieth & D. Bridge Co.* v. *Dubuque*, 32 *Iowa* 427. —FOLLOWED IN Davenport *v.* Chicago, R. I. & P. R. Co., 38 Iowa 633; Dubuque *v.* Illinois C. R. Co., 39 Iowa 56; Iowa R. Land Co. *v.* Woodbury, 39 Iowa 172.

The property of railroads is subject to taxation, and a municipal corporation, authorized by its charter to levy and collect taxes upon "all taxable property within its limits," may levy and collect a tax upon property belonging to railroads the same as other property. *Dunlieth & D. Bridge Co.* v. *Dubuque*, 32 *Iowa* 427.—FOLLOWING Davenport *v.* Mississippi & M. R. Co., 16 Iowa 348.

14. Sinking-fund taxes.—A sinking-fund tax is a tax raised to be applied to the payment of the interest and principal of a public loan, and it cannot, under the statute, be levied for the payment of floating indebtedness. *Union Pac. R. Co.* v. *York County*, 10 *Neb.* 612, 7 *N. W. Rep.* 270.—FOLLOWING Union Pac. R. Co. *v.* Buffalo County Com'rs, 9 Neb. 449.

County commissioners have no authority to divert a sinking-fund tax from the purpose for which it was raised and transfer it to the general fund. *Union Pac. R. Co.* v. *Dawson County*, 12 *Neb.* 254, 11 *N. W. Rep.* 307.—FOLLOWED IN Burlington & M. R. R. Co. *v.* Clay County, 13 Neb. 367.

Neb. Act of 1875 merely authorizes the transfer to the general fund of the surplus sinking fund, after the debt for which it was levied is extinguished. *Union Pac. R. Co.* v. *Dawson County*, 12 *Neb.* 254, 11 *N. W. Rep.* 307.

15. Litigation taxes. — An action against an express company for failure to deliver goods according to contract, where both the contract and failure to deliver occurred before June, 1865, is taxable under Ga. Act of Oct. 13, 1870, and if the affidavit required by the first section is not filed the action will be properly dismissed. *Alexander* v. *Southern Exp. Co.*, 45 *Ga.* 24.

The taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself; consequently the imposition of a tax upon parties commencing suits in the supreme court is not in violation of the Constitution, providing that the mode of levying taxes shall be by valuation, and giving to the legislature power to tax certain specified business classes, among which litigants are not enumerated. *State ex rel.* v. *Lancaster County Com'rs*, 4 *Neb.* 537.

16. Curative acts. — County commissioners, in levying taxes for a certain year, levied to their full limit a tax for current expenses, and then levied another tax to meet a deficit in the county revenue of the preceding year. A railroad company objected to the payment of the additional tax on its property. *Held*, that such additional tax was illegal and void. *Atchison, T. & S. F. R. Co.* v. *Woodcock*, 18 *Kan.* 20.

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The state Constitution provides that no tax shall be levied except in pursuance of a law which shall distinctly state its object. After the above tax was levied the legislature passed an act entitled "An act to legalize a certain levy of taxes," but according to the body of the act it attempted to legalize all taxes made by the commissioners of such county for a certain year. *Held*, that the statute did not have the effect of curing or validating such illegal levy. *Atchison, T. & S. F. R. Co.* v. *Woodcock*, 18 *Kan.* 20.

II. CONSTITUTIONALITY OF STATUTES.*

17. United States courts. — A state law taxing stock issued for loans made to the United States is unconstitutional. *Weston* v. *Charleston*, 2 *Pet.* (*U. S.*) 449.—DISTINGUISHED IN *Com. v.* Erie R. Co., 62 Pa. St. 286.

A law which designates all railroads as a class for the purposes of taxation, and imposes a tax on all alike, giving to all the same right to resist the collection of the tax, does not deny the "equal protection of the law," within the meaning of the United States Constitution, because the means employed may be different from those in taxing other species of property. *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 22 *Am. & Eng. R. Cas.* 225, 115 *U. S.* 321, 6 *Sup. Ct. Rep.* 57.

Where a railroad is not taxable under its charter, a law imposing a tax, in case it be sold or leased to a corporation of another state, does not impair the obligation of a contract within the meaning of the U. S. Constitution. *Chicago, B. & K. C. R. Co.* v. *Guffey*, 122 *U. S.* 561, 7 *Sup. Ct. Rep.* 1300.

As to the right of a state to authorize what is called a "privilege tax" on sleeping cars that are run through the state, see *Gibson County* v. *Pullman Southern Car Co.*, 42 *Fed. Rep.* 572.—FOLLOWING Pullman Southern Car Co. *v.* Gaines, 3 Tenn. Ch. 587; Robbins *v.* Taxing Dist., 13 Lea (Tenn.) 309. NOT FOLLOWING Pullman Palace Car Co. *v.* State, 64 Tex. 274.

18. Alabama. — The law of 1870 entitled "An act to amend an act entitled 'An act to establish revenue laws for the state of Alabama'" is not violative of any constitutional provision. It does not invade the executive powers in remitting penalties already incurred in the non-payment of taxes for the year 1869; it does not exempt the property of railroads from taxation; it does not impair any vested right; it relates to but one subject, and that is sufficiently set forth in the title. *Mobile & G. R. Co.* v. *Peebles*, 47 *Ala.* 317.

The Alabama Constitution provides that all taxes levied on property in the state "shall be assessed in exact proportion to the value of such property," and that "the property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate." The Code of 1876, § 383, provides that railroad property shall be estimated at a sum not less than that which, at interest of eight per cent., would yield the sum shown by the data before the board of assessment to consist of the whole earnings, deducting the running expenses of the road. *Held*, that it was not competent for the legislature thus to attempt to fix an artificial value upon railroad property. *Assessment Board* v. *Alabama C. R. Co.*, 59 *Ala.* 551.

19. Arizona. — Taxation of a railroad franchise granted by congress is not in conflict with that provision of the federal Constitution which grants to congress the right to control commerce among the states. *Atlantic & P. R. Co.* v. *Lesueur*, (*Ariz.*) 37 *Am. & Eng. R. Cas.* 368, 19 *Pac. Rep.* 157.

Nor is the taxation by a territory of such franchise unconstitutional, as the taxation of a federal agency, in the absence of such restriction in the grant of the taxing power to the territory, as congress may permit the territory to do so. *Atlantic & P. R. Co.* v. *Lesueur*, (*Ariz.*) 37 *Am. & Eng. R. Cas.* 358, 19 *Pac. Rep.* 157.

20. Arkansas. — Arkansas statute of March 31, 1883, § 46, which directs the board of railroad commissioners not to include the embankments, tunnels, cuts, ties, trestles, or bridges of railroads in the schedule of the property of railroad companies prepared by them for the purpose of assessment of taxes, is in conflict with the state Constitution of 1874, relating to the assessment and taxation of property within the state. *Huntington* v. *Worthen*, 29 *Am. & Eng. R. Cas.* 230, 120 *U. S.* 97, 7 *Sup. Ct. Rep.* 469.—FOLLOWED ON DIF-

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* Constitutional guaranty of equal rights as applied to the law of taxation, see note, 8 AM. & ENG. R. CAS. 56.

Equality and uniformity in taxation of corporations, see notes, 13 AM. & ENG. R. CAS. 292; 8 *Id.* 57.

Discriminating tax against foreign corporations, see note, 13 AM. & ENG. R. CAS. 312.

FERENT GROUNDS IN St. Louis, I. M. & S. R. Co. *v.* Worthen, 41 Am. & Eng. R. Cas. 589, 52 Ark. 529.

So much of Mansfield's Ark. Dig., § 5649, as excludes "embankments, tunnels, cuts, ties, trestles, or bridges" from assessment by the state railroad commissioners is unconstitutional. *Little Rock & Ft. S. R. Co.* v. *Worthen*, 46 *Ark.* 312.—FOLLOWED ON DIFFERENT GROUNDS IN St. Louis, I. M. & S. R. Co. *v.* Worthen, 41 Am. & Eng. R. Cas. 589, 52 Ark. 529.

Under Ark. Const. art. 16, § 5, which provides that the value of property for taxation shall be ascertained in such manner as the general assembly shall direct, making the same equal and uniform, the legislature has the power to classify property for the purposes of taxation, and to provide for the valuation of different classes by different methods. Such classification under a statute which operates equally and uniformly upon all property of its kind or class is not prohibited by the federal Constitution. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254.

Separate classification of railway property for taxation, and its assessment by an instrumentality different from that employed in the valuation of other property, are justified by its peculiar nature and uses. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254.

Ark. Revenue Act of 1883 is not unconstitutional on the ground that it requires the tracks and rolling stock of railways to be assessed by the state board of commissioners, while it provides for the valuation of all other property by county assessors. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254.

21. California.—California Constitution provides that real estate shall be taxed at its value after deducting the amount of liens thereon, "except as to railroad and other *quasi* public corporations." *Held*, that such provision is in conflict with that provision of the fourteenth amendment of the Constitution of the United States which guarantees the equal protection of the law. *Santa Clara County* v. *Southern Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 182, 18 *Fed. Rep.* 385, 9 *Sawy.* (*U. S.*) 165.—FOLLOWING San Mateo County *v.* Southern Pac. R. Co., 8 Sawy. 281, 13 Fed. Rep. 147, 722.—DISTINGUISHED IN Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121.

The statute of 1863-64, § 1, which provides that when there are several revenue districts in one county the whole length of railroads in such county shall be assessed in that district in which the county seat is located, is in conflict with the state Constitution, art. 11, § 13, requiring assessors and collectors to be elected by the electors of the district in which the property taxed is situated. *People* v. *Placerville & S. V. R. Co.*, 34 *Cal.* 656.

The state Constitution, art. 13, § 10, providing for taxation of railroad property, is not a "local or special law" passed by the legislature. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

The act of March 18, 1874, § 9, authorizing an assessment for taxes in the city of San Francisco after the time within which the board of supervisors can meet to equalize assessments, is violative of that provision of both the state and federal Constitutions which guarantees equal protection of the law. (Myrick and Thornton, JJ., dissenting.) *People* v. *Pittsburg R. Co.*, 22 *Am. & Eng. R. Cas.* 206, 67 *Cal.* 625, 8 *Pac. Rep.* 381.

California Political Code, §§ 3665-3670, providing a special mode of collecting taxes on railroads running through two or more counties, is in violation of that provision of the state Constitution which forbids special laws for the assessment or collection of taxes or for regulating the practice of courts of justice. *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.—FOLLOWING Dundee Mortgage Trust Inv. Co. *v.* School Dist. No. 1, 10 Sawy. 52.—*Santa Clara County* v. *Southern Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 182, 18 *Fed. Rep.* 385, 9 *Sawy.* (*U. S.*) 165.

22. Dakota territory.*—The legislature of the territory passed an act, March 7, 1889, providing that railroad companies that would accept the act should pay three per cent. annually on their gross earnings for the first five years, and two per cent. thereafter. The act of congress organizing the territory provides that the legislative assembly shall pass no law impairing the rights of private property, nor make any discrimination in taxing different kinds of

* See also *post*, **42**.

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property, but that all property subject to taxation shall be taxed in proportion to its value. *Held*, that the above statute is in conflict with such act of congress so far as it exempts from taxation lands owned by a company merely for the purpose of sale, and not necessary for its functions as a common carrier; and such act is also in conflict with the fourteenth amendment of the Constitution of the United States. *Northern Pac. R. Co.* v. *Walker*, 47 *Fed. Rep.* 681.

23. Georgia. — By Georgia Code of 1863 it was enacted that private corporations were subject to be changed, modified, or destroyed at the will of the creator, except so far as the law forbade it; and that in all cases of private charters thereafter granted, the state reserved the right to withdraw the franchise, unless expressly negatived in the charter. Two railroads created prior to 1863, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an act of the legislature passed April 18, 1863, which authorized a consolidation of their stock, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. *Held:* (1) that, by the consolidation a new corporation was created and the original companies were dissolved; (2) that the new corporation became subject to the provisions of the code which reserved the right of the legislature to withdraw its charter or to change, modify, or destroy it; (3) that a subsequent legislative act, taxing the property of the corporation as the property in the state is taxed, was not prohibited by that provision of the Constitution of the United States which denies to states the power of passing laws impairing the obligation of contracts. *Atlantic & G. R. Co.* v. *Georgia*, 98 *U. S.* 359.—DISTINGUISHED IN State ex rel. *v.* Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290; State *v.* Nashville, C. & St. L. R. Co., 12 Lea (Tenn.) 583; Indianola R. Co. *v.* Fryer, 11 Am. & Eng. R. Cas. 324, 56 Tex. 609. FOLLOWED IN Greenwood *v.* Union Freight R. Co., 105 U. S. 13; Memphis & L. R. R. Co. *v.* Railroad Com'rs, 112 U. S. 609; Tennessee *v.* Whitworth, 117 U. S. 139. REFERRED TO IN Citizens' St. R. Co. *v.* Memphis, 53 Fed. Rep. 715. REVIEWED IN Henderson *v.* Central Pass. R. Co., 20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358; State ex rel. *v.* Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.

The act of February 28, 1874, taxing the Atlantic and Gulf railroad company an amount exceeding one half of one per cent. upon its annual net income, is constitutional. *Atlantic & G. R. Co.* v. *State*, 55 *Ga.* 312.—FOLLOWED IN Savannah, G. & N. A. R. Co. *v.* State, 55 Ga. 557.—See also *Central R. & B. Co.* v. *State*, 54 *Ga.* 401; *reversed in* 92 *U. S.* 665.

The act of October 16, 1889, relating to taxing railroad property for county purposes, is a general, not a special law, and except as necessarily checked and qualified by irrevocable exemptions previously granted, it is uniform, equal, and just. It is not wanting in uniformity because it recognizes and seeks to abide by inviolable charter rights of such railroads as can be taxed for county purposes only upon the basis of their net income, there being in fact, under existing conditions, no such railroads now in the state. *Columbus Southern R. Co.* v. *Wright*, 54 *Am. & Eng. R. Cas.* 255, 89 *Ga.* 574, 15 *S. E. Rep.* 293; *affirmed in* 151 *U. S.* 470, 14 *Sup. Ct. Rep.* 396.—FOLLOWED IN Georgia Midland & G. R. Co. *v.* State, 89 Ga. 597, 15 S. E. Rep. 301.

Nor because it requires rolling stock and other floating personalty to be apportioned for county taxation among the several counties through which the respective railroads run. *Columbus Southern R. Co.* v. *Wright*, 54 *Am. & Eng. R. Cas.* 255, 89 *Ga.* 574, 15 *S. E. Rep.* 293; *affirmed in* 151 *U. S.* 470, 14 *Sup. Ct. Rep.* 396.—FOLLOWED IN Georgia Midland & G. R. Co. *v.* State, 89 Ga. 597, 15 S. E. Rep. 301.

Nor because it requires returns to be made to the comptroller-general of the state instead of to the tax receivers of the several counties, and designates that officer, and not the tax officers of the counties, to calculate the amount of taxes due to each county according to the returns and to issue execution therefor. *Columbus Southern R. Co.* v. *Wright*, 54 *Am. & Eng. R. Cas.* 255, 89 *Ga.* 574, 15 *S. E. Rep.* 293; *affirmed in* 151 *U. S.* 470, 14 *Sup. Ct. Rep.* 396.—FOLLOWED IN Georgia Midland & G. R. Co. *v.* State, 89 Ga. 597, 15 S. E. Rep. 301.

And the above act refers to but one subject-matter, and contains nothing different from what is expressed in its title. *Columbus Southern R. Co.* v. *Wright*, 54 *Am. &*

Eng. R. Cas. 255, 89 *Ga.* 574, 15 *S. E. Rep.* 293.—FOLLOWED IN Georgia Midland & G. R. Co. *v.* State, 89 Ga. 597, 15 S. E. Rep. 301.

The state does not by this act deny to any person or railroad corporation the equal protection of its laws, and consequently there is no conflict with the fourteenth amendment of the Constitution of the United States. *Columbus Southern R. Co.* v. *Wright*, 54 *Am. & Eng. R. Cas.* 255, 89 *Ga.* 574, 15 *S. E. Rep.* 293; *affirmed in* 151 *U. S.* 470, 14 *Sup. Ct. Rep.* 396.—FOLLOWED IN Georgia Midland & G. R. Co. *v.* State, 89 Ga. 597, 15 S. E. Rep. 301.

24. Illinois. — Although the Illinois Constitution requires taxation, in general, to be uniform and equal, and declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, uniform as to the class upon which it operates, yet under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals; nor does it violate any provision of the federal Constitution. *Taylor* v. *Secor*, 92 *U. S.* 575.—FOLLOWING Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 561; Chicago, B. & Q. R. Co. *v.* Cole, 75 Ill. 591.—QUOTED AND APPROVED IN Franklin County *v.* Nashville, C. & St. L. R. Co., 12 Lea (Tenn.) 521.

It is within the constitutional power of the legislature to exempt property from taxation, or to commute the general rate for a fixed sum. So a provision in a railroad charter, exempting the company's property from taxation, upon the payment of a certain proportion of its earnings, is constitutional. *Illinois C. R. Co.* v. *McLean County*, 17 *Ill.* 291.—APPROVED IN Chicago *v.* Sheldon, 9 Wall. (U. S.) 50. EXPLAINED IN Cook County *v.* Chicago, B. & Q. R. Co., 35 Ill. 460.

The act of Feb. 14, 1855, which directs that the tracks and superstructure of railroads, and improvements at stations, shall be regarded as personal property for the purpose of taxation, is a valid law. It is competent for the legislature to declare fixtures, which at common law are part of the realty, personal property. *Maus* v. *Logansport, P. & B. R. Co.*, 27 *Ill.* 77.

Though a board of supervisors may not be a court, a statute which allows an appeal by a railroad company to the circuit court from the action of such board in assessing the company's property for taxation is not in conflict with the provision of the state Constitution that the judicial power of the state shall be vested in one supreme court, in circuit courts, in county courts, and in justices of the peace. *Bureau County Sup'rs* v. *Chicago, B. & Q. R. Co.*, 44 *Ill.* 229.

The new Constitution, art. 9, § 1, does not require that the legislature, in providing for the taxation of corporations, designate the precise amount which each corporation shall pay, and that this shall be the same on each corporation, without regard to the value of the franchise or the privileges enjoyed, nor that such taxation shall be of like character with that which may be imposed on innkeepers, and others pursuing particular vocations named. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.—FOLLOWED IN State R. Tax Cases, 92 U. S. 575; Hopkins *v.* Taylor, 87 Ill. 436; Danville L. & M. Co. *v.* Parks, 88 Ill. 463; Chicago, P. & S. W. R. Co. *v.* Raymond, 97 Ill. 212. REAFFIRMED IN Chicago, B. & Q. R. Co. *v.* Siders, 88 Ill. 320.

25. Indiana.—The act of March 6, 1891, relating to taxation, provides a general system for the assessment and valuation of property. The method of ascertaining the valuation and assessing each class and kind of property applies alike to all persons holding and owning the same class of property; it applies alike to all persons under like circumstances and conditions, and it does not deny to railway companies the equal protection of the law, and is not in conflict with the Constitution of the United States. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 625, 33 *N. E. Rep.* 432.

The above act, by creating a state board of tax commissioners, and providing, among other things, for the assessment of "railroad track" and "rolling stock" by such board, is a valid enactment, and does not deny to such property owners "due process of law," or "the equal protection of the law," in the assessment of their property. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 625, 33 *N. E. Rep.* 432.—QUOTING Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 561.

26. Iowa.—The act of April 6, 1872, ch. 26, § 9, in so far as it attempts to release railroad companies from the payment of all taxes except the tax on gross earnings, as

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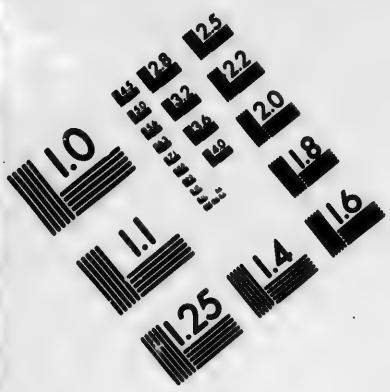

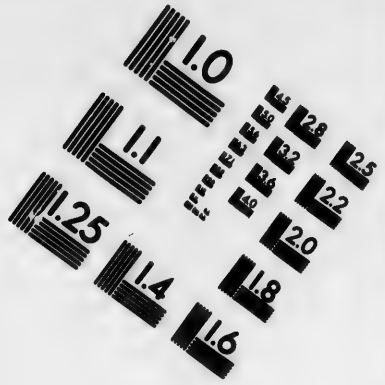

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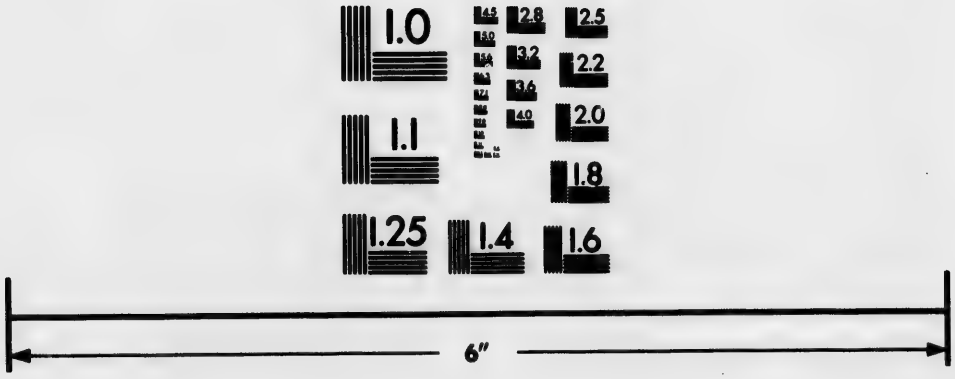

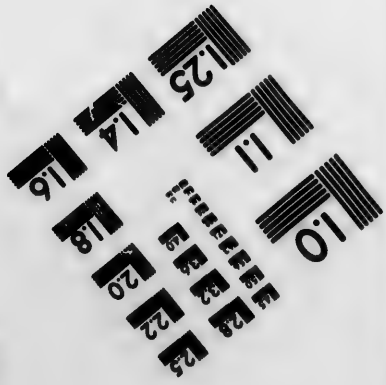

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provided for in a former statute, is in conflict with the state Constitution, art. 8, § 2, providing that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals. *Davenport* v. *Chicago, R. I. & P. R. Co.*, 38 *Iowa* 633.—FOLLOWED IN Iowa R. Land Co. *v.* Woodbury County, 39 Iowa 172. REVIEWED AND APPROVED IN Dubuque *v.* Chicago, D. & M. R. Co., 47 Iowa 196.—*Dubuque* v. *Illinois C. R. Co.*, 39 *Iowa* 56, 20 *Am. Ry. Rep.* 124.—FOLLOWING Dunlieth & D. Bridge Co. *v.* Dubuque, 32 Iowa 427.—FOLLOWED IN Iowa R. Land Co. *v.* Woodbury County, 39 Iowa [illegible] REVIEWED AND APPROVED IN Dubuque *v.* Chicago, D. & M. R. Co., 47 Iowa 196.—*Iowa R. Land Co.* v. *Woodbury County*, 39 *Iowa* 172.—FOLLOWING Dunlieth & D. Bridge Co. *v.* Dubuque, 32 Iowa 427; Paxon *v.* Illinois C. R. Co., 56 Iowa 427; Davenport *v.* Chicago, R. I. & P. R. Co., 38 Iowa 633.—FOLLOWED IN Iowa R. Land Co. *v.* Woodbury County, 39 Iowa 172.—*Dubuque* v. *Chicago, D. & M. R. Co.*, 47 *Iowa* 196.—APPLIED IN Chicago, M. & St. P. R. Co. *v.* Sabula, 13 Am. & Eng. R. Cas. 443, 19 Fed. Rep. 177.

But deciding that said section 9 of the act is unconstitutional does not render the remaining portions of the act void. *Dubuque* v. *Chicago, D. & M. R. Co.*, 47 *Iowa* 196.—REVIEWING AND APPROVING Davenport *v.* Chicago, R. I. & P. R. Co., 38 Iowa 633; Dubuque *v.* Illinois C. R. Co., 39 Iowa 56.

For a synopsis of the various legislative enactments upon the subject of taxation of the property of railway corporations, see *Dubuque* v. *Illinois C. R. Co.*, 39 *Iowa* 56.

The act of the legislature legalizing certain judgment taxes levied by certain municipal corporations is a general law, and valid. *Iowa R. Land Co.* v. *Soper*, 39 *Iowa* 112, 9 *Am. Ry. Rep.* 29.—FOLLOWED IN Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

The provision of the Code, § 1317, providing for the assessment of railroads every year, while real estate is assessed only every two years, is not repugnant to the fourteenth amendment to the Constitution of the United States, nor to the state Constitution, art. 1, § 6, providing that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen, or class of citizens, profits or immunities which upon the same terms shall not belong to all the citizens. *Central Iowa R. Co.* v. *Wright County Sup'rs*, 22 *Am. & Eng. R. Cas.* 223, 67 *Iowa* 199, 25 *N. W. Rep.* 128.

27. Kansas.—The provision in Kansas Act of February 23, 1875, ceding to the United States jurisdiction over the Fort Leavenworth military reservation, but reserving to the state "the right to tax railroad, bridge, and other corporations" thereon, is valid, and does not come within the meaning of U. S. Const., art. 1, § 8, giving to congress exclusive right to legislate over grounds purchased for forts, magazines, arsenals, dockyards, and other needful buildings. *Ft. Leavenworth R. Co.* v. *Lowe*, 114 *U. S.* 525, 5 *Sup. Ct. Rep.* 995.—FOLLOWED IN Chicago, R. I. & P. R. Co. *v.* McGlinn, 114 U. S. 542. QUOTED IN Maricopa County Delinquents *v.* Territory, (Ariz.) 48 Am. & Eng. R. Cas. 620, 26 Pac. Rep. 310.

The law of 1869, ch. 124, or so much of it as provides for the assessment of railroad property by a board of county clerks, and that the entire road shall be assessed as a whole and apportioned to the different counties, townships, etc., through which the road runs, is not unconstitutional. *Missouri River, Ft. S. & G. R. Co.* v. *Morris*, 7 *Kan.* 210, 1 *Am. Ry. Rep.* 353.—APPROVED IN Kansas Pac. R. Co. *v.* Russell, 8 Kan. 558. FOLLOWED IN Missouri River, Ft. S. & G. R. Co. *v.* Blake, 9 Kan. 489. QUOTED IN Wisconsin C. R. Co. *v.* Taylor County, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37; Virginia & T. R. Co. *v.* Washington County, 30 Gratt. (Va.) 471.

The act of 1876, § 37, providing a special method of taxing railroad property outside of organized counties, is not in conflict with the state Constitution, art. 2, § 17, providing that all laws of a general nature shall have a uniform operation throughout the state; nor with section 1 of article 11, providing that the legislature shall provide for a uniform and equal rate of assessment and taxation. *Francis* v. *Atchison, T. & S. F. R. Co.*, 19 *Kan.* 303, 19 *Am. Ry. Rep.* 20.—QUOTED IN Wisconsin C. R. Co. *v.* Taylor County, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37.

The law of 1870, ch. 90, § 7 (Comp. Laws of 1879, pp. 796, 797), so far as it attempts to divert any portion of the general county tax or general township tax to the payment of a certain class of township railroad

bonds, is void, being in contravention of the state Constitution, art. 11, § 4, which provides that "no tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied." *National Bank* v. *Barber*, 5 *Am. & Eng. R. Cas.* 181, 24 *Kan.* 534.

28. Kentucky. — Ky. Act of April 3, 1878, providing a plan for taxing railroads, which provides a time and the office to which a company must make a return of its property with its value, and fixes a time and place for the official assessment, with the right to parties to be present and to be heard, and which affords a remedy in court to test the validity of the proceeding, does not deprive the company of its property without "due process of law." *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 22 *Am. & Eng. R. Cas.* 225, 115 *U. S.* 321, 6 *Sup. Ct. Rep.* 57.—QUOTED IN St. Louis, I. M. & S. R. Co. *v.* Worthen, 41 Am. & Eng. R. Cas. 589, 52 Ark. 529.

The legislature had the constitutional right to pass the act of Feb. 20, 1864, changing the mode of assessing and taxing railroad property, and repealing all laws and charters in conflict with it, unless in cases where the state has expressly relinquished the right to tax in consideration of some public benefit. *Louisville, C. & L. R. Co.* v. *Com.*, 10 *Bush* (*Ky.*) 43.

An act imposing additional taxation for county purposes is constitutional. *Kentucky C. R. Co.* v. *Bourbon County*, 82 *Ky.* 497.

29. Louisiana.—The law which makes the market value of the evidences of rights to the capital of a corporation a criterion of value, for purposes of taxation, of its capital or capital stock, is not unconstitutional. *St. Charles St. R. Co.* v. *Board of Assessors*, 31 *La. Ann.* 852.

The act of 1878, No. 9, §§ 18, 19, authorizing the assessment of taxable property omitted from rolls for previous years, is not in conflict with the state Constitution of 1868, art. 110, prohibiting retroactive legislation. Such laws only as impair the obligation of contracts, or divest rights, or which create new rights, or impose new obligations, not *in esse* before the passage of the law, partaking of the nature of *ex post facto* laws, fall under the ban of the constitutional inhibition. (Manning, J., dissenting.) *New Orleans* v. *New Orleans & C. R. Co.*, 35 *La. Ann.* 679.

Such constitutional restraint does not prevent the passage of remedial or curative laws designed to carry out a previously existing right, or to enforce an anterior obligation. Particularly is such the case in matters of public concern when the object in view is to have the burden of taxation equally shared by all. The above sections are not retroactive, though retrospective. They refer to the past but provide for a future remedy. *New Orleans* v. *New Orleans & C. R. Co.*, 35 *La. Ann.* 679.

La. Const. art. 217, relating to taxation, relates exclusively to foreign corporations, and not to domestic ones. *New Orleans* v. *Pontchartrain R. Co.*, 41 *La. Ann.* 519, 7 *So. Rep.* 83.

30. Maine. — The statute of 1880, ch. 249, entitled "An act relating to the taxation of railroads," provides for a franchise tax, and is, therefore, not in conflict with the state Constitution, art. 9, § 8, requiring all taxes upon real and personal estate to be apportioned and assessed equally, according to its just value. *State* v. *Maine C. R. Co.*, 74 *Me.* 376.

31. Maryland.—The legislature passed a statute entitled "An act to provide for the general valuation and assessment of property in this state," but in the body of the statute was a clause repealing "all laws exempting property from valuation." *Held*, that the repealing clause was not in conflict with the provision of the state Constitution that "every law shall embrace but one subject and that shall be described in its title." *Washington County Com'rs* v. *Franklin R. Co.*, 34 *Md.* 159.

The provisions of the acts of 1866, ch. 157; 1870, ch. 362; and 1872, ch. 234, were repugnant to, and inconsistent with, the exemption from taxation claimed by the Northern Central railway company, under the act of 1854; and, as these several acts could not stand together, the former must be considered as a repeal of the latter. The tax imposed by the act of 1872, ch. 234, upon the gross receipts of the company was a valid tax, and in no wise in conflict with article 15 of the Bill of Rights, which requires that all taxation laid on property shall be uniform and equal. *State* v. *Northern C. R. Co.*, 44 *Md.* 131.—REVIEWING State *v.* Cumberland & P. R. Co., 40 Md. 22.

The imposition by the act of 1872, ch. 234, of a tax of one half of one per cent. upon the gross receipts of all railroad com-

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panies worked by steam, incorporated by or under authority of the state, and doing business therein, in lieu of all other taxes, is a valid exercise of constitutional power. Such tax is not a direct tax upon the property of the companies within the meaning of article 15 of the Bill of Rights, but a tax upon the franchise of said companies, measured by the extent of their business. *State* v. *Philadelphia, W. & B. R. Co.*, 45 *Md.* 361.—QUOTING Delaware R. Tax, 18 Wall. (U. S.) 206. REVIEWING State *v.* Cumberland & P. R. Co., 40 Md. 22; Com. *v.* Provident Inst. for Savings, 12 Allen (Mass.) 312.—QUOTED IN Baltimore Union Pass. R. Co. *v.* Mayor, etc., of Baltimore, 41 Am. & Eng. R. Cas. 646, 71 Md. 405, 18 Atl. Rep. 917.

32. Massachusetts.—The legislature has the power by general law to require domestic corporations to pay to the state a tax upon the excess of the market value of its stock over the value of its real estate and machinery taxable in the town or city where situated; and this power is not affected by the fact that the corporation owns bonds of the United States, or that a portion of its stockholders live in other states. *Com.* v. *Hamilton Mfg. Co.*, 12 *Allen* (*Mass.*) 298; *affirmed in* 6 *Wall.* (*U. S.*) 632.

Mass. Pub. St. ch. 13, § 40, provides that railroad and telegraph companies shall pay an annual tax on their corporate franchises, at a certain valuation. *Held*, that the right to impose this tax upon a telegraph company is not impaired by the fact that certain privileges are conferred upon such companies by U. S. Rev. St. §§ 5263-5266. *Attorney-General* v. *Western Union Tel. Co.*, 33 *Fed. Rep.* 129.

Neither is a tax levied under the above statute void as applied to a company doing an interstate business, because the regulation of interstate commerce is reserved to congress. *Attorney-General* v. *Western Union Tel. Co.*, 33 *Fed. Rep.* 129.

33. Michigan.—The act of 1882 repealing what was known as the Tramway Act, which provides for a specific tax to the state in lieu of all other taxes, is not unconstitutional on the ground that it impairs the obligation of a contract. *Detroit* v. *Detroit City R. Co.*, 39 *Am. & Eng. R. Cas.* 538, 76 *Mich.* 421, 43 *N. W. Rep.* 447.—ADHERING TO Detroit City St. R. Co. *v.* Guthard, 51 Mich. 180, 16 N. W. Rep. 328.

Neither is the above act unconstitutional on the ground that it forms part of the general tax commission scheme, so far as it turns over the property of tramroads for taxation under the general laws of the state. *Detroit* v. *Detroit City R. Co.*, 39 *Am. & Eng. R. Cas.* 538, 76 *Mich.* 421, 43 *N. W. Rep.* 447.

34. Minnesota.—The exemption from ordinary taxation originally created in favor of the Minnesota & Pacific railroad passed with the lands to which it is appendant to the St. Paul & Pacific company, and to the first division of that company. *Stevens County* v. *St. Paul, M. & M. R. Co.*, 29 *Am. & Eng. R. Cas.* 225, 36 *Minn.* 467, 31 *N. W. Rep.* 942.

35. Mississippi. — The Constitution, art. 12, § 13, declares that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." *Held*, that it was not the intention of this provision to confer upon the legislature power to tax property of corporations of the class mentioned, nor to require the taxation of property of corporations whose charters previously granted secured them from taxation. It was not designed to establish the rule that all corporations for pecuniary profit must be taxed, nor to exempt from taxation the property of corporations other than those for pecuniary profit. *Mississippi Mills* v. *Cook*, 56 *Miss.* 40.

Article 12, § 20, of the above Constitution provides that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." *Held*, that any statute or charter which exempts the property of a corporation for pecuniary profit from taxation is in conflict with the above section. (Chalmers, J., dissenting.) *Mississippi Mills* v. *Cook*, 56 *Miss.* 40.

36. Missouri. — (1) *Federal decisions.* —Mo. Act of Dec. 25, 1852, provided that the Pacific railroad should be exempt from taxation until completed and in operation, and until it should declare a dividend, the exemption not to extend longer than two years after completion. *Held*, to constitute a contract which was violated by the state ordinance of 1865, adopted as part of a new Constitution, imposing a ten per cent. tax on the gross earnings of the road before it was completed and in operation. *Pacific R. Co.* v. *Maguire*, 20 *Wall.* (*U. S.*) 36, 6 *Am. Ry. Rep.* 437.—APPROVED IN South Pac. R. Co. *v.* Laclede County, 57 Mo. 147. DISTINGUISHED IN People ex rel. *v.* Com'rs of

Taxes, 2 Am. & Eng. R. Cas. 343, 82 N. Y. 459. REVIEWED IN Hewitt *v.* New York & O. M. R. Co., 12 Blatchf. (U. S.) 452.

A statute imposing a tax on the gross receipts of express companies doing business under contract with railroad or steamboat companies, but exempting companies owning their own means of transportation, is not a denial of the equal protection of the laws of the state, and does not violate the requirements of the Missouri Constitution for "uniformity and equality" of taxation. *Pacific Exp. Co.* v. *Seibert*, 48 *Am. & Eng. R. Cas.* 610, 142 *U. S.* 339, 12 *Sup. Ct. Rep.* 250.

Missouri Act of July 30, 1877, and of the Rev. St. of 1879, §§ 6865–6900, giving the state board of equalization exclusive power to assess railroad property, are not in conflict with art. 10, § 1, of the state Constitution, nor with a provision of a city charter which authorizes the city to levy and collect taxes "upon all real and personal estate taxable by the laws of the state" within its corporate limits. *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.*, 27 *Fed. Rep.* 14.

(2) *State decisions.* — The convention ordinance of 1865, providing that an annual tax of ten and fifteen per cent. on the gross earnings of a certain railroad should be paid to the state in lieu of other taxation, and applied in payment of the debt due from the state on bonds issued to the company, is not in violation of either the fifth or seventh amendment of the Constitution of the United States. These amendments were not designed as limitations upon state governments in respect to their own citizens, but as restrictions upon the federal power. *North Mo. R. Co.* v. *Maguire*, 49 *Mo.* 490, 1 *Am. Ry. Rep.* 243. — FOLLOWED IN Pacific R. Co. *v.* Maguire, 51 Mo. 142. REVIEWED IN Ranney *v.* Bader, 67 Mo. 476.

Neither is the above ordinance unconstitutional by virtue of the clause imposing uniform taxation on all property, nor on the ground that the assessment is not in the nature of a tax. *North Mo. R. Co.* v. *Maguire*, 49 *Mo.* 490, 1 *Am. Ry. Rep.* 243.

The act of March 10, 1871, providing for a uniform system of assessing and collecting taxes on railroads, and which requires the state board of equalization to ascertain the value of such property within the limits of any city, is not in violation of art. 1, § 30, of the state Constitution, providing that taxation on property shall be uniform. *State ex rel.* v. *Severance*, 55 *Mo.* 378.

The act of March 10, 1871, § 3, provided only for the assessment and collection of taxes upon property theretofore subject to taxation which through inadvertence had escaped. It did not operate "retrospectively," in the sense of that word as used in the state Constitution. *Livingston County* v. *Hannibal & St. J. R. Co.*, 60 *Mo.* 516.

The act of March 15, 1875, § 8, under which the amount of the "land contracts" of the Hannibal & St. Joseph railroad company was apportioned and taxed to the counties, cities, and towns along the route of the road and its branches, is not unconstitutional. *Hannibal & St. J. R. Co.* v. *State Board of Equalization*, 64 *Mo.* 294. — REVIEWED IN Cleveland, C., C. & St. L. R. Co. *v.* Backus, 133 Ind. 513; Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 54 Am. & Eng. R. Cas. 227, 133 Ind. 625, 33 N. E. Rep. 432.

A tax levied by state authority upon the gross receipts of an express company, whose business consists in receiving goods to be delivered at points outside of the state, to which the company's line does not extend, is not a violation of that provision of the Constitution of the United States which confides to congress alone the power to regulate commerce with foreign nations and among the several states. *American Union Exp. Co.* v. *St. Joseph*, 66 *Mo.* 675.—FOLLOWING Erie R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 282.

Taxing the shares against the stockholders and also the capital stock of a company, or the property represented by the capital stock, is duplicate taxation. *State* v. *St. Louis, K. C. & N. R. Co.*, 77 *Mo.* 202.

The Rev. St. of 1855, § 32 (Rev. St. 1865, c. 63, § 19), which provided that "if any of the taxpayers in any county or city in which a railroad tax shall be levied shall have subscribed in good faith to the capital stock of any railroad to which the county shall have subscribed, the said taxpayers shall be entitled to a deduction on the amount assessed against them respectively, in proportion to the amounts of their *bona fide* subscriptions, after which they shall be subject to pay their railroad tax as other persons," is repugnant to the Constitution of 1865, and hence invalid. *Cock* v. *Stewart*, 85 *Mo.* 575.—APPROVING Ramsay *v.* Hoeger, 6 Chicago Leg. News 518.

Revised Statutes, § 6880, regulating the levying of taxes on railroad property by

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ascertaining from the returns in the office of the county clerk the average rate levied for school purposes by the local boards, and charging to the railroad taxes at such average rate on the proportionate value of the railroad property certified to the clerk of the county court by the state, is constitutional, both as regards the state and federal Constitutions. *State ex rel.* v. *Missouri Pac. R. Co.*, 92 *Mo.* 137, 6 *S. W. Rep.* 862.—QUOTED IN Chicago & A. R. Co. *v.* Lamkin, 97 Mo. 496, 10 S. W. Rep. 200.

Under the Const. art. 10, § 5, it is competent for the legislature in taxing railroads for school purposes to classify the property. Therefore a statute which authorizes the levying of a school tax on the apportioned value of a roadbed and rolling stock by taking the average of the local rates of the several school districts is not unconstitutional. *Chicago & A. R. Co.* v. *Lamkin*, 97 *Mo.* 496, 10 *S. W. Rep.* 200.—FOLLOWING In re Apportionment of Taxes, 78 Mo. 596. QUOTING State ex rel. *v.* Missouri Pac. R. Co., 92 Mo. 137. REVIEWING State ex rel. *v.* Wabash, St. L. & P. R. Co., 83 Mo. 395.

37. Nebraska. — Legislation authorizing a land tax of "four dollars to the quarter section, to be paid in money, or labor at the rate of two dollars per day, at the option of the person taxed," is not repugnant to any provisions of the Neb. Const. of 1867, and a tax so levied will not be void for want of uniformity because not assessed against lots in cities and towns, or properly occupied as right of way by railroad companies, etc. *Burlington & M. R. R. Co.* v. *Lancaster County*, 4 *Neb.* 293.—FOLLOWED IN Burlington & M. R. R. Co. *v.* York County Com'rs, 7 Neb. 487.

The act of Feb. 12, 1869, entitled "An act to encourage the growth of timber and fruit trees," is repugnant to the Constitution of 1875, and is therefore inoperative; and all deductions made under it from the assessments of lands for each acre planted and cultivated with forest and fruit trees are made without authority of law; they are mere nullities, and must be so treated by the county commissioners in levying the necessary taxes for the current year. *Union Pac. R. Co.* v. *Saunders County Com'rs*, 7 *Neb.* 228.

Land road taxes, legally levied but not collected before the Constitution of 1875 took effect, although not imposed upon the basis directed by that instrument, are not invalidated by it. *Burlington & M. R. R. Co.* v. *Saunders County Com'rs*, 9 *Neb.* 507, 4 *N. W. Rep.* 240.—FOLLOWING Burlington & M. R. R. Co. *v.* York County Com'rs, 7 Neb. 487.

That provision of the act of February 25, 1875, entitled "An act to amend an act to provide for the registration of precinct or township and school-district bonds," making it the duty of the county commissioners to levy the necessary taxes to meet the liability incurred by such bonds, is in conflict with the Constitution of 1867, art. 2, § 19, which declares that "no bill shall contain more than one subject, which shall be clearly expressed in its title." *Burlington & M. R. R. Co.* v. *Saunders County Com'rs*, 9 *Neb.* 507, 4 *N. W. Rep.* 240.

38. New Hampshire. — Chapter 63 of the General Laws is a provision for an unequal division of public expense, and is not authorized by the Constitution. *State* v. *United States & C. Exp. Co.*, 60 *N. H.* 219.

39. New Jersey. — The act entitled "An act relating to taxes to be paid by the Erie Railway company for certain property owned, leased, used, or occupied by it in this state" (Laws of 1870, p. 1168) relates to the property of the Long Dock company, used or occupied by said railway company, and therefore embraces but one object, which is sufficiently expressed in its title. The act is to have effect, though it does not in terms refer to the act "relative to taxes in certain counties of this state." (Laws of 1869, p. 1225.) *State* (*Long Dock Co., Pros.*) v. *Haight*, 36 *N. J. L.* 54.

The act "for the taxation of railroad and canal property," approved April 10, 1884, is not in contravention of the provision of the Constitution that property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. *State Board of Assessors* v. *Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1, 2 *Atl. Rep.* 789.—REVIEWING State (Jersey City & B. R. Co., Pros.) *v.* Mayor, etc., of Jersey City, 31 N. J. L. 575.—QUOTED IN Central R. Co. *v.* State Board of Assessors, 49 N. J. L. 1.

Under the Railroad Taxation Act the taxes imposed are one tax, and the fact that under the act railroad and canal property pays less than its share of municipal or county tax, as compared with other property, is no objection to the law. *State Board*

of Assessors v. *Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1, 2 *Atl. Rep.* 789.

Where a corporation has a contract for the commutation of taxes on any consideration whatever, a statute levying a tax of a greater amount, or upon a different principle, than is expressed in the contract, either upon its property or business or upon its stock, is in conflict with the federal Constitution. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826.

The state may alter modes of procedure which do not affect the substantial rights of parties under the contract, and a change in the method of ascertaining the cost of a company's road for the purpose of taxation thereon under the act of 1865 would not impair the obligation of a contract. The matter is wholly within legislative discretion. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826.

The fourth section of the Tax Act of 1884 is unconstitutional, being an attempt to substitute, "as a correct standard of value" for railroad property, "the assessed value of the real estate of persons other than railroad or canal corporations," instead of the true value of the railroad property itself, which is the sole basis of a constitutional assessment thereof. *Williams* v. *Bettle*, 51 *N. J. L.* 512, 18 *Atl. Rep.* 750.

40. New York. — New York Act of 1853, ch. 462, which gives partial exemption from taxation to the Troy Union railroad company, is within the power of the legislature, and is not unconstitutional as failing to express the subject matter in its title. *People ex rel.* v. *Carter*, 52 *Hun* 458, 24 *N. Y. S. R.* 104, 5 *N. Y. Supp.* 507; *affirmed in* 117 *N. Y.* 625, *mem.*, 26 *N. Y. S. R.* 979, 22 *N. E. Rep.* 1128.—DISTINGUISHING People ex rel. *v.* McLean, 80 N. Y. 254.

New York Act of 1859, entitled "An act to provide for the closing of the entrance of the tunnel of the Long Island railroad company in Atlantic street, in the city of Brooklyn, and restoring the street to its proper grade, and for the relinquishment by said company of its right to use steam power within the said city," is valid and within the taxing power of the legislature. It is not unconstitutional as an attempt to exercise the power of eminent domain in providing for assessing the cost upon the property in the vicinity. *Litchfield* v. *Vernon*, 41 *N. Y.* 123.

The system of taxing corporations under New York laws by dividing the assets into capital stock, surplus profits, and real estate, and taxing each of these, does not constitute such discrimination between the corporation and individuals as to render the law obnoxious to the fourteenth amendment to the Constitution of the United States. *Manhattan R. Co.* v. *Mayor, etc., of N. Y.*, 13 *Am. & Eng. R. Cas.* 261, 18 *Fed. Rep.* 195.

N. Y. Const. art. 7, § 13, declaring that "every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object" refers to state taxes only. Taxation by counties and cities is regulated by other provisions of the Constitution. *People ex rel.* v. *Havemeyer*, 3 *Hun* (*N. Y.*) 97, 16 *Abb. Pr. N. S.* 219, 4 *T. & C.* 365, 47 *How. Pr.* 494.

The act of 1880, ch. 542, § 3, as amended by ch. 361 of 1881, provides that if a corporation makes dividends amounting to six per cent. or more on the par value of its capital, it is to pay one fourth of one mill upon the capital stock for each one per cent. of dividends so made; and that if no dividend is declared, or a dividend less than six per cent., then the tax shall be one and one half mills on each dollar of the value of the stock. During a certain year the dividends made by defendant company were five and three fourths per cent. of the par value of its stock, and the actual value of the stock was 110.16. *Held*, that a tax imposed upon such actual value of the stock was not unequal or unjust. *People* v. *Delaware & H. Canal Co.*, 54 *Hun* 598, 27 *N. Y. S. R.* 624, 7 *N. Y. Supp.* 890; *affirmed in* 121 *N. Y.* 666, *mem.*, 24 *N. E. Rep.* 1093.

41. North Carolina. — The tax imposed upon "deadheads" by the act of 1860–61, ch. 31, § 12, is valid. Such a tax is not a "capitation tax," within the meaning of the Constitution, art. 4, § 8 (amendments of 1836), nor is it a violation of the charter of the Wilmington and Charlotte railroad company. *Gardner* v. *Hall, Phill.* (*N. Car.*) 21.

A clause in a city charter which authorizes the mayor and aldermen to assess the value of property within the city is in conflict with the state Constitution, art. 5, § 3, providing that all property shall be taxed by a uniform rule, as other provisions of the Constitution require city taxes to be

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levied upon valuations made by township trustees. *Carolina C. R. Co.* v. *Wilmington*, 72 *N. Car.* 73.

So much of the act of 1874-75, ch. 184, § 11, subsec. 3, as provides that railroad beds listed for taxation "shall not be valued at less than $8000 per mile," without regard to their real value, is in conflict with the Constitution, and therefore void. *Atlantic & N. C. R. Co.* v. *Carteret County Com'rs*, 75 *N. Car.* 474.

A law to provide for the collection of taxes for past years is not unconstitutional; and the right of the legislature to pass such law is not affected by the lapse of time. Nor does such law (if the taxes imposed in the years mentioned were then uniform and equal) violate the provisions of the Constitution, art. 5, § 3, in regard to uniformity of taxation. *North Carolina R. Co.* v. *Alamance Com'rs*, 82 *N. Car.* 259.—QUOTED IN Jones *v.* Arrington, 91 N. Car. 125.

A statute imposing a tax upon the gross receipts of some railroad companies and upon the capital stock of others is unconstitutional, as not levying taxes by a uniform rule. *Worth* v. *Wilmington & W. R. Co.*, 13 *Am. & Eng. R. Cas.* 286, 89 *N. Car.* 291, 45 *Am. Rep.* 679.—QUOTING Wilmington & W. R. Co. *v.* Reid, 13 Wall. (U. S.) 266.—FOLLOWED IN Worth *v.* Raleigh & G. R. Co., 89 N. Car. 301.

42. North Dakota.* — The tax of a percentage of gross earnings imposed upon railroad companies in lieu of all other taxation, by the Dakota statute, does not violate the Territorial Organic Act, § 6, providing that there shall be no discrimination in taxing different kinds of property, but all property shall be taxed in proportion to its value; or U. S. Const., fourteenth amendment, providing that no state shall deny to any person the equal protection of its laws. *Northern Pac. R. Co.* v. *Barnes*, 53 *Am. & Eng. R. Cas.* 616, 2 *N. Dak.* 310, 51 *N. W. Rep.* 386.—QUOTING Wisconsin C. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. Rep. 833. — FOLLOWED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 395; Northern Pac. R. Co. *v.* Strong, 2 N. Dak. 395; Northern Pac. R. Co. *v.* Brewer, 2 N. Dak. 396; Northern Pac. R. Co. *v.* Tressler, 2 N. Dak. 397.

43. Ohio. — The act of April 15, 1889, requiring "every corporation or company operating a railroad or any part of a railroad within this state" to pay to the commissioner of railroads and telegraphs a "fee" of one dollar per mile for each mile of track operated by it in this state, contravenes the state Constitution, art. 12, §§ 2, 5. *Pittsburgh, C. & St. L. R. Co.* v. *State*, 49 *Am. & Eng. R. Cas.* 503, 49 *Ohio St.* 189, 30 *N. E. Rep.* 435.

44. Pennsylvania. — (1) *Federal decisions.*—The act of February 23, 1866, imposing a tax on the gross receipts of certain companies incorporated under its provisions, is constitutional. *Philadelphia & R. R. Co.* v. *Com.*, 15 *Wall.* (*U. S.*) 284, 4 *Brews.* (*Pa.*) 222.

The power of taxation of a state is limited to persons, property, and business within her jurisdiction. All taxation must relate to one of these subjects. *Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 15 *Wall.* (*U. S.*) 300, 4 *Brews.* (*Pa.*) 183, 4 *Am. Ry. Rep.* 368.

Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state in which the company was incorporated, they are property beyond the jurisdiction of the state. Hence the law of Pennsylvania, passed May 1, 1868, which requires the treasurer of a company, incorporated and doing business in that state, to retain five per cent. of the interest due on bonds of the company made and payable out of the state to non-residents of the state, citizens of other states, and held by them, is not a legitimate exercise of the taxing power of the state. It is a law which interferes between the company and the bondholder, and, under the pretense of levying a tax, impairs the obligation of the contract between the parties. *Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 15 *Wall.* (*U. S.*) 300, 4 *Brews.* (*Pa.*) 183, 4 *Am. Ry. Rep.* 368.—APPROVING Northern C. R. Co. *v.* Jackson, 7 Wall. 262. DISAPPROVING McKeen *v.* Northampton County, 49 Pa. St. 519; In re Short's Estate, 16 Pa. St. 63. DISTINGUISHING Maltby *v.* Reading & C. R. Co., 52 Pa. St. 140.—FOLLOWED IN Pittsburgh, Ft. W. & C. R. Co. *v.* Pennsylvania, 15 Wall. 326. QUOTED IN Worthington *v.* Sebastian, 25 Ohio St. 1. REVIEWED IN United States *v.* Erie R. Co., 9 Ben. (U. S.) 67.

The tax laws of a state can have no extra-territorial operations; nor can any law of a state inconsistent with the terms of a contract made with or payable to parties out of a state have any effect upon the contract

* See also *ante*, **22**.

while it is in the hands of such parties, or other non-residents of the state. *Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 15 *Wall.* (*U. S.*) 300, 4 *Brews.* (*Pa.*) 183, 4 *Am. Ry. Rep.* 368.

A provision in the charter of a railroad company that it shall annually pay to the state a specific tax of one fourth of one per cent. of its capital stock does not create such a contract as will render unconstitutional a law creating an additional tax. And this is true of a consolidated company composed of said company and two others, where the act of consolidation provides that the new company shall "be entitled to all the rights, privileges, and immunities" that each and all of them possess. *Minot* v. *Philadelphia, W. & B. R. Co.*, 18 *Wall.* (*U. S.*) 206, 7 *Am. Ry. Rep.* 312; *affirming* 7 *Phila.* (*Pa.*) 555.—DISAPPROVED IN Nichols *v.* New Haven & N. Co., 42 Conn. 103. DISTINGUISHED IN Maine C. R. Co. *v.* Maine, 96 U. S. 499. QUOTED IN State *v.* Philadelphia, W. & B. R. Co., 45 Md. 361; Wilmington & W. R. Co. *v.* Alsbrook, 110 N. Car. 137. RECONCILED IN Wilmer *v.* Atlanta & R. A. L. R. Co., 2 Woods (U. S.) 447. REVIEWED IN North Carolina R. Co. *v.* Alamance Com'rs, 91 N. Car. 454.

State tax laws have no extraterritorial effect; but a law requiring railroads to pay to the state a certain tax "on the actual cash value of every share of its capital stock," and if the road lies partly out of the state, then to pay a "tax on such number of the shares * * * as would be in that proportion to the whole number of shares which the length of the road * * * within * * * the state should bear to the whole length of such road," is not invalid because the proportion of stock held by stockholders out of the state is greater than the part of road out of the state. *Minot* v. *Philadelphia, W. & B. R. Co.*, 18 *Wall.* (*U. S.*) 206, 7 *Am. Ry. Rep.* 312; *affirming* 7 *Phila.* (*Pa.*) 555.

The act of 1868 is not unconstitutional in that it impairs a supposed obligation of the state not to impose such a tax on the Erie railroad. Unless a state has in clear and unmistakable language exempted a corporation from taxation, or subjected it to a limited and specified taxation, the extent and manner of taxing belongs exclusively to the state. Said company is not found to possess any such exemption, or limited taxation. *Erie R. Co.* v. *Pennsylvania*, 21 *Wall.* (*U. S.*) 492, 6 *Am. Ry. Rep.* 206.—DISTINGUISHING New York & E. R. Co. *v.* Sabin, 26 Pa. St. 244; Erie R. Co. *v.* Com., 66 Pa. St. 84.

The Pa. law imposing a three-mill tax on the face value of railroad and corporation bonds, irrespective of their actual value, is not in violation of the fourteenth amendment to the United States Constitution, guaranteeing equal protection of the law. The law is valid so long as it applies to all corporations alike. States may designate taxpayers by classes, and it is sufficient if the tax on each class is equal and uniform. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 *U. S.* 232, 10 *Sup. Ct. Rep.* 533.—FOLLOWED IN Chester City *v.* Pennsylvania, 134 U. S. 240.

The Pa. law imposing a three-mill tax on railroad bonds, and requiring the accounting officers of the railroads to deduct the tax from the annual interest, and pay the same into the state treasury, is not in conflict with the United States Constitution, as taking property without "due process of law." No personal notice to the bondholders is necessary. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 *U. S.* 232, 10 *Sup. Ct. Rep.* 533.—FOLLOWING First Nat. Bank *v.* Kentucky, 9 Wall. (U. S.) 353.

Such a law is not open to the objection that it taxes a railroad for property which it does not own. The tax is not on the company, but on the bondholders, and the requirement that the company shall pay the tax to the state only provides a convenient and secure method of collection. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 *U. S.* 232, 10 *Sup. Ct. Rep.* 533.

(2) *State decisions.*—The act of May 16, 1857, providing for the sale of what is known as the main line of public improvements, composed of certain lines of railroad, canal, and slack-water improvements belonging to the state, is unconstitutional in so far as it provides that if a certain railroad company shall become the purchaser it shall pay, in addition to the purchase money, $1,500,000, in consideration whereof it and another company named shall be discharged by the state forever from the payment of all taxes, except for certain local purposes. *Mott* v. *Pennsylvania R. Co.*, 30 *Pa. St.* 9.

Pennsylvania Act of April 29, 1844, imposing a tax upon the bonds of corporations, and requiring the financial officers of the corporations to retain the amount of the

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tax from the interest due on the bonds, is not unconstitutional as impairing the obligation of the contracts between the corporations and the bondholders. *Maltby* v. *Reading & C. R. Co.*, 52 *Pa. St.* 140.—DISTINGUISHED IN Cleveland, P. & A. R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 300. FOLLOWED IN Pittsburg, Ft. W. & C. R. Co. *v.* Com., 3 Brews. (Pa.) 355; Pittsburg, Ft. W. & C. R. Co. *v.* Com., 66 Pa. St. 73.—*Delaware, L. & W. R. Co.* v. *Com.*, 66 *Pa. St.* 64.

The acts of April 30, 1864, and of May 1, 1868, in imposing a tax upon the bonds of non-resident bondholders, do not impair the obligation of contracts. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

A tax under the act of June 1, 1889, § 27, upon the net earnings or income of trust companies, which have no capital stock, is a tax on the franchise, and therefore not double taxation, although the net income or earnings were derived from the interest on bonds taxable under the act of 1885. *Com.* v. *New York, L. E. & W. R. Co.*, 150 *Pa. St.* 234, 24 *Atl. Rep.* 609.—FOLLOWING Philadelphia Contributionship for Ins., etc., *v.* Com., 98 Pa. St. 48.

The provisions of the act of June 30, 1885, § 4, requiring the treasurers of corporations to assess a three-mill tax upon the nominal value of corporate loans, to deduct the same from the interest paid thereon, and to return it into the state treasury, does not violate the Constitution, art. 9, § 1, requiring taxes to be uniform. *Com.* v. *Delaware Div. Canal Co.*, 123 *Pa. St.* 594, 16 *Atl. Rep.* 584.—FOLLOWED IN Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 25 W. N. C. 15, 18 Atl. Rep. 406; Com. *v.* New York, L. E. & W. R. Co., 129 Pa. St. 463.—*Com.* v. *Lehigh Valley R. Co.*, 129 *Pa. St.* 429, 25 *W. N. C.* 15, 18 *Atl. Rep.* 406.—FOLLOWED IN Com. *v.* Delaware, L. & W. R. Co., 129 Pa. St. 458; Com. *v.* North Pa. R. Co., 129 Pa. St. 460.

Nor are said provisions repugnant to art. 1, § 10, art. 5, and art. 14, § 1, of the amendments of the Constitution of the United States, respectively, prohibiting the impairment of the obligations of contracts and the deprivation of property without due process of law, etc. *Com.* v. *Delaware Div. Canal Co.*, 123 *Pa. St.* 594, 16 *Atl. Rep.* 584. *Com.* v. *Lehigh Valley R. Co.*, 129 *Pa. St.* 429, 25 *W. N. C.* 15, 18 *Atl. Rep.* 406.—FOLLOWED IN Com. *v.* New York, L. E. & W. R. Co., 129 Pa. St. 463.

As the receipts for transportation by a company paying the tolls are taxable against that company, and the tolls paid are taxable against the company receiving them, it is not a case of double taxation, in violation of the state Constitution, art. 9, § 1, providing that "all taxes shall be uniform." *Com.* v. *New York, P. & O. R. Co.*, 145 *Pa. St.* 38, 22 *Atl. Rep.* 212.

The act of June 30, 1885, does not violate any provision of the Constitution of the state or of the United States or its amendments. *Com.* v. *Delaware & H. Canal Co.*, 150 *Pa. St.* 245, 24 *Atl. Rep.* 599.

The acts of June 30, 1885, and of June 1, 1889, are not in conflict with the state Constitution, art. 9, § 1, requiring uniformity of taxation; nor with the implied prohibition against extraterritorial taxation, contained in the Federal Constitution; nor with art. 5 and art. 14, § 1, of the amendments to the Constitution of the United States, providing for due process of law and equal protection; nor with art. 1, § 10, of the U. S. Constitution, as an impairment of the obligation of the charter contract with the foreign state; nor with the contract contained in the legislation of this state, which, in admitting the corporation to do business, did not impose any condition that the company should act as collector of state taxes; nor as impairing the obligation of contracts between the corporation and its creditors or the holder of the coupon; nor do said acts violate the commerce clause of the Constitution of the United States. *Com.* v. *New York, L. E. & W. R. Co.*, 150 *Pa. St.* 234, 24 *Atl. Rep.* 609.

45. South Carolina.—A tax to pay the entire salaries and expenses of a railroad commission, assessed against railroad companies according to their gross income and proportioned to the number of miles of track in the state, in addition to other taxes, is not in violation of the fourteenth amendment to the Constitution of the United States, nor of a provision of the Constitution of South Carolina that "taxation of property shall be equal and uniform and proportioned to its value." *Charlotte, C. & A. R. Co.* v. *Gibbes*, 48 *Am. & Eng. R. Cas.* 595, 142 *U. S.* 386, 12 *Sup. Ct. Rep.* 255.

A tax imposed by the state "on the gross amount of the receipts of express companies" is to be understood as assessed upon the gross sum received within the state on account of the company that is doing busi-

ness within the state, excluding such share of the actual collections as belongs to the railroad and other companies by arrangement with which the transportation of the express matter is effected, as well as such portion as is received for the use of foreign connecting express companies; and such tax is not prohibited by any provisions of the Constitution of the United States, or of the state. It is not a regulation of "commerce among the states," nor a duty on imports or exports. *Southern Exp. Co.* v. *Hood*, 15 *Rich.* (*So. Car.*) 66.

A statute which requires every railroad company in the state to pay to the state a certain amount, determined by the length of its road, is a tax upon property and is in violation of the provision of the Constitution requiring all property subject to taxation to be taxed in proportion to its value; and the statute is not rendered valid by styling it "a general license law." *State* v. *South Carolina R. Corp.*, 4 *So. Car.* 376.

46. Tennessee.—Tenn. Railroad Taxation Act of 1875, § 11, provided that railroads accepting that section as an amendment to their charters should be exempt from taxation except as therein provided. The supreme court of the state held the section unconstitutional, under the Constitution of 1870, which required all property to be uniformly taxed, and in 1877 the section was repealed, and provision made for a new assessment of companies that had accepted its provisions. *Held*, that the acceptance by a company of the act of 1875 did not constitute a contract the obligation of which could not be impaired by the act of 1877. *Memphis & C. R. Co.* v. *Gaines*, 97 *U. S.* 697.

Under the act of March, 1875, § 11, wherein the mode and manner for the taxation of railroads are provided, to wit: authorizing railroads to pay one and a half per cent. on their gross earnings, thereby exempting all of the property of such companies as accept the conditions of said section from taxation, according to the value of the company's property, equal and uniform with other taxation of property throughout the state, is unconstitutional, because said section, in effect, for a consideration, contracts not to tax railroad companies at all. *Ellis* v. *Louisville & N. R. Co.*, 8 *Baxt.* (*Tenn.*) 530.

Statutes authorizing reassessment of property originally assessed upon inadequate valuation are valid and constitutional. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

A statute which requires corporations to pay a tax upon the value of their property, and also taxes the stockholders upon the value of their shares, neither imposes double taxation nor violates the constitutional mandate that "all property shall be taxed according to value." *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

A privilege tax on the running and using, on railroads in this state, of sleeping cars not owned by the railroads is constitutional and valid, although the owner may be a foreign corporation, and the cars may be used for the accommodation of passengers traveling through the state. *Pullman Southern Car Co.* v. *Gaines*, 3 *Tenn. Ch.* 587.—DISAPPROVED IN Pickard *v.* Pullman Southern Car Co., 117 U. S. 34. FOLLOWED IN Gibson County *v.* Pullman Southern Car Co., 42 Fed. Rep. 572.

A statute which attempts to exempt the property of a railroad company from all other taxation, on condition that it will accept an amendment to its charter and pay a certain per cent. of its gross receipts to the state, is in violation of Tennessee Constitution of 1870, which provides that "all property shall be taxed." *Memphis & C. R. Co.* v. *Gaines*, 3 *Tenn. Ch.* 604.

47. Texas.—Taxes are, within the meaning of the Constitution, "equal and uniform" when no person or class of persons in the territory taxed is taxed at a higher rate than are other persons in the same district upon the same value or thing, and when the objects of taxation are the same, by whomsoever owned or whatever they be. *Norris* v. *Waco*, 57 *Tex.* 635.

The tax of a certain sum per mile, imposed by the act of March 24, 1881, upon firms, persons, or associations owning or running sleeping or dining cars not owned by the railroad company in the state, is an "occupation tax" within the meaning of the state Constitution, art. 8, § 5, declaring that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the same," and is unconstitutional. *Pullman Palace Car Co.* v. *State*, 29 *Am. & Eng. R. Cas.* 194, 64 *Tex.* 274, 53 *Am. Rep.* 758.—

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NOT FOLLOWED IN Gibson County *v.* Pullman Southern Car Co., 42 Fed. Rep. 572.

48. Vermont. — A state law levying a tax upon the gross receipts of railroad companies, and providing that, in case of a railroad operated under lease, the tax shall be paid by the lessor and deducted from the rent covenanted for in the lease, is not unconstitutional as against the lessor in that it impairs the obligation of the contract. The state may adopt that method of collecting the tax from the lessor. *Vermont & C. R. Co.* v. *Central Vt. R. Co.*, 46 *Am. & Eng. R. Cas.* 646, 63 *Vt.* 1, 21 *Atl. Rep.* 262, 731.

Such a law is unconstitutional as a regulation of commerce in so far as it taxes gross receipts derived from interstate business. *Vermont & C. R. Co.* v. *Central Vt. R. Co.* 46 *Am. & Eng. R. Cas.* 646, 63 *Vt.* 1, 21 *Atl. Rep.* 262, 731.

49. Virginia. — The provisions of the Constitution requiring taxation to be equal and uniform, and that all property shall be taxed in proportion to its value, relate to taxation for the purposes of revenue and not to special assessments by municipal corporations for local improvements. *Richmond & A. R. Co.* v. *Lynchburg*, 81 *Va.* 473.—QUOTING Norfolk City *v.* Ellis, 26 Gratt. (Va.) 224.

50. Washington.—The act of November 28, 1883, known as the "Gross Earnings Law," which exempts railroad property from taxation and substitutes a tax upon the gross earnings of railroads, is not in conflict with the Organic Act, § 1924, requiring all taxes to be equal and uniform, and that no distinction between different kinds of property be made in the assessments. *Columbia & P. S. R. Co.* v. *Chilberg*, 6 *Wash.* 612, 34 *Pac. Rep.* 163.

51. West Virginia. — The state Constitution says that "all property, both real and personal, shall be taxed," with certain specified exceptions. *Held*, that the act of March 1, 1866, exempting the property of a certain railroad from taxation until the profits should equal ten per cent. of its capital, was unconstitutional and void. *Chesapeake & O. R. Co.* v. *Miller*, 19 *W. Va.* 408. — DISTINGUISHING Com. *v.* Chesapeake & O. R. Co., 27 Gratt. (Va.) 352.

52. Wisconsin.—The act of 1854, imposing a tax upon railroad property, is not violative of the "uniformity" clause of the Constitution. *Milwaukee & M. R. Co.* v. *Waukesha County Sup'rs*, 9 *Wis.* 431, *n.*

III. INTERPRETATION OF TAX LAWS.

53. In general.*—Connecticut Act of 1864, providing that railroads shall pay a tax of one fourth of one per cent. on the market value of their capital stock and their funded and floating debt, which shall take the place of all other taxes, exempts the property of such companies from all other taxation whether it is used for railroad purposes or not. *Osborn* v. *New York & N. H. R. Co.*, 40 *Conn.* 491, 5 *Am. Ry. Rep.* 218.

The object of Ga. Act of 1874 was to make more searching and sweeping provisions in respect to the taxation of railroads by the state, and to compel more full and specific returns; it was not the intention of that act to exempt such property of railroad companies from taxation as was previously subject thereto, such as town lots laid off for sale. *Savannah, F. & W. R. Co.* v. *Morton*, 71 *Ga.* 24.

A company incorporated before the revision of the Michigan statutes in 1846, and whose charter is silent as to taxation, is liable to pay the specific tax imposed by Rev. St. 121, ch. 21, § 5. *People* v. *Detroit & P. R. Co.*, 1 *Mich.* 458.

The provision of Miss. Const. art. 12, § 13, that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals" is mandatory as to the liability of such property to taxation, but is permissive as to whether the legislature shall tax it the same as property of individuals or exempt it. *Mississippi Mills* v. *Cook*, 56 *Miss.* 40.

Where an act is required to be done annually, and no day is designated, either in express words or by implication, for the beginning of the year, it will ordinarily be presumed that the calendar year was intended. So where a statute imposes a tax of so much per annum upon corporations but does not designate the beginning of the tax year, it will be treated as a tax for the calendar year. *Com.* v. *Lehigh Valley R. Co.*, 129 *Pa. St.* 429, 47 *Phila. Leg. Int.* 406, 25 *W. N. C.* 15, 18 *Atl. Rep.* 406.—FOLLOWED IN Com. *v.* New York, L. E. & W. R. Co., 129 Pa. St. 478.

In construing a legislative act which incorporated within city limits property used exclusively for rural purposes, it will be

* New York Act of 1880 concerning state taxation of corporations construed, see note, 1 L. R. A. 260.

conclusively presumed, on a question of taxation, that the legislature, in passing the act, determined with a view solely to the public good the benefits to accrue to the public and to the property owner. It would be a usurpation of power by the judiciary were it to assume the right to revise the legislative action because of the inequality of benefits resulting from municipal taxation of such property. *Norris* v. *Waco*, 57 *Tex.* 635.

54. As to purpose of the tax. — Under Ky. Act of April 3, 1878, providing for the taxation of railroads, which requires a return to the state auditor showing the length of roads in each county, city, and incorporated town, and providing further that rolling stock and real estate of railroads shall be taxed for each "county, city, town, or precinct in which any portion of the road is located," a public school district is not a precinct within the meaning of the act, and railroads cannot be assessed for school-district purposes. *Louisville & N. R. Co.* v. *Johnson*, (*Ky.*) 11 *S. W. Rep.* 666.

55. As to taxation of road not wholly within the state. — Mo. Act of March 24, 1870, provides generally for the building, leasing, and selling of railroads, both in and out of the state, so as to make connections with roads in the state, and then provides that "if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make arrangement for operating the same as provided in this act, * * * such part as is in the state shall be subject to taxation." *Held*, that as the act provides for operating roads by building and purchasing as well as by leasing, the provision as to taxation applies to a road sold to a company of another state. *Chicago, B. & K. C. R. Co.* v. *Guffey*, 122 *U. S.* 561, 7 *Sup. Ct. Rep.* 1300.

Va. Act of 1881–82, ch. 119, only applies to the taxation of corporations of that state, and does not apply to the rolling stock of a railroad organized in Maryland, but used in operating a road in Virginia. *Marye* v. *Baltimore & O. R. Co.*, 127 *U. S.* 117, 8 *Sup. Ct. Rep.* 1037.—DISTINGUISHED IN Pullman Palace-Car Co. *v.* Board of Assessors, 55 Fed. Rep. 206.

56. State and county taxes. — The court of appeals of Kentucky decided in 1868 that a portion of a railroad in a county was not a part of the county property as to county taxation, but was an entirety and liable in its consolidated character for state revenue only. This case was followed by another to the same effect, and the law remained as declared by the court of appeals until 1876. So much of appellee's road as is in Franklin county was not assessed for county taxes for the years 1868 to 1875, inclusive, and the county now seeks to collect taxes thereon for those years. *Held*, that while the court is of opinion that the law was misinterpreted, yet as appellee complied fully with the existing law as interpreted by the highest court in the state, no more should be required of it. *Franklin County Court* v. *Louisville & N. R. Co.*, 25 *Am. & Eng. R. Cas.* 535, 84 *Ky.* 59.—REVIEWING AND CRITICISING Applegate *v.* Ernst, 3 Bush (Ky.) 648; Louisville & N. R. Co. *v.* Warren County Court, 5 Bush 243.

Although, by the amended charter of the Pacific Railroad Company (Sess. Acts 1851, p. 271, § 6) and the laws applicable to said road (Sess. Acts 1853, p. 13, § 12), provision was simply made for the payment by the corporation of state taxes, nevertheless, under the Constitution (art. 11, § 16) and the general statute (2 Wagn. St. 1159–61, §§ 1–9), the company was liable for county taxes. *State* v. *Dulle*, 48 *Mo.* 282.—REVIEWED IN Atlantic & P. R. Co. *v.* Cleino, 2 Dill. (U. S.) 175.

The provision of Tennessee Code that the property taxable or exempt from taxes for county purposes is the same as that for state revenues is merely a declaration as to what was then liable to taxation, and does not lay down a rule which makes all property taxed by the state liable for county taxes. *Gibson County* v. *Pullman Southern Car. Co.*, 42 *Fed. Rep.* 572

57. Tax on dividends or interest. —The Act of Congress of July 14, 1870, § 15, imposing a tax of two and one half per cent. "for and during the year 1871" on the amount of interest or coupons paid on bonds, and on undivided profits of corporations, does not apply to interest on railroad bonds earned by the company during the year 1871, but not payable, by the terms of the coupon, until January 1, 1872. *United States* v. *Indianapolis & St. L. R. Co.*, 113 *U. S.* 711, 5 *Sup. Ct. Rep.* 716.

The charter of a company provided that when the dividends exceeded six per cent. per annum on the capital stock, six per cent. on the dividends should be paid to the city. *Held*, that the capital paid in and not the

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authorized capital was intended. *Philadelphia* v. *Philadelphia & G. F. Pass. R. Co.*, 52 *Pa. St.* 177.—FOLLOWED IN Philadelphia *v.* Ridge Ave. Pass. R. Co., 102 Pa. St. 190.

A supplement provided that that part of the charter as to "tax on dividends * * * shall be so construed as to apply to the authorized capital of the company." *Held*, that this provision was prospective only, and did not apply to a tax already due. *Philadelphia* v. *Philadelphia & G. F. Pass. R. Co.*, 52 *Pa. St.* 177.

58. School taxes.—The school taxes on a roadbed, apportioned to a county, are properly distributed to the school districts therein in the proportion that the number of school children in each district bears to the whole number in the county; and Mo. Act of 1875 providing for such distribution is not unconstitutional, as giving a portion of the taxes levied upon property in one district to another. *In re Railroad School Tax*, 17 *Am. & Eng. R. Cas.* 491, 78 *Mo.* 596.—QUOTING State ex rel. *v.* Severance, 55 Mo. 388; Washington County *v.* St. Louis & I. M. R. Co., 58 Mo. 376.—FOLLOWED IN Chicago & A. R. Co. *v.* Lamkin, 97 Mo. 496, 10 S. W. Rep. 200.

School taxes, under the revenue law of this state (Mo. Rev. St. § 6880), cannot be levied on railroad property for building houses, or for paying past indebtedness. Such levy can be made only for school purposes proper. *State ex rel.* v. *Wabash, St. L. & P. R. Co.*, 83 *Mo.* 395.—FOLLOWED IN State ex rel. *v.* Wabash, St. L. & P. R. Co., 90 Mo. 166. REVIEWED IN Chicago & A. R. Co. *v.* Lamkin, 97 Mo. 496, 10 S. W. Rep. 200.

Taxes for building school-houses cannot be levied on railroad property. *State ex rel.* v. *Wabash, St. L. & P. R. Co.*, 90 *Mo.* 166, 2 *S. W. Rep.* 275.—FOLLOWING State ex rel. *v.* Wabash, St. L. & P. R. Co., 83 Mo. 395.

The property of defendant being subject to taxation for school purposes for the years 1867–1872 was, under the act of 1871, § 3, liable for school taxes for those years, although not subject thereto by appropriate legislation prior to the act of 1871. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 263, 101 *Mo.* 120, 13 *S. W. Rep.* 406.—DISTINGUISHING State *v.* St. Louis, K. C. & N. R. Co., 77 Mo. 202. QUOTING Livingston County *v.* Hannibal & St. J. R. Co., 60 Mo. 516.

Though the tax authorized by act of the fifteenth legislature (ch. 80, pp. 89, 90), to pay indebtedness to teachers, was one on school districts separately and not on counties, yet where a tax of one sixth of one per cent. was levied on the entire county, and that was the amount due from each school district after comparing the indebtedness of the district with the amount of its taxable property, the tax, though irregular, was sustained. *Texas & P. R. Co.* v. *Harrison County*, 54 *Tex.* 119.

Utah Comp. Laws, 677, § 1912, gives the county court power to divide a county into school districts, and to change the boundaries of such districts, and also provides that taxes shall be assessed in each district for school purposes. A county court extended the boundaries of a school district fifteen miles westward, taking in certain of defendant's property twenty-five miles from the schoolhouse. The intervening country was mountainous and difficult to cross. *Held*, that the property was liable for the tax assessed upon it. *King* v. *Utah C. R. Co.*, 6 *Utah* 281, 22 *Pac. Rep.* 158.

59. Statutes providing for payments in lieu of taxation.*—The payment by a company of a tax of one per cent. on the gross earnings of its road, under acts of Iowa twelfth general assembly, ch. 169, did not relieve the company from the payment of municipal taxes upon property within city limits. *Davenport* v. *Chicago, R. I. & P. R. Co.*, 38 *Iowa* 633.—FOLLOWING Dunlieth & D. Bridge Co. *v.* Dubuque, 32 Iowa 427.

New Jersey Act of February 9, 1869, validated and confirmed a certain lease and contract by which the Morris and Essex railroad company leased its road to the Delaware, Lackawanna and Western railroad company expressly authorizing and empowering the latter company to have, hold, use, enjoy, possess, and exercise the property, things, franchises, immunities, rights, powers, and privileges by the lease and contract granted to it. *Held*, that, under the designation of "immunities and privileges," the act should be construed as a grant of the immunity from taxation expressed in the act of 1865, enacting that the tax of one half of one per cent. which, by the original

* Delaware act providing for payment by railroads of a sum in lieu of taxation construed, see 33 AM. & ENG. R. CAS. 475, *abstr.*

act of incorporation, the lessor company was to pay to the state, should be in lieu and satisfaction of all other taxation or imposition whatsoever. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826.

60. Particular words and phrases. — A statute, after providing that a city might grant the privilege of constructing railroads on its streets, authorized it to collect a tax of one dollar on every hundred dollars of the gross earnings of the company, which was declared to be in lieu of all other taxes. Subsequently plaintiff company accepted an amendment to its charter to construct its railway on the streets of the city, "provided, however, that all restrictions, limitations and conditions" prescribed by the former act should apply to said company. *Held*, that the provision in reference to the special tax provided for in the former act was not one of the restrictions, limitations, and conditions referred to. *Dauphin & L. St. R. Co.* v. *Kennerly*, 74 *Als.* 583.

A Colorado statute provides that the property of railroads for taxation "shall be valued at its full cash value, and assessments shall be made upon the entire railway within this state, and it shall include the right of way, roadbed," etc. *Held*, that the term "right of way" refers to the strip of land appropriated for the track, and not to a mere intangible right of passing. *Keener* v. *Union Pac. R. Co.*, 31 *Fed. Rep.* 126; *new trial granted in* 34 *Fed. Rep.* 871.

When an enrolled act limits taxation to "one half of *per centum* on its annual income," and the act, as published by authority expresses the limitation to be "one half of one *per centum*," the two expressions will be held to mean the same thing. *Goldsmith* v. *Augusta & S. R. Co.*, 62 *Ga.* 468.

The term "railroad corporations," as used in Iowa Laws of 1872, ch. 26, is not used to distinguish the character of the ownership, but of the property, and the provisions of the chapter would apply as well to an individual or a partnership as to an incorporated company. (Beck and Adams, JJ., dissenting.) *Dubuque* v. *Chicago, D. & M. R. Co.*, 47 *Iowa* 196.

A company sought exemption from county taxation under a statute providing that the company should pay into the treasury of the commonwealth a tax on each one hundred dollars' worth of stock in the company, equivalent to the rate of tax on each one hundred dollars' worth of property for state revenue, and "no more." *Held*, that the term "no more" applied to the taxes to be paid into the state treasury, and was a limitation only upon the amount of tax to be assessed for state purposes. *Kentucky C. R. Co.* v. *Bourbon County*, 82 *Ky.* 497.

Mich. Tram Railway Act prescribes the rate and manner of taxing such railway companies, but elsewhere provides that the act may be at any time amended or repealed, though this shall not alter the corporate rights of companies formed under it. The subsequent tax law changed the mode of taxation, but the other clause was not disturbed. *Held*, that the companies came within the tax law, and that the term "corporate rights," used alone, meant only such essential and fundamental rights as attach to corporations, and did not include incidental privileges and immunities, such as a special standard of taxation. *Detroit City St. R. Co.* v. *Guthard*, 51 *Mich.* 180, 16 *N. W. Rep.* 328.—ADHERED TO IN Detroit *v.* Detroit City R. Co., 76 Mich. 421.

Under Pa. Acts of 1879 and 1881, imposing a tax of four mills on "every dollar of the value" of corporate bonds or loans, for state purposes, the word "value" means the actual value, and not the nominal or par value. *Com.* v. *Lehigh Valley R. Co.*, 13 *Am. & Eng. R. Cas.* 347, 104 *Pa. St.* 89.

As the above acts contain no provision for assessment and valuation, they do not constitute an independent scheme for the taxation of corporate loans, but must be aided by the act of 1844. *Com.* v. *Lehigh Valley R. Co.*, 13 *Am. & Eng. R. Cas.* 347, 104 *Pa. St.* 89.

The phrase "general taxation" in Va. Act of March 6, 1847, § 7, *held* to mean that the property of the company was liable to all taxation for state, county, and local purposes. *Baltimore & O. R. Co.* v. *Marshall County Sup'rs*, 3 *W. Va.* 319.—FOLLOWED IN Baltimore & O. R. Co. *v.* Wheeling, 3 W. Va. 372.

61. Repeals and their effect. — By several acts a company was incorporated and made exempt from taxation. Afterwards its property was sold under a legislative act which constituted the individuals or corporation purchasing it a corporate body, made certain material changes in the

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charter in reference to the location of the road, and reserved to the legislature the right to withdraw or abrogate all rights and privileges "vested by this or any other act" in the company. The purchasing company accepted this act by organizing and acting under it. Subsequently, the legislature passed an act (1866, ch. 157), entitled "An act to provide for the general valuation and assessment of property in this state," which contained a clause repealing "all laws exempting property from valuation." *Held*, that the act of 1866, ch. 157, operated as a repeal of any exemption that might have existed in favor of the company. *Washington County Com'rs* v. *Franklin R. Co.*, 34 *Md.* 159.

The charter of a company subjected it to a tax of one and a half per cent. on the cost of the road as soon as the net proceeds should equal seven per cent., and provided that no other tax should be levied upon the company. By the terms of the charter, it might be altered or repealed by the legislature. The subsequent general tax law of 1862 subjected to taxation the real estate of all private corporations "except those which by virtue of any irrepealable contract in their charters or other contracts with the state are expressly exempt from taxation," and it repealed all acts, whether special or local, inconsistent with its provisions. *Held*, that it repealed the provision of the charter in regard to taxation, and that an assessment made upon the real estate of the company in a township was rightfully made under the general law. *State* (*Morris & E. R. Co., Pros.*) v. *Miller*, 30 *N. J. L.* 368; *affirmed in* 31 *N. J. L.* 521.—FOLLOWED IN State (Jersey City & B. R. Co., Pros.) *v.* Mayor, etc., of Jersey City, 31 N. J. L. 575; State (Warren R. Co., Pros.) *v.* Person, 32 N. J. L. 134.

The Morris and Essex railroad company, in 1865, was taxable under the supplement to its charter, approved March 23, 1865, and not under the general tax law of 1862. This supplement to the charter repealed the general tax law, *pro tanto*, and fixed the only form of assessment for taxes that could be made against the company. *McGavisk* v. *State* (*Morris & E. R. Co., Pros.*), 34 *N. J. L.* 509.—QUOTED IN State (Morris & E. R. Co., Pros.) *v.* Com'r of R. Taxation, 38 N. J. L. 472.

N. J. Act of April 2, 1873, relating to the taxation of railroads, applies by clear expression to the Morris and Essex railroad, and therefore the general repealing clause therein extinguishes all the provisions in the charter of that company inconsistent with the act. Section 10 of the act applies only to railroad companies having irrepealable charters. As applied to corporations, every grant of franchises is a charter, and therefore section 6 of the general corporation act of 1846 must be considered as incorporated in the act of 1865, giving to said company the option of selecting to which of two modes of taxation it would submit, by which it is made, in express terms, subject to alteration or repeal. That company has not an irrepealable contract with the state, and is, therefore, subject to taxation, under the act of 1873, without its consent. *State* (*Morris & E. R. Co., Pros.*) v. *Com'r of R. Taxation*, 38 *N. J. L.* 472; *affirming* 37 *N. J. L.* 228. —QUOTING McGavisk *v.* State (Morris & E. R. Co., Pros.), 34 N. J. L. 509. RECONCILING State (Morris & E. R. Co., Pros.) *v.* Minton, 23 N. J. L. 529; State (Morris & E. R. Co., Pros.) *v.* Miller, 30 N. J. L. 368, 31 N. J. L. 521.—FOLLOWED IN State Board of Assessors *v.* Patterson & R. R. Co., 33 Am. & Eng. R. Cas. 468, 50 N. J. L. 446.

A tax due under a statute is not lost or extinguished by the repeal of the statute, if the repealing law provides new modes of collection. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

Pa. Act of May 1, 1868, § 5, requiring a tax against a corporation to be deducted from dividends, is not repealed by the act of 1874, § 4. The latter act makes no change in the nature of the tax. *Catawissa R. Co.'s Appeal*, 78 *Pa. St.* 59.

Pa. Act of March 26, 1846, § 6 (P. L. 179), providing that the stock of the New York and Erie railroad company shall be subject to taxation to an amount equal to the cost of constructing that part of the road situated in Pennsylvania, is not repealed by the provisions of the General Revenue Act of April 24, 1874 (P. L. 68), providing that every railroad company doing business in the commonwealth shall be subject to a certain tax upon its capital stock. The former act fixes the amount of capital stock to be assessed; the latter act fixes the rate of taxation. *Com.* v. *Erie R. Co.*, 98 *Pa. St.* 127.

By the repealing clauses of Pa. Act of June 7, 1879 (P. L. 112), and the act of June 30, 1885 (P. L. 193), the act of April 29, 1844 (P. L. 497), and the act of April 22,

1846 (P. L. 486); so far as they relate to the taxation of mortgages in the hands of corporations, are no longer in force. *Com.* v. *Lehigh Valley R. Co.*, 129 *Pa. St.* 429, 47 *Phila. Leg. Int.* 406, 25 *W. N. C.* 15, 18 *Atl. Rep.* 406.

Wyoming Railroad Assessment Act of December 13, 1879, which provides for the assessment of railroads for taxation by a territorial board, and repeals all inconsistent laws, repeals and supersedes the provisions of a city charter giving to city officers the right to assess railroads within the city. *Union Pac. R. Co.* v. *Cheyenne*, 113 *U. S.* 516, 5 *Sup. Ct. Rep.* 601.

The provision in the original charter of the Baltimore & Ohio railroad, granted by the state of Maryland, to the effect that shares of stock in the company should be considered personal property and exempt from any tax or burden "by the states assenting to this law," was repealed by the Virginia Act of 1847, which exempted the property of the company from taxation until the net income of the company should exceed six per cent. per annum. *Baltimore & O. R. Co.* v. *Wheeling*, 3 *W. Va.* 372.

IV WHO MAY BE TAXED, AND FOR WHAT PROPERTY.

1. *Who May be Taxed.*

62. Railway companies, generally.—Railroads in Kentucky are taxed at the rate of $20,000 per mile of road, including depot grounds, etc., and all the paraphernalia of the roads. By the act of Feb. 20, 1864 (Myers's Sup. 480), the length of the roads is required to be reported to the auditor and the tax to be paid to the treasurer. If a company owns any property in any county in the state which is not included in the statute, as part of the necessary paraphernalia of the road, such property is liable to taxation for revenue and county purposes. *Louisville & N. R. Co.* v. *Warren County Court*, 5 *Bush (Ky.)* 243.—DISTINGUISHED IN Ludlow *v.* Cincinnati Southern R. Co., 7 Am. & Eng. R. Cas. 231, 78 Ky. 357. REVIEWED AND CRITICISED IN Franklin County Court *v.* Louisville & N. R. Co., 25 Am. & Eng. R. Cas. 535, 84 Ky. 59.

Railroads are liable to taxation for county purposes equally and uniformly with the property of a citizen. *Lincoln County Court* v. *Louisville & N. R. Co.*, *(Ky.)* 7 *Am. & Eng. R. Cas.* 320. — DISTINGUISHING Applegate *v.* Ernst, 3 Bush (Ky.) 650. QUOTING Elizabeth & P. R. Co. *v.* Elizabethtown, 12 Bush 238.

A railroad passing through a parish is liable to an assessment of a parish tax on the property of the road located within the parish, unless exempted by a special law. The burden of showing such an exemption is on the company. *Bakewell* v. *Police Jury*, 20 *La. Ann.* 334.

Railroad and canal property is distinguished by characteristics sufficiently marked and important to make it a class by itself, and therefore may be made the subject of separate legislation for the purpose of taxation. *State Board of Assessors* v. *Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1, 2 *Atl. Rep.* 789.— DISTINGUISHING San Mateo County *v.* Southern Pac. R. Co., 8 Am. & Eng. R. Cas. 1, 116 U. S. 138; Santa Clara R. Tax Case, 9 Sawy. (U. S.) 165. QUOTING Sinking-Fund Cases, 99 U. S. 722. REVIEWING State (Central R. Co., Pros.) *v.* Mutchler, 41 N. J. L. 96; State ex rel. *v.* Parsons, 40 N. J. L. 123.

The West Shore & Ontario terminal company is a railroad corporation within the meaning of the New Jersey railroad taxation acts. *Williams* v. *Bettle*, 51 *N. J. L.* 512, 18 *Atl. Rep.* 750; *affirming* 42 *Am. & Eng. R. Cas.* 271, 50 *N. J. L.* 132, 11 *Atl. Rep.* 17.

A railway was required by act of the legislature to complete its road betwen two points by a certain time, and it was provided that the road should not be taxed until completed. Soon after the time fixed, the road was completed to such an extent that by use, under lease, of three miles of another company's track, and of a ferryboat owned by itself, freight and passengers were transported between the points. *Held*, that the road was liable to taxation after the time fixed for its completion, and that the state could demand a sale on non-payment. *Hand* v. *Savannah & C. R. Co.*, 12 *So. Car.* 314.

Property of a railroad company is taxable like all other property, unless exempted by its charter. *Seaboard & R. R. Co.* v. *Norfolk County Sup'rs*, 83 *Va.* 195, 2 *S. E. Rep.* 278.

Property cannot belong to an incorporated company without being vested in it, and the respective shareholders in such an incorporated company constitute the com-

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pany; therefore, property belonging to a company is vested in the shareholders in their corporate capacity and not in them as individuals or natural persons, and is consequently taxable in the name of the company *Baltimore & O. R. Co.* v. *Marshall County Sup'rs*, 3 *W. Va.* 319.

63. Branch roads.—A company chartered with a privilege of building branch roads, and taxed in proportion to the amount of its capital stock by a provision in its charter, built an extensive branch without increasing the amount of its stock. *Held*, that the branch road was subject to taxation, and that Ky. Act of February 20, 1864, regulated the mode of assessment and taxation of the entire road. *Louisville, C. & L. R. Co.* v. *Com.*, 10 *Bush* (*Ky.*) 43.

Mo. Act of March 27, 1875, in relation to payment of assessments on branch railroads and machine shops (Sess. Acts 1875, p. 128), does not govern cases of money collected on assessments made prior to the passage of the act, as where assessment was made prior thereto on machine shops in a town. *State ex rel.* v. *Ferguson*, 62 *Mo.* 77.

64. Company whose road is in possession of mortgagees.—A corporation whose railroad, including its rolling stock and equipment, is in possession of its mortgagees, who are operating the road under the mortgage, is nevertheless liable to taxation upon the valuation of its railroad and its equipment and appendages, pursuant to N. J. act entitled "An act providing for state taxes on railroads, and the more efficient collection thereof." (N. J. Rev. p. 1168.) *State* (*New Jersey Southern R. Co., Pros.*) v. *Railroad Com'rs*, 41 *N. J. L.* 235.

65. Consolidated corporations.*—Two railroads, one liable to taxation and the other not, consolidated, and it was judicially determined that the two lines, as to the public and the state, retained their original status. *Held*, that repairs or improvements on either line would be subject to taxation the same as if there had been no consolidation. *Branch* v. *Charleston*, 92 *U. S.* 677.

Where a new corporation is formed under authority of a statute by the consolidation of existing corporations, and it is declared that the new corporation shall be "vested with all the rights, privileges, franchises, and property which may have been vested in either company prior to the act of consolidation," the new corporation acquires no greater immunity from taxation than the several corporations enjoyed as to their respective roads. Whatever of their property was subject to taxation will remain so. *Chesapeake & O. R. Co.* v. *Virginia*, 94 *U. S.* 718, 16 *Am. Ry. Rep.* 155.—APPROVED IN State ex rel. *v.* Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.—DISTINGUISHED IN Maine C. R. Co. *v.* Maine, 96 U. S. 499.

The consolidation of the Southwestern railroad company and the Muscogee railroad company did not take place until November, 1868, and the new company is subject to tax legislation existing at that time, without the obligation of any contract between it and the state being thereby impaired. *Central R. & B. Co.* v. *State*, 54 *Ga.* 401.—DISTINGUISHED IN State *v.* Atlantic & G. R. Co., 60 Ga. 268; Western & A. R. Co. *v.* State, 54 Ga. 428.

A company owning a bridge across the Mississippi river, originally chartered as two distinct companies by the legislatures of Illinois and Missouri, and consolidated by articles which were confirmed and approved by the legislature of Illinois, is an association incorporated under the laws of the latter state, in the sense of the revenue law authorizing the taxation of its capital stock. *Quincy R. Bridge Co.* v. *Adams*, 88 *Ill.* 615, 21 *Am. Ry. Rep.* 378.

Where a consolidated company is formed by the union of several individual companies, one of which has in its charter no exemption from taxation, the portion of the road which belonged to this company will be subject to taxation after consolidation. *State* v. *Philadelphia, W. & B. R. Co.*, 45 *Md.* 361. See *Philadelphia & W. R. Co.* v. *Maryland*, 10 *How.* (*U. S.*) 376.

New York Act of 1886, ch. 143, provides that every corporation, joint-stock company, or association incorporated by or under any general or special law of the state shall pay a tax of one eighth of one per cent. upon the amount of its capital stock. A railroad company was organized to build a road wholly within the state, and paid the above tax. Subsequently, it consolidated with other corporations in other states so as to form a continous line to the city of Chicago, and the capital stock was increased from $4,500,000 to $30,000,000. *Held*, that the

* Taxation of corporation formed by consolidation of roads chartered by different states, see note, 15 L. R. A. 85.

consolidated company was not incorporated "by or under any general or special law of this state" so as to be liable for a further tax upon its capital stock. *People* v. *New York C. & St. L. R. Co.*, 42 *N. Y. S. R.* 90, 129 *N. Y.* 654, *mem.*, 29 *N. E. Rep.* 959; *reversing* 61 *Hun* 619, *mem.*, 39 *N. Y. S. R.* 725, 737, 15 *N. Y. Supp.* 644.

66. Elevated railway companies.—The foundations, columns, and superstructure of an elevated railway are included in the words "lands" and "real estate," as defined in the statute in reference to taxation (1 N. Y. Rev. St. 387, §§ 1, 2), and so are taxable as real estate *People ex rel.* v. *Com'rs of Taxes*, 2 *Am. & Eng R. Cas.* 343, 82 *N. Y.* 459; *affirming* 19 *Hun* 460.—APPLYING People ex rel. *v.* Cassity, 46 N. Y. 46; Smith *v.* Mayor, etc., of N. Y., 68 N. Y. 552; Hudson River Bridge Co. *v.* Patterson, 74 N. Y. 365; People ex rel. *v.* Com'rs of Taxes, 80 N. Y. 573.—APPLIED IN People ex rel. *v.* Com'rs of Taxes, 101 N. Y. 322, 4 N. E. Rep. 127.

The person or corporation owning these fixtures may be assessed therefor although the fee of the land to which they are affixed is in another; and this without regard to the question whether that other is a natural person or a municipality, or whether the land is or is not liable to taxation. *People ex rel.* v. *Com'rs of Taxes*, 2 *Am. & Eng. R. Cas.* 343, 82 *N. Y.* 459; *affirming* 19 *Hun* 460.

There is nothing in the statutes exempting any part of the property of the New York Elevated railroad company from taxation. *People ex rel.* v. *Com'rs of Taxes*, 2 *Am. & Eng. R. Cas.* 343, 82 *N. Y.* 459; *affirming* 19 *Hun* 460. — DISTINGUISHING Rome R. Co. *v.* Mayor, etc., of Rome, 14 Ga. 275; Home of the Friendless *v.* Rouse, 8 Wall. (U. S.) 430; Tomlinson *v.* Branch, 15 Wall. 460; Humphrey *v.* Pegues, 16 Wall. 244; Pacific R. Co. *v.* Maguire, 20 Wall. 36; Bangor & P. R. Co. *v.* Harris, 21 Me. 533; Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.) 288.

As regards taxation it is immaterial whether a railroad is laid upon the surface, placed on pillars, or carried through a covered way or tunnel; the structures adopted to sustain it, or to facilitate and protect its use, are, within the meaning of the law, land, and for them the railroad company is liable to be taxed. *People ex rel.* v. *Com'rs of Taxes*, 101 *N. Y.* 322, 4 *N. E. Rep.* 127; *reversing* 23 *Hun* 687. — APPLYING People *v.* Com'rs of Taxes, 82 N. Y. 459.

67. Foreign corporations.—A ferry company chartered in one state to run across a river to the border of another state is a citizen of the state creating it, and is not taxable in the other state. *St. Louis* v. *Wiggins Ferry Co.*, 11 *Wall.* (*U. S.*) 423.—APPLIED IN Baltimore & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 461, 22 Fed. Rep. 376. QUOTED IN Cincinnati, N. O. & T. P. R. Co. *v.* Com., 13 Am. & Eng. R. Cas. 270, 81 Ky. 492.

Where a foreign company, under a contract with a company of Indiana, constructs, equips, and operates a portion of the road of the latter in Indiana, the stock of such road must be regarded as vested in the company under whose charter it is built, and cannot be assessed and taxed against the foreign corporation; nor can the roadbed be assessed as real estate against the foreign corporation, and the rolling stock as personal property, since the statute requires it all to be assessed as corporation stock. *Michigan C. R. Co.* v. *Porter*, 17 *Ind.* 380.

That provision of Kansas Laws of 1879, ch. 110, § 22, which permits a township trustee to tax the property of "the citizens" of his township, thereby exempting the property of corporations, is in conflict with that provision of the state Constitution which requires taxes to be upon a uniform and equal rate of assessment; but in 1885 the statute was amended so as to omit the word "citizens," and to permit the tax therein named to be levied upon all property in the township subject to taxation. *Marion & McP. R. Co.* v. *Champlin*, 37 *Kan.* 682, 16 *Pac. Rep.* 222.—FOLLOWED IN Manhattan, A. & B. R. Co. *v.* Burgoyne, 37 Kan. 685; Atchison, T. & S. F. R. Co. *v.* Johnson, 38 Kan. 430.

Before the Michigan Tax Law of 1882 was adopted, railroad companies that had been organized under the state laws, and whose roads lay wholly or partly without the state, were taxable upon a basis fixed for Michigan roads under the Railroad Law of 1873; but if the company with which consolidation has been affected is a foreign one, the consolidated company cannot be taxed as if its road constituted a single line partly without the state, but deriving its powers from the law of the state. *Chicago & N. W. R. Co.* v. *Auditor-General*, 53 *Mich.* 79, 18 *N. W. Rep.* 586.

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The railroads with respect to which the taxation provided for by New Jersey Railroad Taxation Acts of 1873 and 1876 (N. J. Rev. pp. 1166–1168) is imposed are such as were constructed by corporations of the state—domestic corporations holding their corporate franchises under charters granted by the legislature of the state. *State* (*Lehigh Valley R. Co., Pros.*) v. *Mutchler*, 1 *Am. & Eng. R. Cas.* 395, 42 *N. J. L.* 461.

It seems that a foreign corporation, engaged in both state and interstate transportation in this state, is subject to taxation here in common with domestic corporations. *People ex rel.* v. *Wemple*, 54 *Am. & Eng. R. Cas.* 1, 138 *N. Y.* 1, 51 *N. Y. S. R.* 702; *affirming* 65 *Hun* 252.

If any part of the receipts of a foreign company doing business within the state is taxable, the fact that the company has remitted its receipts to its principal office in another state does not affect the right of the state to levy a tax thereon. *Delaware & H. Canal Co.* v. *Com.*, (*Pa.*) 37 *Am & Eng. R. Cas.* 359, 17 *Atl. Rep.* 175.

Pa. Act of June 30, 1885, § 4 (P. L. 193), requiring corporations, upon the payment of interest upon their corporate indebtedness, to deduct and return the state tax imposed, applies not only to domestic corporations, but to foreign corporations doing business in the state. *Com.* v. *New York, L. E. & W. R. Co.*, 129 *Pa. St.* 463, 18 *Atl. Rep.* 412.—QUOTING Com. *v.* Delaware Div. Canal Co., 123 Pa. St. 594.—FOLLOWED IN Com. *v.* New York, L. E. & W. R. Co., 129 Pa. St. 478.

It is competent for the legislature to impose upon foreign corporations doing business in the state the duty, upon the payment of interest upon their corporate bonds held by resident holders, to deduct and return the state tax imposed by Pa. Act of June 30, 1885, § 4 (P. L. 193). *Com.* v. *New York, L. E. & W. R. Co.*, 129 *Pa. St.* 463, 18 *Atl. Rep.* 412.

The New York, L. E. & W. R. Co. is not relieved from this duty to collect and return said tax, or from liability therefor upon failure to perform such duty, by anything authorized, conferred, or required in the acts of February 16, 1841 (P. L. 28), and of March 26, 1846 (P. L. 179). *Com.* v. *New York, L. E. & W. R. Co.*, 129 *Pa. St.* 463, 18 *Atl. Rep.* 412. *Com.* v. *New York, L. E. & W. R. Co.*, 145 *Pa. St.* 57, 22 *Atl. Rep.* 212. See also *Com.* v. *Lehigh Valley R. Co.*, 129 *Pa. St.* 429, 18 *Atl. Rep.* 406, 410.

68. Lessor or lessee roads.—Where the charter of a company authorizes it to acquire, by lease, purchase, or otherwise, any extension of its road, and in pursuance thereof it leases other railroads forever, the property so leased will, for the purposes of taxation, be regarded as the property of the company operating it. *Huck* v. *Chicago & A. R. Co.*, 86 *Ill.* 352, 17 *Am. Ry. Rep.* 419.

Where one company builds a car hoist and lays a third rail upon its own ground, a company using the same jointly with the owner, for which it pays a compensation, cannot be taxed for one half its value. *Irvin* v. *New Orleans, St. L. & C. R. Co.*, 94 *Ill.* 105.

A contract between tw companies, whereby one is to take charge of the road of the other, with all its equipments, and operate the same as a continuous line with its own line, and exercise all the rights and privileges of the other under its franchise, for a consideration named, does not change the ownership of any of the property of the latter company, and the rolling stock of such company is liable to distraint for taxes assessed upon its capital tock. Parting with the possession and use of a thing does not always imply a parting with the absolute ownership. *Archer* v. *Terre Haute & I. R. Co.*, 7 *Am. & Eng. R. Cas.* 249, 102 *Ill.* 493.

A railroad leased for a term of 999 years may be taxed either to the lessor or to the lessee. *Atlantic & St. L. R. Co.* v. *State*, 60 *N. H.* 133.

The rent which the lessee [illegible] to pay is evidence of the market [illegible] of the road at the date of the lease. B[illegible] if the rent is more, or less, than the [illegible] of the road is worth, the taxable value of the use of the road is not on that account more, or less, than the price for which the road can be sold. *Atlantic & St. L. R. Co.* v. *State*, 60 *N. H.* 133.

Under N. Mex. Comp. Laws, § 1812, providing that property under a lease shall be taxed to the lessor unless listed by the lessee, property under a railroad lease cannot properly be assessed to the lessee company operating the road under the lessor's charter. *Valencia County* v. *Atchison, T. & S. F. R. Co.*, 3 *N. Mex.* 380, 10 *Pac. Rep.* 294.

Where a domestic corporation leases its road to a foreign corporation, which agrees to pay the taxes and assessments on the property, the property is properly assessed to the lessee, and not to the lessor or as

non-resident lands. *People ex rel.* v. *Reid*, 46 *N. Y. S. R.* 408, 64 *Hun* 553, 19 *N. Y. Supp.* 528.

69. Railroad chartered by the United States. — A state tax may ordinarily be imposed on the property of a company incorporated by the federal government. Such tax does not in any way interfere with or prevent the discharge by the corporation to the federal government of the functions it was designed to serve. *Union Pac. R. Co.* v. *Lincoln County*, 1 *Dill.* (*U. S.*) 314. *Huntingdon* v. *Central Pac. R. Co.*, 2 *Sawy.* (*U. S.*) 503. *Thomson* v. *Pacific R. Co.*, 9 *Wall.* (*U. S.*) 579. *Union Pac. R. Co.* v. *Peniston*, 18 *Wall.* (*U. S.*) 5. *People* v. *Central Pac. R. Co.*, 43 *Cal.* 398. *Santa Clara County* v. *Southern Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 182, 18 *Fed. Rep.* 385.

But a tax cannot be levied upon the operations of such a company, as for example, upon its franchises. *Union Pac. R. Co.* v. *Peniston*, 18 *Wall.* (*U. S.*) 5.

And a railroad bridge owned by the government and used by a railroad company under a license or a contract cannot be taxed. *Chicago, R. I. & P. R. Co.* v. *Davenport*, 51 *Iowa* 451.

The trial court excluded the evidence offered to sustain the claim of defendant, "that the Central Pacific Railroad is a national road, constructed by the general government for the purpose of carrying into execution its powers over postal, military, and commercial matters, and is therefore not subject to state taxation." *Held*, that the ruling must be sustained. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 47.—FOLLOWING Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5.

70. Railroads lying partly without the state.*—(1) *Federal decisions.*— A company was formed by the union of several railroads which had been previously chartered by Maryland, Delaware, and Pennsylvania, two of which were entirely in Maryland. The charter of one contained no exemption from taxation. The charter of the other made the shares of stock therein personal estate, and exempted them from any tax "except upon that portion of the permanent and fixed works which might be in the state of Maryland" *Held*, that under the Maryland law of 1841, imposing a tax for state purposes upon the real and personal property in the state, that part of the road of the consolidated company which belonged originally to the company having no exemption was liable to be assessed just as it would have been in the hands of the original company. *Philadelphia & W. R. Co.* v. *Maryland*, 10 *How.* (*U. S.*) 376.—APPROVED IN State ex rel. *v.* Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290. FOLLOWED IN Tennessee *v.* Whitworth, 117 U. S. 139; Wilmer *v.* Atlanta & R. A. L. R. Co., 2 Woods (U. S.) 447. QUOTED IN Minot *v.* Philadelphia, W. & B. R. Co., 2 Abb. (U. S.) 323; Baltimore & O. R. Co. *v.* Marshall County Sup'rs, 3 W. Va. 319. QUOTED AND APPROVED IN Evansville, H. & N. R. Co. *v.* Com., 9 Bush (Ky.) 438. REVIEWED IN State ex rel. *v.* Greene County, 54 Mo. 540; State ex rel. *v.* Garroutte, 67 Mo. 445.

A railroad was 455 miles long, 42 miles of which were in a state other than that by which it was incorporated. *Held*, following the state decisions, that it was "doing business" within the state where the 42 miles were, within the meaning of Pa. Act of May, 1868, taxing all railroad companies "doing business within the state, and upon whose road freight may be transported." *Erie R. Co.* v. *Com.*, 21 *Wall.* (*U. S.*) 492, 6 *Am. Ry. Rep.* 206.—QUOTED IN State *v.* Maine C. R. Co., 66 Me. 488.

(2) *State decisions.*—A Connecticut statute provides for taxing railroads one per cent. upon a certain valuation of their franchises and property, but contains a provision that when only a part of the road lies in the state, the company shall pay one per cent. on such proportion of the valuation "as the length of its road lying in this state bears to the entire length of said road." A company owning a road entirely within the state took a perpetual lease of two roads outside of the state, which it operated as one entire system. *Held*, that the Connecticut company could not be regarded as "owning" the other two roads within the meaning of the statute, so as to be entitled to a reduction from the valuation of its property. *State* v. *Housatonic R. Co.*, 48 *Conn.* 44.

A state cannot tax the whole track and equipments, the gross earnings, or the entire capital stock, of a road which lies

* Taxation of railroads partly in and partly out of the state imposing tax, see note, 13 AM. & ENG. R. CAS. 304.

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partly without its boundaries, and is partly operated in other states. It can only tax that part of the road property which lies within its jurisdiction, or the proportion of stock representing that part of the road. *State Treasurer* v. *Auditor-General*, 13 *Am. & Eng. R. Cas.* 296, 46 *Mich.* 224, 9 *N. W. Rep.* 258.

A tax upon the gross earnings of a railway company whose road is partly outside of the jurisdiction is illegal, not only because of the want of jurisdiction, but because it is not levied upon a rule of equality with corporations whose business is wholly in the state. *State Treasurer* v. *Auditor-General*, 13 *Am. & Eng. R. Cas.* 296, 46 *Mich.* 224, 9 *N. W. Rep.* 258.

Where a portion of a road is outside of the state, a claim in proportion to the length of the road within its borders is legal. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

A company incorporated by the state of Ohio, and afterwards authorized to extend its road into Pennsylvania by purchasing a road theretofore built by another company, falls within the class of "companies incorporated by or under any law of this commonwealth," and is subject to the tax imposed on such companies by the act of April 29, 1844. *Com.* v. *Cleveland, P. & A. R. Co.*, 29 *Pa. St.* 370.

Dividends of such company declared out of the profits and paid in stock are equally liable to the tax with dividends paid in cash. *Com.* v. *Cleveland, P. & A. R. Co.*, 29 *Pa. St.* 370.—DISTINGUISHED IN Com. *v.* Erie & P. R. Co., 10 Phila. (Pa.) 465.

The capital stock of a domestic railroad corporation, represented by its equipment in use interchangeably on its lines within and without the state, is taxable, under Pa. Act of June 7, 1879, § 4 (P. L. 114), and act of June 1, 1889, § 21 (P. L. 429), in the proportion that its mileage operated within the state bears to its entire mileage. *Com.* v. *Delaware, L. & W. R. Co.*, 145 *Pa. St.* 96, 22 *Atl. Rep.* 157.—FOLLOWING Pullman Palace Car Co. *v.* Com., 107 Pa. St. 156, 141 U. S. 18.

But the capital of such company, invested in real estate and other railroads outside the state, and in vessels, barges, and tugs, built, registered, and used wholly outside the state, is not subject to such taxation, the said property being already taxable in the states where it exists and is used. *Com.* v. *Delaware, L. & W. R. Co.*, 145 *Pa. St.* 96, 22 *Atl. Rep.* 157.—FOLLOWING Com. *v.* American Dredging Co., 122 Pa. St. 386.

71. Express companies.* — Under New York Const. art. 8, §§ 1, 3, declaring that the term "corporations" should include all associations or joint-stock companies having any of the powers or privileges not possessed by individuals or partnerships, a joint-stock express company formed under the acts of 1849 and 1854 will be deemed a corporation, and will be liable to taxation on its capital like all other corporations. *Sandford* v. *New York Sup'rs*, 15 *How. Pr.* (*N. Y.*) 172.

Where individuals associate under an arrangement having but few of the properties of a private partnership, but with the chief characteristics of a corporation, such as providing for the permanent investment of capital, right of succession, the transfer of property by the assignment of a certificate of ownership, and the prosecution of suits in the name of one person, it will be regarded as something more than a partnership, and as being at least a joint-stock company or association within the meaning of the New York statutes. *So held*, as to the United States express company, which objected to a tax against it under N. Y. Act of 1880, ch. 542, entitled "An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies, and associations." *People ex rel.* v. *Wemple*, 117 *N. Y.* 136, 29 *Am. & Eng. Corp. Cas.* 610, 22 *N. E. Rep.* 1046, 27 *N. Y. S. R.* 341, 6 *L. R. A.* 303, 2 *Int. Com. Rep.* 735; *affirming* 52 *Hun* 434, 24 *N. Y. S. R.* 668, 5 *N. Y. Supp.* 581.—REVIEWING Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. (N. Y.) 158; Westcott *v.* Fargo, 6 Lans. (N. Y.) 319.

Under Pa. Acts of June 7, 1879 (P. L. 17), and of June 1, 1889 (P. L. 431), requiring express companies to pay "a tax of eight mills upon the dollar upon the gross receipts of said companies received from express business done wholly within this state," an express company is liable for a tax upon the whole of its gross receipts, and not merely on so much of its gross receipts as remain after deducting therefrom the amounts paid to other companies for transportation services. *Com.* v. *United States Exp. Co.*, 157 *Pa. St.* 579, 27 *Atl. Rep.* 396.

* Tax on franchise or business of express companies, see note, 6 L. R. A. 303.

The tax upon the whole of the gross receipts of an express company is not illegal double taxation, although the amounts paid by the express company to railroad companies for transportation are included in the gross receipts of railroad companies, and are taxed as such. *Com.* v. *United States Exp. Co.*, 157 *Pa. St.* 579, 27 *Atl. Rep.* 396.

The provisions of the act of June 7, 1879, § 7, and of the act of June 1, 1889, § 23, providing for adjustment of tax between corporations in certain cases, do not apply to express companies which employ railroad companies to do their transportation. *Com.* v. *United States Exp. Co.*, 157 *Pa. St.* 579, 27 *Atl. Rep.* 396.

72. Telegraph and telephone companies.—An interstate telegraph line is taxable by the states through which it runs, but the operation of the line cannot be enjoined for a non-payment of the tax where a great part of it is over United States post roads. *Western Union Tel. Co.* v. *Massachusetts*, 125 *U. S.* 530, 8 *Sup. Ct. Rep.* 961.—DISTINGUISHED IN People ex rel. *v.* Wemple, 138 N. Y. 1.

A tax cannot lawfully be assessed against the property of a corporation when the stock of the corporation is at the same time taxed to its owners. *Cheshire County Telep. Co.* v. *State*, 63 *N. H.* 167.

73. Union depot companies. — A company formed for the sole purpose of furnishing at cost a union depot and terminal facilities for the common use of several companies, and whose only revenue is received in the form of tolls for the use of such depot and terminal facilities, which tolls amount in the aggregate only to the cost of operating the same, is not liable to pay as taxes a percentage on its receipts or gross earnings. Payment of a percentage on their gross earnings by the railway companies constitutes payment of taxes on all the property of the depot company. *State* v. *St. Paul Union Depot Co.*, 41 *Am. & Eng. R. Cas.* 636, 42 *Minn.* 142, 43 *N. W. Rep.* 840.—REAFFIRMED IN St. Paul Union Depot Co. *v.* Minnesota & N. W. R. Co., 47 Minn. 154.

74. Contractors. — Contractors who bind themselves to construct and equip a railroad, and who are to receive subscriptions to the stock, bonds, and mortgages on the road, and are to furnish and pay for all materials, labor, and machinery, and who are placed in possession of the road to enable them to perform the contract and are authorized to operate the road and to receive the earnings thereof, paying to the railroad company the net profits, are not vested with the franchise and right of way, and are not the owners of the road for purposes of taxation. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 340.

2. *What Property is Subject to Taxation.*

a. In General.

75. Real estate, generally. — Iowa Code of 1858, ch. 152, provides that, with certain exceptions, all property, whether real or personal, is the subject of taxation; but real estate owned by railroad companies is only taxable through the shares of the stockholders. *Davenport* v. *Mississippi & M. R. Co.*, 12 *Iowa* 539.

And it makes no difference in this respect that the property is under mortgage to a non-resident of the state by whom it has not been listed. *Davenport* v. *Mississippi & M. R. Co.*, 12 *Iowa* 539.—DISTINGUISHED IN Faxton *v.* McCosh, 12 Iowa 527. REVIEWED IN Davenport *v.* Mississippi & M. R. Co., 16 Iowa 348; Iowa Homestead Co. *v.* Webster County, 21 Iowa 221.

Where a city discontinues a portion of a street and enters into an arrangement or contract by which a railroad company is to have the perpetual use and possession of the land, it is liable for taxes thereon without a fee-simple conveyance. *Muscatine* v. *Chicago, R. I. & P. R. Co.*, 79 *Iowa* 645, 44 *N. W. Rep.* 909.

Under Neb. Revenue Act of 1869, the words "land tax" were not designed to include town and city lots, right of way of railroad companies, etc., though lands lying within the limits of a town or city and not subdivided are subject to the tax. *Burlington & M. R. R. Co.* v. *Lancaster County*, 4 *Neb.* 293.—QUOTED IN Burlington & M. R. R. Co. *v.* York County Com'rs, 7 Neb. 487.

The lands of a railroad company are *prima facie* liable to be assessed for the costs of local improvements. The presumption is that they are benefited in common with all other lands within the area of assessment for such improvements. *In re Cedar Park*, 1 *How. Pr. N. S.* (*N. Y.*) 257.—REVIEWING Troy & L. R. Co. *v.* Kane, 9 Hun (N. Y.) 506; Peru & I. R. Co. *v.* Hanna, 68 Ind. 563; Chicago *v.* Baer, 41 Ill. 306; New Haven *v.* Fairhaven & W. R. Co., 38 Conn. 422.

If the commissioners of assessment have discretion in determining what lands are benefited, it should be shown by their report why they have omitted any, and such omission of lands without explanation is an error in principle, justifying interference by the court. *In re Cedar Park*, 1 *How. Pr. N. S.* (*N. Y.*) 257.

Under Pa. Act of Jan. 4, 1859, providing that all real estate situated in the city of Pittsburgh, owned or possessed by any railroad company, should be subject to taxation for city purposes the same as other real estate, though such real estate and improvements thereon are strictly necessary for the operation of the railroad, they are still liable, as "real estate," to taxation for such purposes. *Pennsylvania R. Co.* v. *Pittsburgh*, 17 *Am. & Eng. R. Cas.* 438, 104 *Pa. St.* 522.—DISTINGUISHING Coatesville Gas Co. *v.* Chester County, 97 Pa. St. 476; Wayne County *v.* Delaware & H. Canal Co., 15 Pa. St. 357. EXPLAINED IN Pennsylvania & N. Y. C. & R. Co. *v.* Vandyke, 137 Pa. St. 249. QUOTED IN Appeal of Western Pa. R. Co., 18 Phila. (Pa.) 614.

The real estate of a street passenger railway is within the meaning and spirit of an act making the real estate of "railroads" liable to taxation, though the company was not incorporated till after the passage of the act. *Pennsylvania R. Co.* v. *Pittsburgh*, 17 *Am. & Eng. R. Cas.* 438, 104 *Pa. St.* 522.

The provisions of a state statute providing for the taxation of the property of railroads are not invalid by reason of the fact that lands improved by having a railroad built on them are not made taxable until they have been so improved ten years. *Wells* v. *Central Vt. R. Co.*, 14 *Blatchf.* (*U. S.*) 426.

76. Easements—Right of way.—A right in a company to take earth, in making embankments, from land contiguous to its right of way is an easement which partakes so far of the character of real estate as to be taxable. *Chicago & P. R. Co.* v. *Hildebrand*, 47 *Am. & Eng. R. Cas.* 145, 136 *Ill.* 467, 27 *N. E. Rep.* 69.

Indiana Act of April 8, 1881, as amended by the act of March 8, 1883, authorizes the assessment of the easement or right of way of a company for the cost of establishing a drain. *Baltimore, O. & C. R. Co.* v. *Ketring*, 41 *Am. & Eng. R. Cas.* 10, 122 *Ind.* 5, 23 *N. E. Rep.* 527.

77. Roadbed and track. — Under the statutes of Indiana, the state board of equalization has exclusive authority to value and assess railroad property denominated as "railroad track" and "rolling stock"; and the right of way with the improvements thereon is to be assessed as railroad track, the "right of way" including all lands and lots acquired for necessary side tracks and turnouts and the improvements thereon. *Pfaff* v. *Terre Haute & I. R. Co.*, 29 *Am. & Eng. R. Cas.* 181, 108 *Ind.* 144, 9 *N. E. Rep.* 93.—QUOTING Chicago & A. R. Co. *v.* People ex rel., 98 Ill. 350.

A strip of land 100 by 400 feet, purchased by a company in anticipation of future need for a branch road, occupied in part (35 by 400 feet) by a trestlework supporting tracks, is taxable by the state, under N. J. Act of April 10, 1884 (Pamph. L. p. 142), for the 35 feet in actual use, and by local assessment for the remaining 65 feet lying vacant for many years. *United N. J. R. & C. Co.* v. *Jersey City*, 53 *N. J. L.* 547, 22 *Atl. Rep.* 59.—DISTINGUISHING State (Camden & A. R. Co., Pros.) *v.* Mansfield Com'rs, 23 N. J. L. 510; State (New Jersey R. & T. Co., Pros.) *v.* Newark, 25 N. J. L. 315, 26 N. J. L. 519; State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 33 N. J. L. 315, 35 N. J. L. 537.

The roadbed of a company is property legally subject to assessment for benefits resulting from the building of a sewer. *State* (*Paterson & H. R. R. Co., Pros.*) v. *Passaic*, 54 *N. J. L.* 340, 23 *Atl. Rep.* 945.—FOLLOWING New Jersey R. & T. Co. *v.* Elizabeth, 38 N. J. L. 330; State (New Jersey Midland R. Co., Pros.) *v.* Mayor, etc., of Jersey City, 42 N. J. L. 97.

Land appropriated and used by a company for track and depot purposes is, in the possession of said company, "land" for purposes of assessment under the provisions of the Ohio Act of March 29, 1867, "to authorize the county commissioners to construct roads, on petition of a majority of resident landowners along and adjacent to the line of said road." *Baltimore & O. R. Co.* v. *Belmont County*, 19 *Ohio St.* 589.

78. Bridges.* — A bridge firmly attached to and incorporated with the stonework of an aqueduct whose piers extend a great depth below the bottom of a river

* Taxing railroad bridges across rivers that are boundary lines between states, see 37 AM. & ENG. R. CAS. 410, *abstr.*

Taxation of railway bridges and bridge companies, see note, 45 AM. & ENG. R. CAS. 25.

and are fastened to the solid rock cannot be considered personalty or anything else other than real estate within the meaning of the tax laws. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217.—APPROVING Smith *v.* Mayor, etc., of N. Y., 68 N. Y. 554. REVIEWING Snederker *v.* Warring, 12 N. Y. 170.

A bridge across a river, being owned exclusively by the United States, is not taxable, either wholly or in part, to a railroad company, although the company paid half the cost of its construction and is secured in its use. *Chicago, R. I. & P. R. Co.* v. *Davenport*, 51 *Iowa* 451.

The Iowa statutes, after providing generally for the taxation of railroad property, enact that "all railway bridges across the Mississippi and Missouri rivers shall be subject to assessment and taxation on the same basis as the property of individuals in the several counties where situated." *Held*, that the portion of a bridge over the Missouri river which lies within the state of Iowa is taxable as a bridge, and not as part of the road of the company using it. *Union Pac. R. Co.* v. *Pottawattamie County*, 4 *Dill.* (*U. S.*) 497.—RECONCILING Union Pac. R. Co. *v.* Hall, 91 U. S. 343.

An Iowa statute provided that railroad bridges across the Mississippi and Missouri rivers should be taxed as individual property. At the time the statute was passed there were bridges over these rivers, owned by private companies, on which the railroad companies paid rent or toll; but subsequently the plaintiff company constructed a bridge of its own across the Mississippi river. *Held*, that this bridge was taxable as individual property by the local authorities. Whether it was taxable under the statute must be determined by the nature of the property and not by the ownership. *Chicago, M. & St. P. R. Co.* v. *Sabula*, 13 *Am. & Eng. R. Cas.* 443, 19 *Fed. Rep.* 177.—APPLYING Dubuque *v.* Chicago, D. & M. R. Co., 47 Iowa 196.

And the fact that a bridge across one of the above rivers is used for general travel as well as for railroad purposes does not change its character so as to prevent it being taxable as individual property under the above statute. *St. Joseph & G. I. R. Co.* v. *Devereux*, 41 *Fed. Rep.* 14.

A city ordinance accepted by a bridge company, granting to the company the use of a street of the city for the purpose of constructing the approaches to its bridge, with the proviso that nothing in the ordinance shall be construed as "waiving" the right of the city to tax the bridge, constitutes such a contract between the city and the company as authorizes the city to tax the bridge, not only for school and railroad purposes, but for ordinary city purposes. *Henderson Bridge Co.* v. *Henderson*, 90 *Ky.* 498, 14 *S. W. Rep.* 493.

The bridge, at least for the purpose of collecting taxes, should be considered as a part of a railroad. *Henderson Bridge Co.* v. *Henderson*, 90 *Ky.* 498, 14 *S. W. Rep.* 493. —FOLLOWING Elizabethtown &. P. R. Co. *v.* Elizabethtown, 12 Bush (Ky.) 239.

Under Missouri Rev. St. 1879, § 6901, a railroad bridge constituting a part of a track, but used also for general travel, is taxable as a bridge; but if no toll is charged upon such bridge, it is taxable as a part of the railroad. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 89 *Mo.* 98, 14 *S. W. Rep.* 511. —DISTINGUISHED IN Glenn *v.* Mississippi River Bridge Co., 109 Mo. 253. REVIEWED IN State ex rel. *v.* Wabash R. Co., 114 Mo. 1.

Under the above statute, a bridge owned by a railroad company and constituting a part of its track is taxable only as a part of the road and not as a separate structure, notwithstanding it is used in part as a toll bridge for the passage of teams, wagons, and the like. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 37 *Am. & Eng. R. Cas.* 406, 97 *Mo.* 348, 10 *S. W. Rep.* 436.—DISTINGUISHED IN State ex rel. *v.* Mississippi River Bridge Co., 54 Am. & Eng. R. Cas. 308, 109 Mo. 253, 19 S. W. Rep. 421.

A railroad bridge may lawfully be segregated for the purposes of taxation from the railway line in connection with which it is used, where its ownership is separate from that of the railway. *State ex rel.* v. *Mississippi River Bridge Co.*, 54 *Am. & Eng. R. Cas.* 308, 109 *Mo.* 253, 19 *S. W. Rep.* 421.

The fact that the bridge is under lease to a railroad company "forever" at a fixed rent, subject to a defeasance in case of failure by the lessee to comply with its terms, does not destroy the ownership by the bridge company within the meaning of the revenue law. *State ex rel.* v. *Mississippi River Bridge Co.*, 54 *Am. & Eng. R. Cas.* 308, 109 *Mo.* 253, 19 *S. W. Rep.* 421.—DISTINGUISHING State ex rel. *v.* Hannibal

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& St. J. R. Co., 97 Mo. 348; State ex rel. *v.* Hannibal & St. J. R. Co., 89 Mo. 103.

Under Mo. Rev. St. 1889, § 7755, that portion of a railroad bridge across the Mississippi river at Louisiana, Mo., lying west of the Missouri state line, is taxable as a bridge while owned by a bridge company. *State ex rel.* v. *Mississippi River Bridge Co.*, 54 *Am. & Eng. R. Cas.* 308, 109 *Mo.* 253, 19 *S. W. Rep.* 421.—DISTINGUISHING State ex rel. *v.* Hannibal & St. J. R. Co., 37 Am. & Eng. R. Cas. 406, 97 Mo. 348.

A company was incorporated by the legislature of Pennsylvania for the purpose of constructing a railroad in that state. To enable it to reach the seaboard by means of connection with railroads in New Jersey, the legislature of Pennsylvania gave to it the power to construct a bridge across the Delaware river, provided that a concurrent law, to the same effect, should be passed by the legislature of New Jersey. By the treaty of 1783 between the two states (Rev., p. 1181), the consent of both states is necessary to authorize the erection of a bridge over the Delaware. The legislature of New Jersey passed a concurring act, authorizing the erection of the bridge. *Held*, that as to the state of New Jersey, the company did not thereby become a domestic railroad company within the meaning of the railroad taxation acts; that it was not taxable in the manner provided for in those acts, nor entitled to the exemption from taxation therein created, and that it was taxable on so much of its bridge as is in the state of New Jersey, under the general tax law of the state. *State* (*Lehigh Valley R. Co., Pros.*) v. *Mutchler*, 1 *Am. & Eng. R. Cas.* 395, 42 *N. J. L.* 461.

Under New Jersey Railroad Taxation Act of 1873 (Rev., p. 1166), the Central railroad company of New Jersey is not taxable for county, township, or municipal purposes, for a railroad bridge over the Delaware river at Phillipsburg, which was erected by the Lehigh Coal and Navigation company, a corporation of the state of Pennsylvania, under permission granted by the legislature of the state; the said bridge being leased to the former company, and being used by it as part of its line of railroad, and being, with its piers and abutments, less than 100 feet in width. *State* (*Central R. Co., Pros.*) v. *Mutchler*, 41 *N. J. L.* 96.—REVIEWED IN State Board of Assessors *v.* Central R. Co., 24 Am. & Eng. R. Cas. 546, 48 N. J. L. 146.

Where the legislature fixes the limit of a town at the middle of a navigable river on which the town is built, the portion of a railroad bridge over the river, and the track thereon, within the limits of the town, are subject to taxation by the town, as well as the land on which the bridge and track are constructed. *Central Vt. R. Co.* v. *St. John's*, 4 *Montr. L. R.* 466.

79. Depot grounds, buildings, etc.—The depot grounds of plaintiff company, being used for business purposes, and bounded in part by the streets of the city of Mount Pleasant, though not a part of any addition or a subdivision of an addition to said city, and though not laid out on the map referred to in section 1 of the act incorporating said city (extra session of 1856, ch. 15), are within the limits of said corporation and are subject to taxes for the improvement of its streets and sidewalks. *Burlington & M. R. R. Co.* v. *Spearman*, 12 *Iowa* 112.—DISTINGUISHING Covington *v.* Southgate, 15 B. Mon. (Ky.) 491; Morford *v.* Unger, 8 Iowa 82.

As to the right of a city to tax the depot grounds, buildings, and roadbed of a railroad corporation, the court was equally divided. *Davenport* v. *Mississippi & M. R. Co.*, 16 *Iowa* 348.

Under authority of a statute, a company discontinued its location over certain land used for station purposes and took another parcel of land which it had formerly owned but had sold for "station purposes and for tracks and yard room to be used in connection therewith." *Held*, that the whole parcel was taxable as used for station purposes, under the statute. *Norwich & W. R. Co.* v. *Worcester County Com'rs*, 151 *Mass.* 69, 23 *N. E. Rep.* 721.

The fact that land taken by the company for station purposes was once a part of the road does not affect the nature of the taking, and such land is not, therefore, exempt from taxation. *Norwich & W. R. Co.* v. *Worcester County Com'rs*, 151 *Mass.* 69, 23 *N. E. Rep.* 721.

A depot and depot grounds of a railroad, actually used in the operation of the railroad, or kept for the use thereof, in the transaction of such increased business as may be reasonably anticipated in the near future, are taxable only as adding value to the mileage of the main line and side track of the railroad, under the provisions of Neb. Comp. St. ch. 77, entitled "Revenue."

Burlington & M. R. R. Co. v. *Lancaster County Com'rs*, 15 *Neb.* 251, 18 *N. W. Rep.* 71.

Lands occupied by freight and passenger depots, being necessary for the enjoyment of the franchises of the railroad company, are not liable to taxation under the Pennsylvania laws. *Northampton County* v. *Lehigh C. & N. Co.*, 75 *Pa. St.* 461.

A statute providing that "the track, right of way, depot grounds, buildings, machine shops, rolling stock, and all other property necessary to use in operating a railroad" shall be exempt from taxation will not relieve the company from paying taxes on certain marsh lands originally acquired for depot grounds but never reclaimed or used for that purpose. *Milwaukee & St. P. R. Co.* v. *Milwaukee*, 34 *Wis.* 271.

80. Lands exempt "until sold and conveyed."—A Minnesota railroad charter exempted a company's lands from taxation until they should be sold and conveyed. A part of such lands was afterwards included within the territory of Dakota; but before that territory was cut off the company had mortgaged its property, and at a foreclosure sale the governor of Minnesota bid in the property, which was subsequently conveyed to another company. *Held*, that the right of immunity from taxation as to such lands was not merged, but was conveyed to and acquired by the new company. *Winona & St. P. R. Co.* v. *Deuel County*, 7 *Am. & Eng. R. Cas.* 348, 3 *Dak.* 1, 12 *N. W. Rep.* 561.—APPROVING St. Paul & P. R. Co. *v.* Parcher, 14 Minn. 297; State *v.* Winona & St. P. R. Co., 21 Minn. 315. REVIEWING Secombe *v.* Milwaukee & St. P. R. Co., 23 Wall. (U. S.) 108.

As to what amounts to a sale and conveyance, see *State* v. *Southern Minn. R. Co.*, 21 *Minn.* 344, 19 *Am. Ry. Rep.* 239.

Where the exemption from taxation of lands granted to a railroad company is until they are sold and conveyed, a contract to convey is equivalent to an actual conveyance, so as to render the lands liable to taxation. *State* v. *Winona & St. P. R. Co.*, 21 *Minn.* 472.—REVIEWED IN Brown County *v.* Winona & St. P. Land Co., 38 Minn. 397.

A transfer of a land grant is not a sale and conveyance within the meaning of Minn. Act of May 22, 1857, exempting certain lands from taxation until sold and conveyed. *Nobles County* v. *Sioux City & St. P. R. Co.*, 26 *Minn.* 294, 3 *N. W. Rep.* 701.

—FOLLOWED IN Stevens County *v.* St. Paul, M. & M. R. Co., 29 Am. & Eng. R. Cas. 225, 36 Minn. 467, 31 N. W. Rep. 942.

Where a company to which lands are granted by the state to aid in the construction of its road, such lands to be exempt from taxation until "sold and conveyed," has sold the lands and received the consideration, so that it retains no lien upon nor actual interest in them, though it retains the naked legal title only as trustee for the purchaser, it has "sold and conveyed" them, within the meaning of the exempting clause. *Brown County* v. *Winona & St. P. Land Co.*, 38 *Minn.* 397, 37 *N. W. Rep.* 949. —REVIEWING State *v.* Winona & St. P. R. Co., 21 Minn. 472.

Minn. revenue laws have fixed May 1st as the date for determining the taxability of property, and its ownership and value for purposes of taxation for the year. Hence lands of a railway company which are exempt from taxation "until sold and conveyed," if conveyed before May 1st, are subject to taxation for the then current year. If not conveyed until after that date, they are not so subject. *Martin County* v. *Drake*, 37 *Am. & Eng. R. Cas.* 389, 40 *Minn.* 137, 41 *N. W. Rep.* 942.—DISTINGUISHING Hennepin County *v.* St. Paul, M. & M. R. Co., 33 Minn. 534.

81. Land not needed or not in actual use.—A company should be taxed, under the law as it now stands, for its "road" as an entirety, including all property in any way used by it in running or operating the road. But the real estate owned by a company, or held by it in trust, and not used in running or operating the road, should be taxed in the same manner as the real estate of private individuals. *Toledo & W. R. Co.* v. *Lafayette*, 22 *Ind.* 262.

A Michigan statute imposed a specific annual tax of one per cent. on the cost of a railroad and reserved the right to tax its gross earnings, and contained the provision that "the above several taxes shall be in lieu of all other taxes to be imposed within this state." *Held*, that the tax imposed was on the railroad itself, and had no relation to lands owned by the company and not necessary to the working of the road, which were mortgaged and held for sale, and that such lands might be taxed. *Tucker* v. *Ferguson*, 22 *Wall.* (*U. S.*) 527.

The real estate of railroads, not used for the ordinary and usual purposes in operat-

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ing the roads, is subject to municipal taxation under N. H. Gen. Laws, ch. 53, §§ 5, 9. *Nashua & L. R. Co.* v. *Nashua*, 62 *N. H.* 602.

A portion of the real property which a company was expressly allowed to hold was not used by the company for railroad purposes, but was rented for a coal yard. *Held*, that such portion was liable to taxation, and that an assessment as to it was valid. *Cook* v. *State* (*Camden & B. County R. Co., Pros.*), 33 *N. J. L.* 474; *reversing* 32 *N. J. L.* 338.

Where a company has completed its road and appendages, so far as is at present contemplated, at its several stations, the land lying outside the roadway limitation of 100 feet, not being in actual use, nor in present contemplation of use by the company, is liable to taxation. *State* (*Cape May & M. R. Co., Pros.*) v. *Middle Tp.*, 38 *N. J. L.* 270, 13 *Am. Ry. Rep.* 47.

82. Lands under water.—A railroad company, as the grantee of docks, is not liable to taxation on lands under water in front of the docks, which have never been reclaimed and over which the tide ebbs and flows. The title to such lands is in the state. *State* (*New York, L. E. & W. R. Co., Pros.*) v. *Yard*, 11 *Am. & Eng. R. Cas.* 529, 43 *N. J. L.* 632; *affirming* 43 *N. J. L.* 121.

83. Swamp lands. — Where a county under obligation to convey its swamp lands to a railroad company, under contract between them, refuses so to do, it will be thereby estopped from afterwards claiming that during such time the title was in the company and thus the land was subject to taxation. *Iowa R. Land Co.* v. *Story County*, 36 *Iowa* 48.—FOLLOWING Cedar Rapids & M. R. R. Co. *v.* Woodbury County, 29 Iowa 247; Cedar Rapids & M. R. R. Co. *v.* Carroll County, 41 Iowa 153.—DISTINGUISHED IN Buena Vista County *v.* Iowa Falls & S. C. R. Co., 49 Iowa 226; Howard County *v.* Bullis, 49 Iowa 519. FOLLOWED IN American Emigrant Co. *v.* Iowa R. Land Co., 52 Iowa 323; Adams County *v.* Burlington & M. R. Co., 39 Iowa 507. RECONCILED IN Cedar Rapids & M. R. R. Co. *v.* Carroll County, 41 Iowa 153.

Nor would such lands in any case be taxable before conveyance, if it were not then known what particular lands the company would be entitled to. There must have been a definite designation of the lands. *Iowa R. Land Co.* v. *Story County*, 36 *Iowa* 48.

Nor would such lands, while held as the property of the county, be taxable under Iowa Revision, § 711, which exempts from taxation property of a county or the state when not held for pecuniary profit. *Iowa R. Land Co.* v. *Story County*, 36 *Iowa* 48.

84. Indian lands. — A railroad built across an Indian reservation in a territory is subject to taxation by the territory where there is no treaty stipulation or express exclusion against the jurisdiction of the territory. *Maricopa County Delinquents* v. *Territory*, (*Ariz.*) 48 *Am. & Eng. R. Cas.* 620, 26 *Pac. Rep.* 310.

By New York Act of 1836, ch. 316, a company was authorized to contract with the chiefs of an Indian nation for a right of way across their lands, to be used without any limitation as to time. *Held*, that such right of way was "owned" within the meaning of a subsequent statute taxing railroads upon their property owned, though the company did not hold the fee simple to the right of way. *People ex rel.* v. *Beardsley*, 52 *Barb.* (*N. Y.*) 105; *affirmed in* 41 *N. Y.* 619, *mem.*

It was not intended, by the act "to relieve the Seneca nation of Indians from certain taxes on the Alleghany and Cattaraugus reservation," passed Feb. 19, 1857, to affect any of the provisions of the general law respecting the property liable to taxation. The tax is not to be assessed or imposed on the reservations, or any part of them, for any purpose, so long as the reservations remain the property of the Seneca nation. But when the Indians enter into a contract with a railroad company by which they give to the latter the right to construct its road upon their land, and the road has been constructed thereon and is used and occupied by the company, the land ceases to be the property of the Seneca nation to the extent specified in the contract. Although the fee of the land does not pass to the company, the possession and use, and the right to possess and use, pass by such contract. *People ex rel.* v. *Beardsley*, 52 *Barb.* (*N. Y.*) 105; *affirmed in* 41 *N. Y.* 619, *mem.*

All real estate owned, possessed, or appropriated for use by railroad companies is to be assessed. *People ex rel.* v. *Beardsley*, 52 *Barb.* (*N. Y.*) 105; *affirmed in* 41 *N. Y.* 619, *mem.*

85. Grain elevators and warehouses.—Grain warehouses built by private individuals upon lands leased by a railroad

company along and on the company's right of way, and intended for the private benefit of the lessees, who have the right to remove the same before the termination of their leases, are not the property of the company, but are personal property of the lessees, and taxable as other personal property. *Gilkerson* v. *Brown*, 61 *Ill.* 486.

Under the Minnesota statute (Law 1876, ch. 4), a grain elevator standing upon the lands of a railroad company, constructed and owned by it, and constituting a part of its real estate, is not taxable as personal property of the corporation. *Chicago, M. & St. P. R. Co.* v. *Houston County*, 38 *Minn.* 531, 38 *N. W. Rep.* 619.

In 1868 the legislature passed an act entitled "An act to enable the United Railroad and Canal companies to increase their depot and terminal facilities at Jersey City." The statute provided that such parts of the property with any improvements thereon as might be used for other than "railroad, canal, depot, transshipping, or landing purposes" should be subject to local and municipal taxation. *Held*, that a grain elevator which was only used in the handling and storing of grain for transshipment, and only did work that had formerly been done by hand, was not liable to taxation. *State* (*Pennsylvania R. Co., Pros.*) v. *Mayor, etc., of Jersey City*, 49 *N. J. L.* 540, 9 *Atl. Rep.* 782, 8 *Cent. Rep.* 633. — DISTINGUISHING State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537; Railroad Co. *v.* Berks County, 6 Pa. St. 70; Erie County *v.* Erie & W. Transp. Co., 87 Pa. St. 434.

86. Shops. — Shops owned and operated by a company for the construction and repair of its locomotives and cars are liable to taxation for local purposes as real estate, even though they have no greater capacity than is required for the work the company itself has for them to do. *Pennsylvania & N. Y. C. & R. Co.* v. *Vandyke*, 137 *Pa. St.* 249, 20 *Atl. Rep.* 653. — DISTINGUISHING Northumberland County *v.* Philadelphia & E. R. Co., 20 W. N. C. 381; New York & E. R. Co. *v.* Sabin, 26 Pa. St. 242. EXPLAINING Northampton County *v.* Lehigh C. & N. Co., 75 Pa. St. 461; Pennsylvania R. Co. *v.* Pittsburgh, 104 Pa. St. 522. FOLLOWING Railroad Co. *v.* Berks County, 6 Pa. St. 70; Erie County *v.* Erie & W. Transp. Co., 87 Pa. St. 434; Allegheny County *v.* McKeesport Diamond Market, 123 Pa. St. 169.

87. Tunnels. — Under Maryland statutes of 1876, ch. 159, 260, relating to taxation of steam railroads, there can be no special tax on tunnels or on bridges over streams, which tunnels and bridges form part of a railroad. *Appeal Tax Court* v. *Western Md. R. Co.*, 50 *Md.* 274.

The "tunnels, tracks, substructures, superstructures, stations, viaducts, and masonry" of a company, situate on and under Fourth avenue in the city of New York, are "land" within the meaning of that word as used in the statute in reference to property liable to taxation (1 N. Y. Rev. St. 387, § 2), and are assessable as such. *People ex rel.* v. *Com'rs of Taxes*, 101 *N. Y.* 322, 4 *N. E. Rep.* 127; *reversing* 23 *Hun* 687.

The fact that certain of the structures were built for the purpose of furnishing to the public safe and convenient crossings over the tracks, in compliance with the requirements of N. Y. Act of 1872, ch. 702, and that under said act the city is required to pay a portion of the expense of the construction, does not divest the structures of the incidents attached to the other property belonging to the company, or give the city any title thereto. *People ex rel.* v. *Com'rs of Taxes*, 101 *N. Y.* 322, 4 *N. E. Rep.* 127; *reversing* 23 *Hun* 687.

88. Wharves and docks. — Under a statute which provides for taxing the real estate of corporations "above what may be required and used by them for the transaction of their appropriate business," a wharf provided by a company to accommodate its business is not taxable, though at certain seasons it is not in use by the company. *Osborn* v. *Hartford & N. H. R. Co.*, 40 *Conn.* 498, 5 *Am. Ry. Rep.* 226.

A company was authorized to own and run steamboats in connection with its road. Instead of doing this it made an arrangement with a steamboat company in which it had no interest to run boats from its wharves, freight being way-billed through and the gross receipts divided in certain agreed proportions. The court inclined to regard the arrangements as an indirect mode of exercising its charter rights with regard to running steamboats, and the premises used by the steamboat company as not liable, by reason of such use, to local taxation. *Osborn* v. *Hartford & N. H. R. Co.*, 40 *Conn.* 498, 5 *Am. Ry. Rep.* 226.

89. Property in hands of receiver. — There is no sound principle upon which

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the property of a person or corporation which is placed in the hands of a receiver, for the purposes of a pending suit, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated. *Stevens* v. *New York & O. M. R. Co.*, 13 *Blatchf.* (*U. S.*) 104.

A railroad corporation will not be relieved from taxation under N. J. Railroad Taxation Act by the fact that it is in the hands of a receiver, under an appointment of the court of chancery on proceedings against it as an insolvent corporation. *State* (*New Jersey Southern R. Co., Pros.*) v. *Railroad Com'rs*, 41 *N. J. L.* 235.—APPROVED IN State *v.* Montclair & G. L. R. Co., 43 N. J. L. 524.

If a receiver of an insolvent company operates the road in the same manner as if the corporation were solvent, the money derived by him therefrom is derived from the use of the franchise conferred upon the corporation, and therefore is subject to the payment of the tax upon the franchise imposed by the New York Corporation Tax Act of 1880. *Central Trust Co.* v. *New York City & N. R. Co.*, 35 *Am. & Eng. R. Cas.* 9, 110 *N. Y.* 250, 18 *N. Y. S. R.* 30, 18 *N. E. Rep.* 92; *reversing* 47 *Hun* 587, 15 *N. Y. S. R.* 178.

The fact that the property and franchises of a corporation are in the hands of receivers, appointed by a United States court, does not affect the liability of the corporation to pay a state tax accruing on "gross receipts." It is not improper for the accounting officers of the commonwealth to make a settlement for such tax against the corporation, in its corporate name, without naming the receivers. *Philadelphia & R. R. Co.* v. *Com.*, 13 *Am. & Eng. R. Cas.* 367, 104 *Pa. St.* 80.

90. Property within military reservation.—The state of Kansas has power and authority to tax railroad property belonging to a private corporation, situated exclusively within the boundaries of the Fort Leavenworth military reservation. *Ft. Leavenworth R. Co.* v. *Lowe*, 13 *Am. & Eng. R. Cas.* 370, 27 *Kan.* 749.

91. Omitted property in hands of subsequent purchaser.*—Prior to March 10, 1871, when a statute was passed providing a uniform system of taxing railroads, such property was not subject to taxation in specie. The only form of taxation provided was a tax against the shares, and no lien existed for the collection of the tax upon the corporate property; and this method of taxation was applicable to the North Missouri railroad company, after its property had been sold, as to back taxes. *State* v. *St. Louis, K. C. & N. R. Co.*, 77 *Mo.* 202.—DISTINGUISHED IN Kansas City *v.* Hannibal & St. J. R. Co., 81 Mo. 285; State ex rel. *v.* Hannibal & St. J. R. Co., 101 Mo. 120.

Property subject to taxation, but which has escaped it, is, in the hands of a subsequent purchaser, subject to taxation for the years in which it escaped through the inadvertence of any of the officers who had duties to perform with regard to assessing, levying, or collecting the taxes. *Kansas City* v. *Hannibal & St. J. R. Co.*, 22 *Am. & Eng. R. Cas.* 239, 81 *Mo.* 285.—RECONCILED IN State ex rel. *v.* Hannibal & St. J. R. Co., 101 Mo. 136.

92. Rolling stock, generally.*—As the law stood without the amendment of 1889, the proper railway official was required to report to the state board of equalization for taxation all rolling stock owned or operated by the company, and this board was directed to assess against each company all property exclusively used in operating the railroad. *Denver & R. G. R. Co.* v. *Church*, 48 *Am. & Eng. R. Cas.* 627, 17 *Colo.* 1 28 *Pac. Rep.* 468.

Under Illinois Act of April 9, 1869, entitled "An act for the collection of railroad taxes in certain counties, cities, and towns," the persons or company operating a railroad are liable for the taxes upon the rolling stock used upon such road, without reference to the ownership of the road or the rolling stock so used. *Kennedy* v. *St. Louis, V. & T. H. R. Co.*, 62 *Ill.* 395, 7 *Am. Ry. Rep.* 346.—REVIEWED IN Denver & R. G. R. Co. *v.* Church, 17 Colo. 1.

The rolling machinery of a railroad is intimately connected with the purposes and uses of the track and superstructure, and it is within the power of the legislature to treat such machinery as real property for purposes of taxation. *Louisville & N. A. R. Co.* v. *State*, 25 *Ind.* 177.

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*Reassessment as against subsequent purchasers, see note, 22 AM. & ENG. R. CAS. 245.

*Taxation of rolling stock, see notes, 17 AM. & ENG. R. CAS. 466; 8 L. R. A. 299.

Taxation of rolling stock of foreign corporations. Virginia Act 1881–82 construed, see 33 AM. & ENG. R. CAS. 486, *abstr.*

Under Kan. Laws of 1876, ch. 34, relating to assessment and taxation, a railroad company organized under the laws of the state, and operating its road within the state, must return to the auditor of the state a full list of all the rolling stock operated by the company, whether owned or leased by it; and the company operating or using such rolling stock is liable for the taxes due thereon. *Shawnee County Com'rs* v. *Topeka Equipment Co.*, 26 *Kan.* 363.

Where a company is carrying on business in the state, and is the owner of rolling stock adapted for use upon railroads, and such rolling stock is actually leased to and operated by a railroad corporation organized under the laws of the state, and operating its road within the state, such rolling stock is to be listed with the auditor of the state by the railroad corporation, and to be assessed by the board of railroad assessors, and need not be listed by the company owning the same in the county where it is doing business. *Shawnee County Com'rs* v. *Topeka Equipment Co.*, 26 *Kan.* 363.

Rolling stock, equipment, and other property used by a lessee company in operating a railroad, and in its business connected therewith, not taken and held by it under the lease and in the capacity of lessee, are not within a grant of immunity from taxation. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826.

The rolling stock of a non-resident corporation passing through the state for purposes of interstate commerce is not liable to taxation in the state. *Bain* v. *Richmond & D. R. Co.*, 41 *Am. & Eng. R. Cas.* 574, 105 *N. Car.* 363, 11 *S. E. Rep.* 311, 8 *L. R. A.* 299, 3 *Int. Com. Rep.* 149.

The rolling stock of the Wilmington and Weldon railroad company used upon its branch roads, or roads otherwise acquired, ascertained by a *pro rata* standard based on the relative lengths thereof to the whole line, is liable to taxation. *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 137, 14 *S. E. Rep.* 652. See also *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 437, 14 *S. E. Rep.* 1007.

93. Cars.—Section 8, art. 1, of the federal Constitution, which confers power upon congress to regulate commerce among the several states, does not inhibit the taxation by a state of railway cars found within its borders, though in the transaction of business they pass into adjoining states and territories. *Denver & R. G. R. Co.* v. *Church*, 48 *Am. & Eng. R. Cas.* 627, 17 *Colo.* 1, 28 *Pac. Rep.* 468.—DISTINGUISHING Carlisle *v.* Pullman Palace Car Co., 8 Colo. 320. QUOTING Pullman Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876.

A domestic corporation using and operating cars may be required to pay the taxes thereon, though the exclusive ownership be in a foreign corporation with its domicil, principal office, and principal place of business in another state. *Denver & R. G. R. Co.* v. *Church*, 48 *Am. & Eng. R. Cas.* 627, 17 *Colo.* 1, 28 *Pac. Rep.* 468.—REVIEWING Kennedy *v.* St. Louis, V. & T. H. R. Co., 62 Ill. 395.

The owner of cars is not exempt from taxation thereon on the ground that the companies over whose roads they run pay taxes on their earnings. *Comstock* v. *Grand Rapids*, 17 *Am. & Eng. R. Cas.* 457, 54 *Mich.* 641, 20 *N. W. Rep.* 623.

The statutory rule for taxing a car-loaning company or the owner of a special freight line (How. Mich. St. § 1229) does not apply to the owner of cars that are used in his own business, even though the company over whose road they run makes to the owner an allowance for "wheelage." *Comstock* v. *Grand Rapids*, 17 *Am. & Eng. R. Cas.* 457, 54 *Mich.* 641, 20 *N. W. Rep.* 623.

A corporation, other than a railroad company paying taxes on its gross receipts, whose business it is to own or possess railroad freight cars which are used and run by railroad companies in Michigan, organized under the laws of that state, is subject to be taxed under Mich. Act 1883, No. 152. *Fargo* v. *Auditor-General*, 22 *Am. & Eng. R. Cas.* 216, 57 *Mich.* 598, 24 *N. W. Rep.* 538.

94. Sleeping and palace cars.*—A state has the right to levy what is called a "privilege" tax on sleeping cars engaged in business wholly within the state. *Gibson County* v. *Pullman Southern Car Co.*, 42 *Fed. Rep.* 572.—FOLLOWING Western Union Tel. Co. *v.* Alabama State Board, 132 U. S. 472, 10 Sup. Ct. Rep. 161.

Colorado Gen. Laws of 1877, § 2251, provide for the assessment and taxation of all the property, real and personal, "owned,

* Sleeping cars; taxation of, see note, 41 AM. & ENG. R. CAS. 578.

Tennessee statute imposing tax on sleeping cars construed, see 45 AM. & ENG. R. CAS. 18, *abstr.*

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belonging to, and used" by railroad corporations in the operation of their roads in the state. *Held*, that sleeping cars owned by a foreign corporation but used by railroad companies of the state are taxable by the state but not by counties. *Carlisle* v. *Pullman Palace Car Co.*, 8 *Colo.* 320, 54 *Am. Rep.* 553, 7 *Pac. Rep.* 164.—DISTINGUISHED IN Denver & R. G. R. Co. *v.* Church, 17 Colo. 1.

A railroad operating sleeping cars of the Pullman Palace Car company has a qualified property therein, making it liable for taxes thereon as a part of the rolling stock of its road. *Kennedy* v. *St. Louis, V. & T. H. R. Co.*, 62 *Ill.* 395, 7 *Am. Ry. Rep.* 346.—DISTINGUISHED IN State ex rel. *v.* St. Louis County Court, 29 Am. & Eng. R. Cas. 192, 13 Mo. App. 53.

Sleeping cars built and owned by a corporation having its principal office, or place of business, in Chicago, and leased by it to various railroad companies in Maryland, are not subject to taxation under Maryland Act of 1876, ch. 260. *Appeal Tax Court* v. *Pullman Palace Car Co.*, 50 *Md.* 452.—FOLLOWING Philadelphia, W. & B. R. Co. *v.* Appeal Tax Court, 50 Md. 397; Appeal Tax Court *v.* Northern C. R. Co., 18 Md. 217, 50 Md. 417.—APPLIED IN Baltimore & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 461, 22 Fed. Rep. 376.

Under the act of 1871 (Laws 1871, p. 56), a company in Missouri cannot be taxed upon the cars of the Pullman Palace Car company leased and operated by it. *State ex rel.* v. *St. Louis County Court*, 29 *Am. & Eng. R. Cas.* 192, 13 *Mo. App.* 53; *affirmed in* 84 *Mo.* 234.—DISTINGUISHING Kennedy *v.* St. Louis, V. & T. H. R. Co., 62 Ill. 395.

Under Pa. Revenue Act of June 7, 1879, § 7 (P. L. 112), the Pullman Palace Car company, a corporation chartered under the laws of Illinois, is taxable by Pennsylvania upon its gross receipts derived from all sources from its business carried on within the state, including receipts derived from passengers traveling in the cars of said corporation passing into, through, and out of said state. *Pullman Palace Car Co.* v. *Com.*, 107 *Pa. St.* 148.

Such construction of the above act does not render it obnoxious to the provision of the federal Constitution regulating interstate commerce. *Pullman Palace Car Co.* v. *Com.*, 107 *Pa. St.* 148.

95. Horses. — Under Pa. Acts of Aug. 25, 1864, and of April 29, 1844, horses owned by a passenger railway company and used in drawing its cars are taxable for municipal purposes. *Citizens' Pass. R. Co.* v. *Donohugh*, 15 *Phila.* (*Pa.*) 258.—QUOTING Schuylkill P. Bridge Co. *v.* Frailey, 13 S. & R. 422; Lehigh C. & N. Co. *v.* Northampton County, 8 Watts & S. 334. REVIEWING Wayne County Com'rs *v.* Delaware & H. Canal Co., 15 Pa. St. 351.

96. Logs and lumber.—Logs cut by a railroad company upon its lands, for the purpose of sale, the lands being exempt from taxation by virtue of the provisions of Minn. Sp. Laws 1865, ch. 8, § 1, and Minn. Sp. Laws 1870, ch. 65, § 1, are subject to taxation. *State* v. *Northern Pac. R. Co.*, 39 *Minn.* 25, 38 *N. W. Rep.* 635.

For purposes of taxation, wood, timber, logs, and lumber, owned by a railroad corporation and distributed along its line for present use in operating and repairing such road, are to be deemed a part of the railroad, and subject to be taxed in that form by the justices of the supreme judicial court. And therefore such articles cannot be lawfully taxed in the towns where they may happen to be, although they exceed in value the sum of fifty dollars. *Fitchburg R. Co.* v. *Prescott*, 47 *N. H.* 62.

97. Corporate franchises, generally.*—The franchise of a company is property subject to taxation, and is not exempt by reason of its being a means or instrumentality employed by congress to carry into operation the powers of the general government. *Central Pac. R. Co.* v. *State Board of Equalization*, 60 *Cal.* 35, 13 *Am. & Eng. R. Cas.* 256.—DISTINGUISHING Thomson *v.* Pacific R. Co., 9 Wall. (U. S.) 587; M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316.—NOT FOLLOWED IN San Benito County *v.* Southern Pac. R. Co., 37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827.

A franchise of a corporation is property, and as such is liable to taxation, as well as the capital stock and tangible property of the corporation. The franchise may also be condemned for public use, under the right of eminent domain, upon due compensation being made. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.—QUOTING West River Bridge Co. *v.* Dix, 6 How. (U. S.) 529; Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 547;

* Distinction between franchise and property tax, see note, 35 AM. & ENG. R. CAS. 15.

Taxation of corporate franchise, see note, 1 L. R. A. 244.

Wilmington R. Co. *v.* Reid, 13 Wall. 264; State Tax *v.* Railway Gross Receipts, 15 Wall. 296; Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 367.

The authority given to one company by N. H. Laws 1887, ch. 304, to buy another railway, and to increase its capital to such an amount as may be requisite, but with no increase or renewal of the dividend-paying franchises belonging to the two companies before the purchase, was not a creation or renewal of corporate powers within the meaning of N. H. Gen. Laws, ch. 13, § 5, which provides that no "act incorporating, chartering, or renewing the corporate powers of any railroad * * * company" shall be enrolled or published, or have the force of law until the payment into the state treasury of fifty cents per thousand on the largest amount of capital authorized in said act so incorporating, chartering, or renewing said corporate powers. *Opinion of Justices*, 54 *Am. & Eng. R. Cas.* 306, 65 *N. H.* 673, 23 *Atl. Rep.* 620.

The corporate franchise of a railroad is property and as such is taxable. *State Board of Assessors* v. *Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1, 2 *Atl. Rep.* 789.

A charter granted in 1833 provided that all the property purchased by the officers of the company should vest in the shareholders "in proportion to their respective shares, and the shares shall be deemed personal property; and the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." *Held*, that the legislature might, notwithstanding, in 1869, levy an *ad valorem* tax upon the franchise. *Wilmington & W. R. Co.* v. *Reid*, 64 *N. Car.* 226; *reversed in* 13 *Wall.* (*U. S.*) 264.

A charter granted in 1852 provided that the railroad and all engines, cars, machinery, and works of the company, together with all profits and property thereof of every description, should be exempt from taxation for fifteen years; "and thereafter the legislature may impose a tax not exceeding twenty-five cents per annum on each share of the capital stock held by individuals, when the annual profits shall exceed eight per cent." *Held*, that the legislature might, in 1869, authorize an *ad valorem* tax not exceeding two thirds of one per cent. upon the franchise, rolling stock, and real estate of the company, though the annual profits had never exceeded eight per cent. *Raleigh & G. R. Co.* v. *Reid*, 64 *N. Car.* 155; *reversed in* 13 *Wall.* (*U. S.*) 269.—APPLYING McRee *v.* Wilmington & R. R. Co., 2 Jones (N. Car.) 186.—APPROVED IN State *v.* Krebs, 64 N. Car. 604. FOLLOWED IN Wilmington & W. R. Co. *v.* Reid, 64 N. Car. 226.

The franchise of the Atlantic, Tennessee & Ohio R. Co. is subject to tax. It is a distinct species of property from that enumerated in the clause of the charter exempting the roadbed, etc., from taxation for a limited period. *Atlantic, T. & O. R. Co.* v. *Mecklenburg Com'rs*, 87 *N. Car.* 129.

A tax imposed directly by the legislature upon a corporation, or its gross receipts, or the cash value of the shares of its capital stock, or upon each mile of its road at a certain sum per mile, and not assessed by assessors, is a franchise or privilege tax. *Worth* v. *Petersburg R. Co.*, 89 *N. Car.* 301.

The franchise, capital stock, property consisting of land machinery, etc., shares of capital stock, and profits arising from the business of a corporation, are each the subject of distinct taxation. *Worth* v. *Petersburg R. Co.*, 89 *N. Car.* 301

Franchises of a corporation are taxable property and should be assessed, not separately, but with its tangible property. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

98. Tolls, and gross receipts therefor. — The amounts received by one railroad company for the use of its railroad within the state by another railroad company, for transportation either within or through the state, are taxable at the rate of eight tenths of one per cent., as gross receipts for tolls, under Pa. Act of June 7, 1879, § 7 (P. L. 116). *Com.* v. *New York, P. & O. R. Co.*, 48 *Am. & Eng. R. Cas.* 633, 145 *Pa. St.* 38, 22 *Atl. Rep.* 212

As the railroad for the use of which the receipts are paid lies wholly within the state, the tax on such receipts is not a burden imposed by the state upon the company which pays them, and therefore is not violative of the commerce clause of the Constitution of the United States. *Com.* v. *New York, P. & O. R. Co.*, 48 *Am. & Eng. R. Cas.* 633, 145 *Pa. St.* 38, 22 *Atl. Rep.* 212.

But moneys received by a company for the use of its tracks by the trains of another company in common with its own trains, computed at the rate of so much for

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each ton of freight and for each passenger carried, are not rents, nor receipts from passengers and freight traffic, but receipts for tolls. Such tolls are not included within the gross receipts taxable under Pa. Act of June 1, 1889, § 23 (P. L. 431), imposing a tax upon the gross receipts "from passengers and freight traffic transported wholly within this state" of every company owning, operating, or leasing any railroad. *Com.* v. *New York, L. E. & W. R. Co.*, 145 *Pa. St.* 200, 22 *Atl. Rep.* 807.

Construed in the light of preceding legislation, and of the fact that the well-defined word "tolls," appearing in prior taxing statutes, was omitted from the act of 1889, the words employed in that act apply only to receipts for carriage done by the company taxed or by a company operating its works under a lease. *Com.* v. *New York, L. E. & W. R. Co.*, 145 *Pa St.* 200, 22 *Atl. Rep.* 807.

99. Bonds and coupons.—(1) *Federal decisions.*—Where a railroad extends through two states, bonds issued by the company and secured by a mortgage on the entire road are not taxable in one of the states under a statute taxing the interest on railroad bonds, and requiring the fiscal officers of the company to deduct the tax from the amount of interest payable on the bonds. *Northern C. R. Co.* v. *Jackson*, 7 *Wall.* (*U. S.*) 262.—APPROVED IN Cleveland, P. & A. R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 300; United States *v.* Baltimore & O. R. Co., 17 Wall. 322. RECONCILED IN Wilmer *v.* Atlanta & R. A. L. R. Co., 2 Woods (U. S.) 447. REVIEWED IN Philadelphia & R. R. Co. *v.* Barnes, 7 Phila. (Pa.) 543.

A railroad owned by an improvement company which had power, among other things, to improve the navigation of a river and to own and develop lands, is liable, under the Act of Congress of July 13, 1866, for the five per cent. tax on coupons of bonds issued for its indebtedness. *Kentucky Imp. Co.* v. *Slack*, 100 *U. S.* 648.—FOLLOWED IN Eastern Ky. R. Co. *v.* Slack, 100 U. S. 659.

Neither the general tax law of Pennsylvania (Bright. Dig. 1858) nor the act of April 30, 1864, contemplates taxing the interest coupons of railroad bonds. *Jackson* v. *Northern C. R. Co., Chase Dec.* (*U. S.*) 268.

Interest on bonds of a corporation held by non-resident aliens is not taxable by the United States under section 122 of the act of June 30, 1864, as amended by section 9 of the act of July 13, 1866. *United States* v. *Erie R. Co.*, 9 *Ben.* (*U. S.*) 67.—DISAPPROVING Michigan C. R. Co. *v.* Slack, 22 Int. Rev. Rec. 337. REVIEWING United States *v.* Baltimore & O. R. Co., 17 Wall. (U. S.) 322; Stockdale *v.* Atlantic Ins. Co., 20 Wall. 323; Cleveland, P. & A. R. Co. *v.* Pennsylvania, 15 Wall. 300.

(2) *State decisions.*—Bonds and other property of a company not forming any part of the railroad or its appurtenances are subject to taxation as the property of other citizens. *State* v. *Georgia R. & B. Co.*, 54 *Ga.* 423.

By Mass. Pub. St. ch. 11, § 4, personal estate for the purposes of taxation includes money at interest and other debts due the persons to be taxed, more than they are indebted or pay interest for, and "public stocks and securities." *Held*, that the bonds of a railroad company were not public stocks and securities within the meaning of the statute, notwithstanding the company was chartered by congress with a large land grant, with the reserved power to the general government to use it for certain public purposes and to regulate charges thereon for government transportation. *Hale* v. *Hampshire County Com'rs*, 137 *Mass.* 111.—QUOTING United States *v.* Wigglesworth, 2 Story (U. S.) 369; United States Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904.

Bonds of a railroad incorporated in the state are taxable as "money at interest," under New Hampshire laws. *Sawyer* v. *Nashua*, 59 *N. H.* 404.

And they are not exempted by being secured by mortgage or otherwise. *Boston, C. & M. R. Co.* v. *State*, 62 *N. H.* 648.

100. Capital—Borrowed capital.—Railroad companies are not taxed upon their capital, but upon the valuation of their real estate in the several towns through which the road passes; and, *semble*, they are liable to be so taxed, though not in the receipt of any profits or income. *People ex rel.* v. *Niagara County Sup'rs*, 4 *Hill* (*N. Y.*) 20.—FOLLOWING Mohawk & H. R. Co. *v.* Clute, 4 Paige (N. Y.) 384.

Under Pa. Act of April 29, 1844, § 32, enumerating property subject to taxation, which includes mortgages and "money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, and all public loans or stocks whatsoever," the borrowed capital of a rail-

road company is taxable. *Maltby* v. *Reading & C. R. Co.*, 52 *Pa. St.* 140.

Under the above statute capital borrowed by a corporation from citizens of other states may be taxed. *Maltby* v. *Reading & C. R. Co.*, 52 *Pa. St.* 140.

101. Capital stock — Shares of stock.—The words "capital stock," as used in Ill. Act. of 1872, do not mean "shares of stock," either separately or in the aggregate, but are intended to designate the property of the corporation subject to taxation. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.

The property of the shareholders in a corporation is distinct from that of the corporation, although the shares of stock have no value save that which they derive from the corporate property and franchise; and a tax levied upon the property of the one is not levied upon the property of the other. A tax upon the capital stock and franchise of a corporation is not a tax upon the shares of the shareholders. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561. — QUOTING Allen *v.* Board of Assessors, 3 Wall. (U. S.) 583; Gordon *v.* Appeal Tax Court, 3 How. (U. S.) 133.

The term "stock" as used in 1 Ind. Rev. St. § 32, providing for the assessment of corporate property, does not include subscriptions to stock, but the actual, tangible property of the corporation. *State ex rel.* v. *Hamilton*, 5 *Ind.* 310. — FOLLOWED IN Floyd County *v.* New Albany & S. R. Co., 11 Ind. 570.—*Michigan C. R. Co.* v. *Porter*, 17 *Ind.* 380.

The charter of a company provided that it should pay to the state an annual tax of one half of one per cent. upon its capital stock paid in, including $500,000 of purchase money paid to the state, until a certain date, and thereafter an annual tax of three fourths of one per cent. upon its capital stock paid in, including the above amount, and also upon all loans made to the company. Subsequently a statute consolidating the company with another provided that the corporation should be subject to the same rate of tax as though such consolidation had not taken place. *Held*, that a specific tax on a "bonus" allowed to the original purchasers of the road is allowable, though it did not stand on the books of the company as stock paid in. *People* v. *Michigan S. & N. I. R. Co.*, 4 *Mich.* 398.

Shares of stock in an incorporated company may be taxed as a distinct species of property belonging to the holder, independently of the taxation imposed upon the value of the franchise and upon the real and personal estate of the corporation itself. *Belo* v. *Forsyth County Com'rs*, 82 *N. Car.* 415.

The legislature, by N. Car. Act of 1877, ch. 155, § 9 (6), intended to, and did, provide for taxing the shares of stock in railroad corporations owned by private parties. *Belo* v. *Forsyth County Com'rs*, 82 *N. Car.* 415.

A railroad charter provided that all the property of the company should be vested in the stockholders in proportion to their shares, and "the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever for the term of fifteen years; and thereafter the legislature may impose a tax not exceeding twenty-five cents per annum per share on each share of the capital stock whenever the annual profits thereof shall exceed six per cent." The president of the company was required to make to the legislature an annual report of receipts and expenditures. *Held*, that the right of the legislature to impose the charge did not depend upon the taxing power, but upon the charter contract, and that the tax was properly payable by the corporation, and not by the individual stockholders. *State ex rel.* v. *Seaboard & R. R. Co.*, 52 *Fed. Rep.* 450.

A railroad lay entirely in North Carolina, but terminated at the Virginia line, where it connected with a road of that state. The legislatures of the two states consolidated the two corporations, the North Carolina act declaring that the stockholders of the Virginia company were thereby constituted stockholders in the North Carolina company, with the same rights, powers, privileges, and franchises as if they had subscribed an equal amount to it. *Held*, that this act operated to increase the shares of the North Carolina company by all the shares of the Virginia company, and that the latter became subject to taxation as stipulated in the charter of the former, and was bound to pay the tax on all its shares, irrespective of the proportion of its property lying in North Carolina, or of the citizenship of its stockholders. *State ex rel.* v. *Seaboard & R. R. Co.*, 52 *Fed. Rep.* 450.

Ohio Act of April 16, 1870, entitled "An act to enable railroad companies to redeem their bonded debts" (67 Ohio L. 89), authorizes the issue of certificates of preferred

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stock, and not of certificates of indebtedness. The holders of certificates issued under it are stockholders, and not creditors, and, under Ohio Rev. St. § 2746, are not required to list their shares for taxation in Ohio. *Miller* v. *Ratterman*, 43 *Am. & Eng. R. Cas.* 339, 47 *Ohio St.* 141, 24 *N. E. Rep.* 496.

102. Bonds and stock held in trust. — Mo. Rev. St. of 1865, § 2, has no application to shares of stock held by a county merely as trustee for individual taxpayers, to whom the shares were to be transferred on producing their tax receipts. *Griswold* v. *St. Louis, K. C. & N. R. Co.*, 8 *Mo. App.* 582, *app'x.*

Under Pa. Act of June 30, 1885, § 4, bonds issued by a corporation of the state doing business therein, and held by other corporations of the state in trust for persons "whose residence is unknown," are subject to the state tax of three mills imposed by said section. *Com.* v. *Lehigh Valley R. Co.*, 129 *Pa. St.* 429, 47 *Phila. Leg. Int.* 406, 25 *W. N. C.* 15, 18 *Atl. Rep.* 406.

And in a case where a corporation has wholly disregarded its duty and neglected to assess and collect the tax on such bonds, as required by section 4 of said act, and especially in the absence of any proof to the contrary, the bonds must be presumed to be owned by residents of Pennsylvania. *Com.* v. *Lehigh Valley R. Co.*, 129 *Pa. St.* 429, 47 *Phila. Leg. Int.* 406, 25 *W. N. C.* 15, 18 *Atl. Rep.* 406.

103. Stock in foreign corporations.* — Shares of corporate stock owned by residents of the state are taxable, although the tangible property represented by the shares is in another state and there taxable. The constitutional inhibition against double taxation only applies to such taxation when imposed by the same state. *San Francisco* v. *Fry*, 63 *Cal.* 470.

It is provided by Conn. Gen. St. § 3828, that "personal property in this state or elsewhere, not exempt by this title, shall for the purpose of taxation include all notes, bonds, and stocks (not issued by the United States), moneys, credits, choses in action, * * * goods, chattels, or effects, or any interest therein, and such property belonging to any resident in this state shall be set in his list in the town where he resides, at its then actual valuation, except when otherwise provided." And section 3830 provides that "the list of any person need not include any property situated in another state when it can be made satisfactorily to appear to the assessors that the same is fully assessed and taxed in such other state, to the same extent as other like property owned by its citizens." *Held*, that the stock of corporations located in other states falls within the intent of section 3828, and is taxable in Connecticut when owned by residents of that state; and that it makes no difference whether the corporations are public or private ones. But under section 3830 such foreign corporations are presumed to be taxed in the state where they are located, and it is the duty of the assessors to ascertain that they are not so taxed, and not of the taxpayer to prove that they are. *Lockwood* v. *Weston*, 61 *Conn.* 211, 23 *Atl. Rep.* 9.

Stock in the company's own road held by itself, or in other roads in the state, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; and stock held by the company in railroads without the limits of the state is not taxable here. *Wright* v. *Southwestern R. Co.*, 64 *Ga.* 783.

Under Ill. Revenue Act of 1872, the capital stock of corporations created under the laws of the state must be taxed, and the shares of stock are exempted from taxation; but when a resident of the state owns shares of stock in a corporation created by the laws of another state, they are taxable against him. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.

A city has the right to tax its citizens for stock owned by them in a foreign railroad company, although a tax has been paid thereon in the state where the corporation is located. *Seward* v. *Rising Sun*, 13 *Am. & Eng. R. Cas.* 315, 79 *Ind.* 351.

If a railroad corporation is situated in another state, and the road and all property of the road are taxed in that state to the corporation on the same valuation, and at the same rate, as the property of individuals, a stockholder residing in New Hampshire is not liable to be taxed there for his stock in the road. *Smith* v. *Exeter*, 37 *N. H.* 556.

Residents of New Jersey are liable to be taxed on the value of stock owned by them in railroad corporations out of the state. The tax law of 1851 taxes only chattels within the state, but it taxes residents for debts due to them from non-residents and stocks

* Shares of stock in foreign corporations, see note, 13 AM. & ENG. R. CAS. 314.

in foreign corporations; this is the intention and the construction of the act, and the legislature has power to impose such a tax. *State* (*Fish, Pros.*) v. *Branin*, 23 *N. J. L.* 484.

The provision of Ohio Act of April 5, 1859, § 3 (S. & C. 1438), that "no person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, which he is required to list, any share or portion of the capital or property of any company or corporation which is required to list or return its capital and property for taxation in this state," does not apply to shares of a railroad company which is formed by the consolidation of an Ohio company with companies of other states, notwithstanding such company pays taxes in Ohio on the portion of its property which is situated there. *Lee* v. *Sturges*, 46 *Ohio St.* 153, 19 *N. E. Rep.* 560.—QUOTING West Wis. R. Co. *v.* Trempealeau County Sup'rs, 93 U. S. 595. REVIEWING Bradley *v.* Bauder, 36 Ohio St. 28.

A construction, by officers having the enforcement of the tax laws of Ohio, since the enactment thereof, to the effect that, under such laws, shares held by residents of Ohio of stock of foreign railroad corporations having property in that state on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio, does not bind the successors of such officers, nor the state, in the property assessment and collection of taxes upon such shares. *Lee* v. *Sturges*, 46 *Ohio St.* 153, 19 *N. E. Rep.* 560.

104. Foreign - held stock and bonds.*—The interests represented by the shares of stock in a company organized under the laws of the state are within the jurisdiction of the state, even when the owners thereof are non-residents; and the provisions in Iowa Code of 1851, § 462, and in Laws of 1858, ch. 152, § 7, for taxing the shares of non-resident stockholders in railroad companies in this state, are valid as within the scope of legislative power. *Faxton* v. *McCosh*, 12 *Iowa* 527.—FOLLOWED IN Davenport *v.* Mississippi & M. R. Co., 12 Iowa 539. REVIEWED IN Iowa Homestead Co. *v.* Webster County, 21 Iowa 221.

A non-resident holder of shares in a corporation in North Carolina is not liable to tax there. Such property is beyond the jurisdiction of the state, and subject only to that in which the holder has his domicil. The ruling in this case has no application to banking corporations formed and operated under the act of congress. *North Carolina R. Co.* v. *Alamance Com'rs*, 91 *N. Car.* 454.—REVIEWING Minot *v.* Philadelphia W. & B. R. Co., 18 Wall. (U. S.) 206.

A resident in the District of Columbia appointed by will as trustee of his estate a citizen and resident of Pennsylvania. The trustee kept the securities of the estate with a trust company in the city of Washington. The only beneficiary under the trust was the widow of the testator, who received a fixed annuity each year. The remainder of the income was given to persons residing in Pennsylvania. Among the securities of the estate were the bonds of a railroad of Pennsylvania. *Held*, that the bonds were liable to the state tax under Pa. Act of June 8, 1891 (P. L. 229), and that the company had a right to retain the amount of this tax from the interest on the bonds. *Guthrie* v. *Pittsburgh, C. & St. L. R. Co.*, 158 *Pa. St.* 433, 27 *Atl. Rep.* 1052.

Non-resident bondholders are not taxable in this state upon bonds of domestic corporations held and owned by them. Neither the bondholder nor the property is within the jurisdiction of the state. Tenn. Act of 1887, ch. 2, § 8, so far as it undertakes to impose such tax upon previously issued bonds, is invalid. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

A state cannot tax the bonds of a railroad company held by persons living out of the state. *Com.* v. *Chesapeake & O. R. Co.*, 27 *Gratt.* (*Va.*) 344.

105. Shares of stock in express companies.—The American Express company and the United States Express company are associations in the nature of partnerships, the capital stock of which is divided into shares, which are transferable like those of a corporation. *Held*, that, for purposes of taxation, the shares were clearly personal property within the statute, and the court inclined to the opinion that they should be treated as if they were shares of stock in a private corporation. *Lockwood* v. *Weston*, 61 *Conn.* 211, 23 *Atl. Rep.* 9.

Va. Act of Feb. 15, 1866, § 93, for the assessment of taxes, embraces express companies chartered by the state; and the pres-

* Tax on foreign-held stock and bonds, see note, 13 AM. & ENG. R. CAS. 317.

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ent stockholders are personally liable for taxes due to the commonwealth from the company incurred while they were stockholders. *Anderson* v. *Com.*, 18 *Gratt.* (*Va.*) 295.

106. Undivided profits.* — Under the Act of Congress of July 14, 1870, § 15, imposing a tax of two and a half per cent. on undivided profits of corporations which have been "added to any surplus, contingent, or other fund," a railroad is not taxable for profits used for construction. *Marquette, H. & O. R. Co.* v. *United States*, 123 *U. S.* 722, 8 *Sup. Ct. Rep.* 319.

A tax can be just and equal on railroad corporations only by taxing the profits. *Paine* v. *Wright*, 6 *McLean* (*U. S.*) 395.

The investments in such an enterprise are materially different from investments in real estate. *Paine* v. *Wright*, 6 *McLean* (*U. S.*) 395.

107. Dividends. — A company was incorporated subject to the provisions of Pa. Railroad Law of February 19, 1849, with a provision that it should not be taxed until its dividends amounted to six per cent. per annum. A subsequent act subjected all corporations to a tax on each one per cent. of dividends. *Held*, that the company was taxable under the latter act on a dividend less than six per cent. per annum. The provision in the act of 1849 allowing the legislature to amend, etc., charters authorized the imposition of the tax by the latter act. *Com.* v. *Fayette County R. Co.*, 55 *Pa. St.* 452.

A company leased its road to another corporation for 999 years, at twelve per cent. per annum on its capital; the first company increased the number of its shares seventy-one per cent. (the par value of both the original and increased shares being fifty dollars), on which the stockholders were to receive seven per cent. dividends, being the same amount they would have received on the original number of shares at twelve per cent. *Held*, that this increase was not subject to state taxation as a dividend or profits. *Com.* v. *Pittsburg, Ft. W. & C. R. Co.*, 74 *Pa. St.* 83, 2 *Am. Ry. Rep.* 220.—FOLLOWED IN Com. *v.* Erie & P. R. Co., 74 Pa. St. 94.

Pa. Act of 1872 provided that defendant company "shall annually pay into the treasury of the city of Philadelphia, for the use of said city, a tax of six *per centum* upon so much of any dividend declared which may exceed six *per cent'im* upon their said capital stock." *Held*, that this meant six per cent. upon so much of the capital stock as was paid in, and that if the dividends for the whole year amounted to over six per cent. the company was liable to the tax. The company cannot escape taxation by declaring dividends of less than six per cent., if all the dividends in one year amount to over six per cent. *Philadelphia* v. *Ridge Ave. Pass. R. Co.*, 13 *Am. & Eng. R. Cas.* 341, 102 *Pa. St.* 190.— FOLLOWING Citizens' Pass. R. Co. *v.* Philadelphia, 49 Pa. St. 251; Second & T. St. Pass. R. Co. *v.* Philadelphia, 51 Pa. St. 465; Philadelphia *v.* Philadelphia & G. F. Pass. R. Co., 52 Pa. St. 177.

A corporation, engaged in the business of manufacturing and leasing sleeping cars, set apart as capital a fund accumulated from the rentals of its cars, etc., and subsequently, in good faith, in reduction of its capital stock, paid therefrom to its stockholders twelve dollars per share, reducing the par value of each share by that amount. Such division among the stockholders, being an actual *bona fide* reduction of capital stock, and neither made, declared, nor returned as a dividend, either of annual profits or of accumulated surplus, did not subject the capital stock to taxation, under Pa. Act of June 7, 1879, § 4 (P. L. 114), on the basis of a dividend of twelve dollars per share. *Com.* v. *Central Transp. Co.*, 145 *Pa. St.* 89, 22 *Atl. Rep.* 209.

A company in embarrassed circumstances sold a large amount of stock below par, and afterwards paid a dividend on its whole capital. There was no proof that this was profits. *Held*, that the company was not liable to the tax on profits for this amount. *Com.* v. *Erie & P. R. Co.*, 10 *Phila.* (*Pa.*) 465. — DISTINGUISHING Com. *v.* Cleveland, P. & A. R. Co., 29 Pa. St. 370; Lehigh Crane Iron Co. *v.* Com., 55 Pa. St. 448; Atlantic & O. Tel. Co. *v.* Com., 66 Pa. St. 57.

108. Indebtedness. — A corporation is not taxable upon the value of the debts it owes, and to assess a corporation on the amount of its debts by the state board of equalization would be a clear violation of law. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561. — REVIEWING Com. *v.* Hamilton Mfg. Co., 12 Allen (Mass.) 300.

The solvency of a corporation, for the purposes of taxation upon its bonded indebtedness under Pa. Act of June 30, 1885 (P. L. 194), will be assumed, on proof that

* See also REVENUE, 7.

the interest on such indebtedness has been paid. *Com.* v. *Philadelphia & R. C. & I. Co.*, 137 *Pa. St.* 481, 20 *Atl. Rep.* 531, 580.

109. Certificates of indebtedness.—The Act of Congress of Feb. 8, 1875, § 19, providing for a tax on corporations of ten per cent. of the amount of their own notes used for circulation and paid out by them, does not apply to certificates of indebtedness by a railroad company and payable to bearer at a date named. *Philadelphia & R. R. Co.* v. *Pollock*, 17 *Am. & Eng. R. Cas.* 483, 19 *Fed. Rep.* 401.—FOLLOWING United States *v.* Wilson, 106 U. S. 620, 2 Sup. Ct. Rep. 85.

110. Payments of interest.—The receivers of a railroad company, which was the guarantor of bonds of a coal company, purchased, from the holders of some of the bonds, interest coupons at a discount. Said coupons were then canceled, surrendered to the coal company, and charged to it in an account current. *Held*, that for purposes of taxation this was equivalent to payment of the interest by the coal company, and it was the duty of the treasurer to make the proper assessment, the commonwealth not being bound to await the general settlement of accounts between the two companies. *Com.* v. *Philadelphia & R. C. & I. Co.*, 137 *Pa. St.* 481, 20 *Atl. Rep.* 531, 580.

Pa. Act of June 30, 1885, § 4, requiring the deduction of a state tax by corporate officers in paying interest on scrip, bond, or certificate of indebtedness issued to residents of the commonwealth, with penalty for non-compliance, applies to a foreign corporation upon bonds owned by either individuals or corporations in Pennsylvania and acting as trustees for persons whose residence is unknown, although the bonds were originally issued and sold to non-residents. *Com.* v. *New York, L. E. & W. R. Co.*, 150 *Pa. St.* 234, 24 *Atl. Rep.* 609.

Where interest was payable on these bonds June 1, 1889, the date of the passage of the act, only one half year's tax will be charged for 1889. *Com.* v. *New York, L. E. & W. R. Co.*, 150 *Pa. St.* 234, 24 *Atl. Rep.* 609.

Where bonds of a practically insolvent corporation, with interest in default, are in good faith exchanged for bonds which fund the arrears of interest, the funding of the interest is not such payment as will render the company liable for tax on such interest, under the act of 1885. The payment contemplated by the act is payment in money. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

A solvent corporation, it seems, may not pay its interest in stock or scrip, or other equivalent money, and thereby escape the tax. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

A corporation, finding itself unable to meet the interest on a large body of its obligations, was, by the joint action of stockholders and creditors, placed in the hands of a receiver, and a plan of reorganization effected. In pursuance of such plan, certain of the bondholders deposited their bonds, bearing six per cent. interest, with an agent of the creditors, who gave therefor negotiable certificates bearing four per cent., and interest on these certificates was advanced, to be treated as interest if the reorganization went through, but if not, as advances to be repaid. The reconstruction trustees also made payment of interest with money voluntarily subscribed by certain stock and junior loan holders, the trustees taking an assignment of coupons as means of reimbursement. *Held*, that, as the payment was a voluntary advance of money by parties not liable therefor, and not as agents for the corporation, it was not a payment of interest by the corporation, liable to tax under the act of 1885. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612. — DISTINGUISHING *Com.* v. Philadelphia & R. R. Co., 137 Pa. St. 481.

A subsequent deposit by the corporation to repay the advances for preceding years, although a ratification and adoption of what had been done as having been done on behalf of the company as well as for its benefit, is not such a payment of the interest that the company is bound to account for the tax under the act of 1885. The settlement was between separate parties dealing at arm's length, and was the acceptance of a completed act, not as it might have been, nor even necessarily as it ought to have been, but as it actually was at that time. And as the tax was to be deducted at the time of payment from the lien holders, it could not be done afterwards. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

Such ratification and deposit constitute an agency as to future payment of interest and bind the corporation for the tax on such payments, in the absence of sufficient excuse for failure to deduct the same. *Com.*

v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

Such deposit by the corporation with the agent, to be paid by the agent to the bondholders to make up the full amount of the back interest due on their bonds, is a payment of interest by the corporation subject to the tax under the Act of 1885. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

Where the payment of interest is for a portion of a year only, the tax will be apportioned. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

111. Loans.—Under Pa. Act of April 30, 1864, corporations are to make returns, and are liable for the tax on loans, although the duty of deducting the tax is imposed by law upon officers of the corporation. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

In imposing the tax upon loans, the state is not bound to inquire where the creditors reside, but can impose the tax, and require the officers of the company to retain it out of the interest. Such a direction makes the corporation liable for the tax. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

112. Damages in condemnation proceedings.—A statute provided for the assessment of damages by appraisers in condemnation proceedings, and that when their report was filed it should have the effect of a judgment, but that the company might abandon its location at any time during sixty days and thus avoid payment of the amount. During the sixty days a judgment for damages was taxed to the landowner as "money at interest." *Held*, that the landowner only had an expectancy or possibility of a positive judgment for the amount of damages during the sixty days, and therefore it was not taxable. *Arnold* v. *Middletown*, 41 *Conn.* 206.

b. Lands Held under Government Grants.*

113. United States courts.—Lands sold or granted by the United States may be taxed before the government has parted with the legal title by issuing a patent; but this principle is applicable only to cases where the right to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right. *Kansas Pac. R. Co.* v. *Prescott*, 16 *Wall.* (*U. S.*) 603, 4 *Am. Ry. Rep.* 166.—DISTINGUISHED IN Union Pac. R. Co. *v.* McShane, 3 Dill. (U. S.) 303; Cass County *v.* Morrison, 28 Minn. 257. EXPLAINED IN Wisconsin C. R. Co. *v.* Taylor County, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37. FOLLOWED IN Northern Pac. R. Co. *v.* Traill County, 25 Am. & Eng. R. Cas. 364, 115 U. S. 600; New Orleans Pac. R. Co. *v.* United States, 33 Am. & Eng. R. Cas. 74, 124 U. S. 124; Central Pac. R. Co. *v.* Howard, 51 Cal. 229. QUOTED IN Northern Pac. R. Co. *v.* Cannon, 46 Am. & Eng. R. Cas. 419, 46 Fed. Rep. 224; Missouri River, Ft. S. & G. R. Co. *v.* Morris, 13 Kan. 302.

Hence where there has been a large grant, e. g., to a great railroad company to aid in the construction of its road, if prepayment by the grantee of the cost of surveying, selecting, and conveying the lands granted be required by the statute making the grant before any of the lands "shall be conveyed," or if the grant contain a proviso that any of the lands granted and not sold by the company within three years after the final completion of the road shall be liable to be sold to actual settlers under the preemption laws, at a price named per acre, the money to be paid to the company—no title, in the first instance unless there be the required prepayment, nor in the second instance at all, vests in the grantee in such a way as that a tax sale will divest the government title. *Kansas Pac. R. Co.* v. *Prescott*, 16 *Wall.* (*U. S.*) 603, 4 *Am. Ry. Rep.* 166.

Where patents have issued for lands granted to railroads, such lands are liable to state taxation whether the costs of survey have been paid or not. *Union Pac. R. Co.* v. *McShane*, 22 *Wall.* (*U. S.*) 444, 11 *Am. Ry. Rep.* 456.—FOLLOWED IN New Orleans Pac. R. Co. *v.* United States, 33 Am. & Eng. R. Cas. 74, 124 U. S. 124. QUOTED IN Northern Pac. R. Co. *v.* Cannon, 46 Am. & Eng. R. Cas. 419, 46 Fed. Rep. 224.

Lands granted to the Northern Pacific railroad are not subject to state or territorial taxation while the title is held in the United States as security for cost of survey-

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* Property is not taxable when it belongs to United States, see note, 13 AM. & ENG. R. CAS. 244.

Taxation of public lands, see note, 13 AM. & ENG. R. CAS. 375.

Taxation of railroad land grants, see note, 17 AM. & ENG. R. CAS. 397.

When land grants become taxable, see note, 48 AM. & ENG. R. CAS. 654.

ing as required by the Act of Congress of July 17, 1870, though the road be completed. *Northern Pac. R. Co.* v. *Traill County*, 25 *Am. & Eng. R. Cas.* 364, 115 *U. S.* 600, 6 *Sup. Ct. Rep.* 201.—FOLLOWING Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603; Union Pac. R. Co. *v.* McShane, 22 Wall. 444.—APPLIED IN Tarpey *v.* Deseret Salt Co., 5 Utah 494. NOT FOLLOWED IN Northern Pac. R. Co. *v.* Wright, 51 Fed. Rep. 68. QUOTED IN Northern Pac. R. Co. *v.* Cannon, 46 Am. & Eng. R. Cas. 419, 46 Fed. Rep. 224; State *v.* Central Pac. R. Co., 40 Am. & Eng. R. Cas. 467, 20 Nev. 372. RECONCILED IN Denny *v.* Dodson, 13 Sawy. (U. S.) 68.

When by act of congress lands are granted *in præsenti* to a state in aid of the construction of a railroad, and it is provided that upon the completion of sections of twenty miles patents shall issue for such portions of the lands granted as shall have been earned, an indefeasible right vests in the railroad upon the completion of its road, and the land is subject to taxation, although the land department has erroneously refused to issue patents therefor. *Wisconsin C. R. Co.* v. *Price County*, 41 *Am. & Eng. R. Cas.* 669, 133 *U. S.* 496, 10 *Sup. Ct. Rep.* 341.—FOLLOWED IN Northern Pac. R. Co. *v.* Wright, 51 Fed. Rep. 68; Davis *v.* Capitol Phosphate Co., 57 Fed. Rep. 118. QUOTED IN Northern Pac. R. Co. *v.* Cannon, 46 Am. & Eng. R. Cas. 419, 46 Fed. Rep. 224.

The land grant made to plaintiff company by Act of Congress of July 2, 1864, passed immediate title to all land not specifically reserved, and the grant attached to the specific sections upon a definite location of the road; therefore such lands became taxable to the company when the road was located and built, though no patents had yet issued, and the government officers had refused to issue patents until satisfied that the lands did not contain minerals. *Northern Pac. R. Co.* v. *Walker*, 47 *Fed. Rep.* 681. —APPLIED IN Northern Pac. R. Co. *v.* Wright, 51 Fed. Rep. 68.

The future discovery of minerals in such lands will not divest the company's title, but will inure entirely to its benefit. *Northern Pac. R. Co.* v. *Walker*, 47 *Fed. Rep.* 681.

114. Arizona.—Lands which have not been surveyed are not assessable. *Atlantic & P. R. Co.* v. *Yavapai County*, (*Ariz.*) 39 *Am. & Eng. R. Cas.* 543, 21 *Pac. Rep.* 768.

115. California.—Where lands are granted by the general government to a company on certain conditions, as that the title thereto shall attach upon the completion of sections of the road, such lands are not subject to state taxation until the conditions have been complied with, and the company is entitled to a patent. *Central Pac. R. Co.* v. *Howard*, 51 *Cal.* 229, 12 *Am. Ry. Rep.* 98.—FOLLOWING Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 604.

If a grant by congress to a company of public land to aid in the construction of its railroad contains conditions by which the grant is liable to be defeated, the land cannot be taxed while the conditions are in force and before they have been fulfilled. *Central Pac. R. Co.* v. *Howard*, 52 *Cal.* 227, 20 *Am. Ry. Rep.* 111.

Under the act of congress admitting the state of California into the Union and providing that the state "shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States shall be impaired or questioned," and "shall never levy any tax or assessment of any description whatever upon the public domain of the United States," lands cannot be taxed by the state until they have been patented to individuals or a corporation by the general government, or until such persons or corporation have become vested with a perfect equitable title. *Central Pac. R. Co.* v. *Howard*, 52 *Cal.* 227, 20 *Am. Ry. Rep.* 111.

116. Illinois.—Lands selected by the Illinois Central railroad company under an act of congress are liable to taxation when sold by the company and paid for by the purchaser, although no conveyance may have been made. *Champaign County* v. *Reed*, 100 *Ill.* 304.

117. Iowa.—When lands are acquired from the government after the close of the assessment for the current year, they should not be assessed for taxation until the year following. *Tallman* v. *Butler County Treasurer*, 12 *Iowa* 531.—APPLYING Bangor & P. R. Co. *v.* Harris, 21 Me. 533. FOLLOWING Des Moines N. & R. Co. *v.* Polk County, 10 Iowa 1.

Under Iowa Code of 1851, § 462, the lands granted to the state by Act of Congress of May 15, 1856, for the purpose of aiding in the construction of railroads, are not subject to taxation as lands while they

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remain the property of the companies to which they were granted by the state. They are taxable only through the shares of the stockholders. *Tallman* v. *Butler County Treasurer*, 12 *Iowa* 531.—REVIEWED IN Iowa Homestead Co. *v.* Webster County, 21 Iowa 221.

But such lands are liable to taxation by the state after the railroad companies to which they were granted become possessed of the unconditional title in fee, and before they have been alienated by said companies. *Burlington & M. R. R. Co.* v. *Hayne*, 19 *Iowa* 137.

Lands held by a company under land grant acts of congress, which have never been certified or set apart, and which are incapable of identification, are not taxable. *Cedar Rapids & M. R. R. Co.* v. *Woodbury County*, 29 *Iowa* 247.—DISTINGUISHING Iowa Homestead Co. *v.* Webster County, 21 Iowa 221; Dubuque & P. R. Co. *v.* Webster County, 21 Iowa 235.—FOLLOWED IN Iowa R. Land Co. *v.* Story County, 36 Iowa 48; Cedar Rapids & M. R. R. Co. *v.* Carroll County, 41 Iowa 153.

Where a company has fully earned lands granted to it by the general government by the completion of its road in sections as required, such lands are liable to taxation although no certificate has yet issued for them. *Iowa Homestead Co.* v. *Webster County*, 21 *Iowa* 221. *Dubuque & P. R. Co.* v. *Webster County*, 21 *Iowa* 235.—DISTINGUISHED IN Cedar Rapids & M. R. R. Co. *v.* Woodbury County, 29 Iowa 247. FOLLOWED IN Cedar Rapids & M. R. R. Co. *v.* Carroll County, 41 Iowa 153.

The patents issued by the governor to the Iowa Falls and Sioux City railroad company, under Iowa Act of April 7, 1868, § 4, are conclusive evidence that the lands mentioned therein were then earned. Accordingly, the lands were not subject to taxation till the year following the issuance of the patents. *Iowa Falls & S. C. R. Co.* v. *Cherokee County*, 37 *Iowa* 483. *Iowa Falls & S. C. R. Co.* v. *Woodbury County*, 38 *Iowa* 498.

The lands granted to the Iowa Falls and Sioux City railroad company by Iowa Act of April 7, 1868, § 4, to aid the construction of a railroad, did not become the property of the company, nor taxable as such, until the construction and completion of the road in accordance with the terms prescribed by said act. *Iowa Falls & S. C. R. Co.* v. *Cherokee County*, 37 *Iowa* 483.

In such case parol evidence is admissible to show that the company has been guilty of fraudulent practices to prevent the issuance of the patent. But the fact of the completion of the railroad earlier than the issuance of the patent is not evidence of such practices to avoid taxation. *Iowa Falls & S. C. R. Co.* v. *Woodbury County*, 38 *Iowa* 498.

Lands granted to railroads are not taxable until the year after they are patented, when there is no evidence of fraudulent or intentional delay in procuring the patent. *McGregor & M. R. Co.* v. *Brown*, 39 *Iowa* 655.

The lands granted to the Cedar Rapids & Missouri River R. Co., by Act of Congress of June 2, 1864, did not become subject to taxation until they were selected or ascertained to be the lands embraced in the grant. The earliest evidence of their identification is the certificate of the commissioner of the general land office, approved by the secretary of the interior. And when the company became entitled to any portion of the lands granted by the Act of Congress of May 15, 1856, by the completion of any part of its road, as prescribed by federal or state legislation, such portion of the grant thereupon became subject to assessment and taxation. It was the intention of the act that the railroads should be constructed westward from the initial eastern point, and that the 120 sections granted for the construction of each 20 miles of road should be selected from the unoccupied lands adjacent to the part thus constructed. *Cedar Rapids & M. R. R. Co.* v. *Carroll County*, 41 *Iowa* 153.—FOLLOWING Cedar Rapids & M. R. R. Co. *v.* Woodbury County, 29 Iowa 247.

Acts of the eleventh general assembly, ch. 134 and 144, conferred upon the Sioux City and St. Paul railway company the title to the lands embraced in the acts of congress, conditional upon its compliance with the conditions of the grant, which was to be determined by subsequent legislation. *Sioux City & St. P. R. Co.* v. *Osceola County*, 43 *Iowa* 318, 14 *Am. Ry. Rep.* 450.

Acts of the fifteenth general assembly, ch. 34, directing the governor to certify to the company the lands held by the state in trust for its benefit, vested in it a perfect legal title thereto, and they thereupon became taxable to it. An assessment and levy of taxes upon the lands for any years previous to the passage of this act were illegal and void. *Sioux City & St. P. R. Co.*

v. *Osceola County*, 43 *Iowa* 318, 14 *Am. Ry. Rep.* 450.

The lands selected in Sac county, in pursuance of the grant to the state, under the Act of May 15, 1856, and by the state conferred conditionally upon the Cedar Rapids and Missouri River railroad company, had not become subject to taxation on the first day of January, 1867. *Cedar Rapids & M. R. R. Co.* v. *Sac County*, 46 *Iowa* 243.

Iowa Laws 1874, ch. 34, authorizing the certification to plaintiff company of certain lands held by the state in trust for it, did not pass the title until the governor had certified them; and until then they were not taxable to the company. *Sioux City & St. P. R. Co.* v. *Osceola County*, 50 *Iowa* 177.

Where no conflicting claim is made to lands inuring to a company under a congressional grant they become taxable from the time they are earned by the company, though not certified by the land department until afterwards. *Iowa R. Land Co.* v. *Fitchpatrick*, 52 *Iowa* 244, 3 *N. W. Rep.* 40.—FOLLOWING Iowa Homestead Co. *v.* Webster County, 21 Iowa 221.

Lands which have been earned by a company under a congressional grant, but to which there are conflicting claims, and the title to which is still in the United States, are not taxable. The fact that a month has elapsed between the cancellation of an entry and the filing of another entry, during which time there was no claim adverse to that of the railroad company, will not render the lands taxable from that time, it not appearing that the company neglected to procure title during such time for the purpose of escaping taxation. *Dickerson* v. *Yetzer*, 53 *Iowa* 681, 6 *N. W. Rep.* 41, 21 *Am. Ry. Rep.* 176. — DISTINGUISHING Iowa Homestead Co. *v.* Webster County, 21 Iowa 221; Chicago, B. & Q. R. Co. *v.* Holdsworth, 47 Iowa 20.

Lands which have been earned by a railroad company under the congressional grant of May 15, 1856, but have been withheld from certification under such grant because of adverse claims thereto, and without fault upon the part of the company, are not taxable during the time they are so withheld. *Grant* v. *Iowa R. Land Co.*, 54 *Iowa* 673, 7 *N. W. Rep.* 113.—DISTINGUISHING Iowa R. Land Co. *v.* Fitchpatrick, 52 Iowa 244.

Where lands were not certified to a company by the United States until several years after they were earned under the grant, the title being withheld because of conflicting claims thereto—*held*, that their taxation to the company during the interval was illegal. *Doe* v. *Iowa R. Land Co.*, 54 *Iowa* 657, 7 *N. W. Rep.* 118.

118. Kansas. — The Kickapoo treaty of 1862 provides that all lands sold under the provisions of article 5 of said treaty shall be forfeited to the government if not fully paid for in accordance with the provisions of said treaty, and also provides that "none of said lands shall be subject to taxation until the patents have been issued therefor." After said land has been sold to the Atchison and Pike's Peak railroad company, now known as the Central Branch Union Pacific railroad company, and by it sold to an individual who has made valuable and lasting improvements thereon, but before said lands have been paid for and before the patents have been issued therefor—*held*, that neither said lands nor the improvements thereon are taxable. *Parker* v. *Winsor*, 5 *Kan.* 362.

As long as the title to land lying within an Indian reserve remains in the United States, or in the Indians, or in both, the land is not taxable by the state. A mere contingent, conditional, and inchoate equity obtained by a railway company in such lands, but which does not amount to a title legal or equitable, does not so divest the title of the United States as to subject the land to taxation. *Douglas County Com'rs* v. *Union Pac. R. Co.*, 5 *Kan.* 615.

Where land is granted to a company for the sole purpose of aiding in the construction of railroad and telegraph lines, and such railroad and telegraph lines are constructed to the approval of the government, the company acquires such an interest in the land as renders it subject to taxation, even though it has not received a patent, and has not paid the cost of surveying, selecting, and conveying the same, and the fees of the register and receiver of the land office, required by law to be paid before the issue of the patent. *Kansas Pac. R. Co.* v. *Culp*, 9 *Kan.* 38.

A provision in a grant that all lands so granted which shall not be disposed of by the company within three years after the completion of the road "shall be subject to settlement and pre-emption like other lands, and at a price not exceeding one dollar and twenty-five cents per acre to be paid to said company," reserves no such interest to the

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government as will render the land not subject to taxation. *Kansas Pac. R. Co.* v. *Culp*, 9 *Kan.* 38.

On July 25, 1866, congress passed an act entitled "An act granting lands to the state of Kansas to aid in the construction of the Kansas and Neosho Valley railroad, and its extensions to Red river." By the terms of this act, upon the certificate of the governor of Kansas that any ten consecutive miles of this railroad had been completed, patents were to issue directly to the company for the lands opposite such completed section, and so for each successive section. No action on the part of the state was in terms called for. The company, now the Mo. R., Ft. S. & Gulf R. Co., as required, formally accepted the grant with its terms and conditions. Prior to 1870 it had complied with all the terms and conditions of the grant required to be performed by it. The state took no action in reference to this matter until March, 1871, when the legislature passed a joint resolution formally accepting the grant. No patents had issued for certain of the lands within this grant in Bourbon county up to April 21, 1871. *Held*, that they were nevertheless subject to taxation for the year 1870. *Missouri River, Ft. S. & G. R. Co.* v. *Morris*, 13 *Kan.* 302.

By contract with the secretary of the interior, an individual became the purchaser of a tract in southeastern Kansas, known as the Cherokee neutral lands. By the terms of that contract, lands were patented as paid for. Having paid for and received patents for a portion of these lands, in March, 1869, he assigned his contract to plaintiff in error. On August 8, 1870, plaintiff paid the balance of the purchase money, and on November 2, 1870, received a patent for the remainder of said lands. *Held*, that the lands paid for August 8, and patented November 2, 1870, were not subject to taxation for the year 1870. *Missouri River, Ft. S. & G. R. Co.* v. *Morris*, 13 *Kan.* 302. — QUOTING Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603.

119. Minnesota.*—By Minn. Special Laws 1865, ch. 9, the swamp lands granted by the state to the St. Paul and Chicago railway company, to aid in the construction of its road, are subject to taxation whenever contracted to be sold, conveyed, or leased by the company. *St. Paul & C. R. Co.* v. *McDonald*, 34 *Minn.* 195, 25 *N. W. Rep.* 453.

The "railroad land-grant" lands reserved and retained by the state and subsequently sold by it pursuant to Minn. Special Laws 1877, ch. 201, § 9, are subject to taxation in the hands of the grantees of the state; and no one but the United States can raise the question of the state's authority to dispose of such lands for the purposes expressed in the act. *Morrison County* v. *St. Paul & N. P. R. Co.*, 42 *Minn.* 451, 44 *N. W. Rep.* 982.

Lands embraced in a railroad land grant, and exempt from ordinary taxation while held by the corporation for whose benefit the grant was made—*held*, to have become subject to taxation, the entire beneficial interest of the corporation having been conveyed by a trust deed, to secure a specified charge upon the lands exceeding their value, and the *cestuis que trustent* being empowered, at their mere election, to take and appropriate the entire property in satisfaction of their claims upon it, and so as to leave nothing to revert to the grantor. *Chippewa County* v. *St. Paul, S. & T. F. R. Co.*, 41 *Am. & Eng. R. Cas.* 619, 42 *Minn.* 295, 44 *N. W. Rep.* 70. — DISTINGUISHING Sioux City & St. P. R. Co. *v.* Robinson, 41 Minn. 452, 43 N. W. Rep. 326.

120. Missouri.—Lands granted by the state to a railroad company under Mo. Act of Sept. 20, 1852, are not taxable for state and county purposes, under the general revenue law, except through the stockholders. *State* v. *Hannibal & St. J. R. Co.*, 37 *Mo.* 265.— DISTINGUISHED IN St. Joseph *v.* Hannibal & St. J. R. Co., 39 Mo. 476; St. Louis Mut. L. Ins. Co. *v.* Board of Assessors, 56 Mo. 503. FOLLOWED IN Livingston County *v.* Hannibal & St. J. R. Co., 60 Mo. 516.

121. Nebraska. — Where land is granted to a company, and has been fully earned by the completion of its road, the company is the equitable owner of the land, and the same is taxable notwithstanding the failure of the company to pay certain fees for the entry of the same. *Price* v. *Lancaster County*, 20 *Neb.* 252, 29 *N. W. Rep.* 931.

Upon the facts stated in the petition—*held*, that the railway company had earned the lands in controversy at the time the taxes were levied, and that the state had prior to said levy parted with its title to the plaintiff's grantor, and that the lands were

* Taxation of Minnesota railroad land-grant lands in the hands of grantees, see 41 AM. & ENG. R. CAS. 684, *abstr.*

taxable, although the United States did not approve the selection of the state until after the levy of the taxes. *Elkhorn L. & T. L. Co.* v. *Dixon County*, 35 *Neb.* 426, 53 *N. W. Rep.* 382.

Lands for which a patent has issued to the Union Pacific railway company are taxable by the authorities of the state of Nebraska, notwithstanding the proviso of section 3 of the act of July 1, 1862 (12 St. at L. 489), which subjects lands not sold or disposed of by the company within three years from the completion of the road to settlement and pre-emption at one dollar and twenty-five cents per acre. *Union Pac. R. Co.* v. *McShane*, 3 *Dill.* (*U. S.*) 303.—DISTINGUISHING Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603.

122. Nevada.—The Act of Congress of July 10, 1886, which provides that "no lands granted to any railroad corporation by any act of congress shall be exempt from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same because no patent has been issued therefor," delegates to states and territories the right to tax the lands granted, although the grantees have not paid the costs of surveying and selecting. *State* v. *Central Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 467, 20 *Nev.* 372, 22 *Pac. Rep.* 237.—QUOTING Northern Pac. R. Co. *v.* Traill County, 115 U. S. 600.

The Act of Congress of July 1, 1862, operates as a grant *in præsenti* of the lands therein specified to the Central Pacific R. Co., and the right of the state to collect taxes thereon under the act of 1886 cannot be defeated by the delay of the corporation in applying for patents, nor by the neglect or delay of the secretary of the interior to determine the character of the land and whether it falls within the grant, the identification of the land and its character being capable of proof upon the trial in an action for the taxes. *State* v. *Central Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 467, 20 *Nev.* 372, 22 *Pac. Rep.* 237.—REVIEWING Hannibal & St. J. R. Co. *v.* Smith, 9 Wall. (U. S.) 97.

Congress, having full control over the public domain, may make it subject to state taxation upon such conditions as are deemed proper, and then, if so taxed, it must be done subject to those conditions. *State* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 275, 21 *Nev.* 247, 30 *Pac. Rep.* 686.

The act of July 10, 1886, is a grant to the states of the right to tax lands in which the United States still has such an interest as renders them exempt, and, being beneficial, its acceptance by the grantee will be presumed. *State* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 275, 21 *Nev.* 247, 30 *Pac. Rep.* 686.

The title or interest of the United States in the public lands will not be affected where only the possessory claim to the land is assessed. Such assessment will only reach the taxpayer's interest in the land. *State* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 275, 21 *Nev.* 247, 30 *Pac. Rep.* 686.

The possessory claim to public land, which may be taxed as something separate and distinct from the title in fee, is an actual possession, and not a constructive possession or a mere claim to the land. Mortgaging and leasing public land do not constitute actual possession thereof. *State* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 275, 21 *Nev.* 247, 30 *Pac. Rep.* 686.

Surveyed lands within the Pacific railroad grants are subject to taxation; unsurveyed lands are not. *State* v. *Central Pac. R. Co.*, 21 *Nev.* 260, 30 *Pac. Rep.* 689.

123. Oregon.—The lands of a company already earned under a grant from the general government, and such indemnity lands as it has already selected, are subject to taxation, though it may not have received a patent therefor; but such indemnity lands as it has not selected are not taxable. *Oregon & C. R. Co.* v. *Lane County*, 23 *Oreg.* 386, 31 *Pac. Rep.* 964.

124. Wisconsin.—Where the general government grants lands to a state to aid railroads, and a company has complied fully with the conditions of the grant, and has earned lands, they are taxable; and there is nothing in the position of the state as trustee which would prevent its imposing a tax on the land. *West Wis. R. Co.* v. *Trempealeau County Sup'rs*, 35 *Wis.* 257.—QUOTED IN Attorney-General *v.* Chicago & N. W. R. Co., 35 Wis. 425. REVIEWED IN Wisconsin C. R. Co. *v.* Taylor County, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37.

No tax can be imposed upon lands while they remain the property of the United States, nor upon those granted by it to a state in trust for works of internal improvement, and as to which the trust has not been executed; but when such lands have been earned by a railroad company under

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such a grant, and the state and the United States have each parted with all right, title, and interest therein to the company, by patents regularly issued, they become relieved, *pro tanto*, of the trust implied in the grant, and subject to the legislative will in the imposition of taxes. *Wisconsin C. R. Co.* v. *Taylor County*, 1 *Am. & Eng. R. Cas.* 532, 52 *Wis.* 37, 8 *N. W. Rep.* 833.—EXPLAINING Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603. QUOTING Union Pac. R. Co. *v.* McShane, 22 Wall. 444. REVIEWING West Wis. R. Co. *v.* Trempealeau County, 35 Wis. 258.

Where a company has complied fully with the conditions of a grant it secures an equitable right to the lands granted within the place limits of the grant, and they at once become taxable, although patents therefor have been withheld owing to officials of the United States erroneously construing a decision of the supreme court of the United States against the company. *Wisconsin C. R. Co.* v. *Price County*, 64 *Wis.* 579, 26 *N. W. Rep.* 93.—QUOTED IN Wisconsin C. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94.

When lands granted in aid of a railroad have been fully earned, and the company is entitled to a patent therefor, they are taxable by the state although a patent has not yet issued. *Wisconsin C. R. Co.* v. *Comstock*, 71 *Wis.* 88, 36 *N. W. Rep.* 843.

V. SITUS OF PROPERTY FOR TAXATION.

125. In general.*—Under a provision of California Constitution all property is assessable for taxation in the county where situate, except "the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county," which are to be assessed by a state board. A statute required the state board to assess steamers crossing waters dividing railroads. *Held*, that the steamers are assessable in the counties, and therefore the statute is in violation of the Constitution; that an assessment by the state board which included the steamers is void as a whole. *California* v. *Central Pac. R. Co.*, 33 *Am. & Eng. R. Cas.* 451, 127 *U. S.* 1, 8 *Sup. Ct. Rep.* 1073.—FOLLOWING Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394; San Francisco *v.* Central Pac. R. Co., 63 Cal. 469.

The franchise of a company for the purposes of taxation is a unit; so is the roadway, and so the rolling stock; and the *situs* of the choses in action and personalty may be fixed by the legislature, and treated like the franchise. *Franklin County* v. *Nashville, C. & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 445, 12 *Lea* (*Tenn.*) 521.—APPROVING State Railroad Tax Cases, 92 U. S. 575.

126. The proper county, generally.*—The property, real and personal, of the North Missouri railroad was liable to assessment in the counties through which it passed, prior to the act of March 10, 1871. *State* v. *St. Louis, K. C. & N. R. Co.*, 8 *Mo. App.* 582, *app'x*.

Brown county was created in March, 1883, being attached to Holt county, under the general statute, for election, judicial, and revenue purposes. In June, 1883, the county commissioners of Holt county levied state, county, and school taxes upon the property in Brown county. In July, 1883, an election was held for county offices, and officers elected who qualified and entered upon the duties of their offices. In April, 1884, a company paid to the treasurer of Holt county the taxes levied by the county commissioners of that county on the railroad in Brown county. *Held*, that the taxes should have been paid to the treasurer of Brown county. *Fremont, E. & M. V. R. Co.* v. *Brown County*, 24 *Am. & Eng. R. Cas.* 616, 18 *Neb.* 516, 26 *N. W. Rep.* 194.—ADHERED TO IN Morse *v.* Hitchcock County, 19 Neb. 566.

127. Place of owner's residence.—Following the rule that the *situs* of personal property follows the person of the owner, rolling stock should be taxed where the corporation has its residence; but this rule of law may be modified by the legislature. It is competent for it to say that rolling stock for the purposes of taxation shall be distributed through the counties, cities, or towns through which the road passes, in proportion to its length in such localities. *State ex rel.* v. *Severance*, 55 *Mo.* 378.

Whether a railroad corporation is to be considered as resident, for purposes of taxation or otherwise, in each county through which its road runs, or only in the city where its principal business office is situ-

* State cannot tax property beyond its limits, see note, 13 AM. & ENG. R. CAS. 312.

* Distribution of tax on railroads in counties, see note, 13 AM. & ENG. R. CAS. 255.

ated, *quære*. *People ex rel.* v. *Pierce*, 31 *Barb.* (*N. Y.*) 138.

A corporation, like a natural person, may have a special or constructive residence, so as to be charged with taxes and duties, or to be subject to a special jurisdiction, but the legal residence of a corporation is not confined to the locality of its principal office of business; it extends to the territorial limits of the jurisdiction which granted its charter, which, for judicial purposes, defines its locality. *Glaize* v. *South Carolina R. Co.*, 1 *Strobh.* (*So. Car.*) 70.

A city council may tax the real estate in the city, and the rolling stock, of a company, the residence or domicil of the company being in the city. *Orange & A. R. Co.* v. *Alexandria City Council*, 17 *Gratt.* (*Va.*) 176.—APPLIED IN Baltimore & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 461, 22 Fed. Rep. 376. REVIEWED IN Montgomery City Council *v.* Shoemaker, 51 Ala. 114.

128. Principal place of business. —Personal property belonging to a railroad corporation, but not composing any part of its capital stock, is liable to be taxed where the corporation has its place of business. *Portland, S. & P. R. Co.* v. *Saco*, 60 *Me.* 196.

The term "for business," used in Mich. Act No. 24, Laws of 1867, entitled "An act to authorize the formation of corporations for the purpose of engaging in commerce or navigation," and which provides that the articles of association of corporations organized thereunder shall state "the city or town and county in this state where their general office for business is located," is used in its ordinary significance and refers to the business in which the corporation is engaged. *Detroit Transp. Co.* v. *Board of Assessors*, 91 *Mich.* 382, 51 *N. W. Rep.* 978.

The statement in the articles of association of such a corporation of the place where its office for business is located is not conclusive against the state for purposes of taxation. *Detroit Transp. Co.* v. *Board of Assessors*, 91 *Mich.* 382, 51 *N. W. Rep* 978. — DISTINGUISHING Western Transp. Co. *v.* Scheu, 19 N. Y. 408; Starch Factory *v.* Dolloway, 21 N. Y. 449; Pelton *v.* Northern Transp. Co., 37 Ohio St. 450. NOT FOLLOWING Union Steamboat Co. *v.* Buffalo, 82 N. Y. 351.

The personal property of a company should be taxed in the township or ward where the principal business of such company is transacted. *State* (*Jersey City & B. R. Co., Pros.*) v. *Haight*, 30 *N. J. L.* 447. —FOLLOWED IN State (Warren R. Co., Pros.) *v.* Person, 32 N. J. L. 134.

A tax, under New Jersey Act of 1863, was rightly assessed on the Warren railroad company in the town of Belvidere, where the office of its secretary was. *State* (*Warren R. Co., Pros.*) v. *Person*, 32 *N. J. L.* 134. —FOLLOWING State (Morris & E. R. Co., Pros.) *v.* Miller, 30 N. J. L. 369; State (Jersey City & B. R. Co., Pros.) *v.* Haight, 30 N. J. L. 447.

It appearing that the prosecutor had an office in the town of Belvidere, and there being no evidence that it had any other office in the state, the one in Belvidere must be deemed to be its principal office, until another more important one is shown, and the company is taxable there. *State* (*Warren R. Co., Pros.*) v. *Person*, 32 *N. J. L.* 566.

129. Real estate, generally.—Real estate of corporations, as of individuals, is taxable only in the towns where it is situated. *Cocheco Mfg. Co.* v. *Strafford*, 51 *N. H.* 455.

130. Track, roadbed, etc. — The roadbed of a railroad is real property for the purposes of county taxation, within the meaning of the Delaware tax laws. *Neary* v. *Philadelphia, W. & B. R. Co.*, (*Del.*) 9 *Atl. Rep.* 405.

Under Ill. Rev. St. ch. 86, § 8, county commissioners can only levy a tax on property in their county. A railroad track is regarded as real estate and must be taxed in the respective counties; and it is error to levy a tax on an undivided part of a railroad lying in different counties, and on its furniture. *Sangamon & M. R. Co.* v. *Morgan County*, 14 *Ill.* 163. —CRITICISED IN Louisville & N. R. Co. *v.* State, 8 Heisk. (Tenn.) 663. REVIEWED IN Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 159. REVIEWED AND APPROVED IN Dinsmore *v.* Racine & M. R. Co., 12 Wis. 649.

The rails, sleepers, bridges, etc., of a railroad corporation, together with their easement in the lands, within the located limits of the road, are real estate, and as such are liable to taxation in the towns where they are situated. *Providence & W. R. Co.* v. *Wright*, 2 *R. I.* 459.—REVIEWED IN Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 159.

131. Ties, poles, and posts. — Railroad ties, telegraph poles, and posts kept for sale are "merchants' goods, wares, and commodities," within the meaning of Wis.

Rev. St. §1040, as amended by ch. 258, Laws of 1882, and are taxable where they are kept for sale, though the owner resides in another county of the state. *Torrey* v. *Shawano County*, 79 *Wis.* 152, 48 *N. W. Rep.* 246.

Such ties, poles, and posts, purchased in piles upon the right of way of a company in one county, by merchants residing and doing business in another county, and kept where purchased until resold by the owners at their place of business, are taxable in the county where they are so kept. *Torrey* v. *Shawano County*, 79 *Wis.* 152, 48 *N. W. Rep.* 246.

132. Rolling stock.* — (1) *Federal decisions.*—Where rolling stock is regarded as personal property and taxable in the state where the company has its domicil, rolling stock used by it on a leased road in another state is not taxable there. *Baltimore & O. R. Co.* v. *Allen*, 17 *Am. & Eng. R. Cas.* 461, 22 *Fed. Rep.* 376.—APPLYING Orange & A. R. Co. *v.* Alexandria City Council, 17 Gratt. (Va.) 186; Philadelphia, W. & B. R. Co. *v.* Appeal Tax Court, 50 Md. 415; Appeal Tax Court *v.* Northern C. R. Co., 50 Md. 417; Hays *v.* Pacific Mail Steam-ship Co., 17 How. (U. S.) 596; St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.) 425; Pacific R. Co. *v.* Cass County, 53 Mo. 31.

Personal property, such as rolling stock, continuously used in a state acquires a *situs* in that state for purposes of taxation, and may, at the option of the state, be subjected to an equal property tax, and that notwithstanding it be used exclusively in interstate commerce. The state is sovereign, except as limited by the federal Constitution; and a sovereign may tax all the property within its jurisdiction, unless there be some federal law taking away this power. *Pullman Palace Car Co.* v. *Twombly*, 29 *Fed. Rep.* 658.—APPLYING Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5. CRITICISING Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4. FOLLOWING Erie R. Co. *v.* Pennsylvania, 15 Wall. 282. QUOTING Smith *v.* Turner, 7 How. (U. S.) 283; Morgan *v.* Parham, 16 Wall. 471; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 829.

The fact that a company owns a large number of sleeping cars which are used throughout the country, requiring a frequent change of cars from one road to another, and identically the same cars not being continuously in use in one state, does not prevent a continuous and constant use in that state, so that the cars acquire a *situs* there for the purpose of taxation. *Pullman Palace Car Co.* v. *Twombly*, 29 *Fed. Rep.* 658.

It is within the legislative power to establish a *situs* for personal property elsewhere than at the place where it is found; and when cars are run continuously through two states they may have a *situs* for taxation in each state, but only a fair proportion of the value can be taxed in each. *Pullman Palace Car Co.* v. *Twombly*, 29 *Fed. Rep.* 658.

(2) *State decisions.*—For purposes of taxation, the *situs* of rolling stock is where it is habitually used. *Atlantic & P. R. Co.* v. *Yavapai County*, (*Ariz.*) 39 *Am. & Eng. R. Cas.* 543, 21 *Pac. Rep.* 768.

If the specified property be constantly changing, the amount may be fixed by the average amount so used. *Atlantic & P. R. Co.* v. *Lesueur*, (*Ariz.*) 37 *Am. & Eng. R. Cas.* 368, 19 *Pac. Rep.* 157.—QUOTING Marye *v.* Baltimore & O. R. Co., 127 U. S. 117, 8 Sup. Ct. Rep. 1037.

A law which requires rolling stock to be taxed in the several counties in the proportion that the length of the road in that county bears to the whole length of the road does not apply where a company runs its trains through a county over the track of another company under a mere license, and without any real title or interest in the track. *Cook County* v. *Chicago, B. & Q. R. Co.*, 35 *Ill.* 460.

The *situs* of rolling stock, for the purposes of taxation, is the place where the property of the manager or agent would be taxed in contemplation of law, it being in his possession and subject to taxation as his own. *Dubuque* v. *Illinois C. R. Co.*, 39 *Iowa* 56.—DISTINGUISHING Baldwin *v.* Mississippi & M. R. Co., 5 Iowa 518; Richardson *v.* Burlington & M. R. Co., 8 Iowa 260.

The rolling stock of a company existing under the laws of another state, but operating in Iowa, is subject to taxation there, and it is the duty of the agent or manager of such company to list such rolling stock for municipal taxation. *Dubuque* v. *Illinois*

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* Where rolling stock of railroad is taxable, see note, 1 L. R. A. 246.

Rolling stock leased or conditionally sold by a car-trust company is taxable where the car trust has its place of business, see 24 AM. & ENG. R. CAS 626, *abstr.*

C. R. Co., 39 *Iowa* 56. — DISAPPROVING Davenport *v.* Mississippi & M. R. Co., 16 Iowa 349. FOLLOWING Dunlieth & D. Bridge Co. *v.* Dubuque, 32 Iowa 427.

Rolling stock, whether considered as personal property or movable fixtures, is taxable, according to the laws of Maryland, only at the "home office" of the company. *Appeal Tax Court* v. *Western Md. R. Co.*, 50 *Md.* 274.

Rolling stock, none of which is permanently located in the city in which is the principal office and place of business of the company, is not subject to valuation and assessment in such city, under Md Act of 1876, ch. 260, § 17. *Philadelphia, W. & B. R. Co.* v. *Appeal Tax Court*, 50 *Md.* 397. — APPLIED IN Baltimore & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 461, 22 Fed. Rep. 376.

The rolling stock of a company must be taxed in the city where it has its home office. *Appeal Tax Court* v. *Northern C. R. Co.*, 50 *Md.* 417. — FOLLOWING Philadelphia, W. & B. R. Co. *v.* Appeal Tax Court, 50 Md. 397.

A manufacturer lived in one ward of a city, and had a warehouse and stock in trade in another, and had a number of railway cars which he used in the transportation of his wares. The cars were taxed in both wards. *Held*, that they were properly taxable with the stock in trade as appurtenant to the business. *Comstock* v. *Grand Rapids*, 17 *Am. & Eng. R. Cas.* 457, 54 *Mich.* 641, 20 *N. W. Rep.* 623.

Personal property of a railroad which is capable of having an actual *situs* is taxable in the counties where situated; and other property, such as rolling stock, which has no actual *situs*, is taxable in the county where the corporation resides. *Pacific R. Co.* v. *Cass County*, 53 *Mo.* 17, 12 *Am. Ry. Rep.* 336. —APPLIED IN Baltimore & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 461, 22 Fed. Rep. 376.

A court may apportion the valuation of the rolling stock of a company for taxation among the counties through which the road runs, and assign to one county a share proportionate to the length of the road therein. *Richmond & D. R. Co.* v. *Alamance Com'rs*, 7 *Am. & Eng. R. Cas.* 339, 84 *N. Car.* 504.

133. Corporate bonds.—Investments in bonds and stocks of foreign railroad corporations by residents of Ohio may lawfully be taxed in Ohio; and the provisions of the act of April 5, 1859 (2 S. & C. 1438), imposing a tax on such bonds and stocks, are not in violation of the federal or state constitution. *Worthington* v. *Sebastian*, 25 *Ohio St.* 1.—QUOTING Cleveland, P. & A. R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 300.

Bonds of a corporation are taxable property and have their *situs* for purposes of taxation, in the absence of any special provision affecting them, at the place of the bondholder's residence, not at the place where the corporation is situated. This *situs* cannot be altered, by statute as to pre-existing bonds, without violating the obligation of a contract. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

Bondholders resident in the state are taxable for county or city purposes upon bonds of domestic corporations held and owned by them only at the place of the bondholder's residence, not at the place where the corporation is located, if that be different. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

134. Mortgages. — Mortgages before foreclosure are mere choses in action and are taxable at the place of the domicil of the owner. So *held*, as to a railroad mortgage on its depot grounds, road, and rolling stock. *Davenport* v. *Mississippi & M. R. Co.*, 12 *Iowa* 539.

Under Pa. Revenue Acts of 1879 and 1881 mortgages should be assessed and taxed in the respective counties. Railroad companies are not obliged to retain and pay the tax on the mortgages made by them. *Com.* v. *Lehigh Valley R. Co.*, 16 *Phila.* (*Pa.*) 584.—REVIEWING Delaware, L. & W. R. Co. *v.* Com., 66 Pa. St. 69.

135. Shares of stock. — Under Md. Act of 1874, ch. 483, shares of stock in a street railway company held by non-residents are taxable where the company has its principal office; and under Md. Act of 1878, ch. 178, it is the duty of the tax commissioner to include the shares of such stock in his return as taxable where the company has its principal office. *Mayor, etc., of Baltimore* v. *Baltimore City Pass. R. Co.*, 7 *Am. & Eng. R. Cas.* 362, 57 *Md.* 31.

For purposes of taxation the *situs* of shares of stock may be fixed by statute at the place where the corporation is located, even as against non-resident stockholders. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

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Under Vermont statute (R. L. § 283), the stock of non-resident stockholders of a corporation located in that state may be legally set in the list of the town in which the corporation has its principal place of business, and the corporation compelled by *mandamus* to pay the taxes assessed upon such stock; and a statute authorizing such taxation, and allowing the corporation to deduct the taxes thus paid from the dividends due to such stockholders, is constitutional. *St. Albans* v. *National Car Co.*, 57 *Vt.* 68.—QUOTING Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527.

136. School taxes. — It was not intended by Mo. Act of 1871, § 13 (Sess. Acts. 1871, p. 58), that a railroad should pay school taxes in any other districts than those through which it passes, or in which it holds property. And the average rate of taxation spoken of in that section, on which to base the railroad tax, is to be made up from those districts and none other. (Sess. Acts 1875, p. 129.) *Livingston County* v. *Hannibal & St. J. R. Co.*, 60 *Mo.* 516.—FOLLOWED IN Caldwell County *v.* Hannibal & St. J. R. Co., 60 Mo. 521. QUOTED IN State ex rel. *v.* Hannibal & St. J. R. Co., 101 Mo. 120. RECONCILED IN State ex rel. *v.* Hannibal & St. J. R. Co., 101 Mo. 136.

VI. EXEMPTIONS.

1. *General Principles.**

137. Legislative power to grant exemptions. — The legislature was not restrained by Ark. Const. of 1836 from granting immunity from taxation, and could bind the state by an act exempting a railroad corporation from taxes. *St. Louis, I. M. & S. R. Co.* v. *Berry*, 41 *Ark.* 509.

The legislature of the territory of Minnesota had power to exempt railroad lands from taxation until sold and conveyed by the company. And such a provision in a charter constitutes a contract which cannot be impaired by subsequent legislation. *Winona & St. P. R. Co.* v. *Deuel County*, 7 *Am. & Eng. R. Cas.* 348, 3 *Dak.* 1, 12 *N. W. Rep.* 561.—APPROVING St. Paul & P. R. Co. *v.* Parcher, 14 Minn. 297; State *v.* Winona & St. P. R. Co., 21 Minn. 315. QUOTING Humphrey *v.* Pegues, 16 Wall. (U. S.) 249.—REVIEWED IN Winona & St. P. R. Co. *v.* Watertown, 1 S. Dak. 46.

The subsequent division of the territory of Minnesota does not forfeit or affect contract rights of a railroad corporation as to taxation of lands situated in that part of the territory incorporated into the territory of Dakota. *Winona & St. P. R. Co.* v. *Deuel County*, 7 *Am. & Eng. R. Cas.* 348, 3 *Dak.* 1, 12 *N. W. Rep.* 561.

A law granting to a railroad immunity from taxation upon payment of a quarterly commutation, the state reserving the right to annul the agreement at any time, is within the scope of legislative power. *Neary* v. *Philadelphia, W. & B. R. Co.*, (*Del.*) 9 *Atl. Rep.* 405.

A revenue law which exempted the property of railroad and like corporations from taxation would be invalid under Iowa Constitution of 1857, art. 8, § 2. *Iowa Homestead Co.* v. *Webster County*, 21 *Iowa* 221.

It is well settled that a legislature has the constitutional right to grant to a corporation an exemption from taxation, and to provide for a specific tax and declare that no other tax shall ever be imposed. *State* v. *Dexter & N. R. Co.*, 69 *Me.* 44.

The power of the state to exempt from taxation for a limited period lands granted in aid of the construction of railroads is not an open question. *Chippewa County Sup'rs* v. *Auditor General*, 65 *Mich.* 408, 32 *N. W. Rep.* 651.—REVIEWING People *v.* Auditor General, 7 Mich. 84; People *v.* Auditor General, 9 Mich. 134.

The provisions of Miss. Const. art. 12, § 20, that "taxation shall be equal and uniform throughout the state" and that "all property shall be taxed in proportion to its value, to be ascertained as directed by law" do not require that all property shall be taxed, and do not deny to the legislature the right to exempt property. *Mississippi Mills* v. *Cook*, 56 *Miss.* 40.

Mo. Const. of 1865, art. 11, § 16, was not designed to withdraw existing exemptions from taxation. It was intended to operate prospectively only. *Scotland County* v. *Missouri, I. & N. R. Co.*, 65 *Mo.* 123.

The legislature of a state has power, when not restrained by a constitutional provision, to exempt the property of a railway from taxation. *State* (*Little, Pros.*) v. *Bowers*, (*N. J.*) 5 *Atl. Rep.* 178.

By N. Mex. Railroad Incorporation Act of Feb. 2, 1878, § 3, it is provided that, to aid the construction of railroads, all the property of every kind and description of every

* Exemption of railroads from taxation, see notes, 24 AM. & ENG. R. CAS. 505; 1 *Id.* 569

corporation formed under that act shall be exempt from taxation until the expiration of six years from the completion of its road. By act of Feb. 12, 1878, this exemption was extended to all corporations organized under the laws of the territory for the purpose of constructing railroads. By act of Feb. 15, 1878, the words "six years from the completion of its road" are defined, and the exemption is limited to a period of twelve years from the commencement of construction. *Held*, that the granting of this exemption from taxation to corporations not organized under the act of Feb. 2, 1878, is not in contravention of the Act of Congress of March 2, 1867, § 1, forbidding the legislative assemblies of the territories from granting private charters or special privileges. *Santa Fe County Com'rs* v. *New Mexico & S. P. R. Co.*, 3 *N. Mex.* 116, 2 *Pac. Rep.* 376.

The offer of this exemption to railroad companies not organized under the act of Feb. 2, 1878, is not a mere gratuity and without consideration, but upon its acceptance, by complying with its conditions by constructing and operating a railroad, it becomes a binding contract from which the territory cannot recede. *Santa Fe County Com'rs* v. *New Mexico & S. P. R. Co.*, 3 *N. Mex.* 116, 2 *Pac. Rep.* 376.—DISTINGUISHING West Wis. R. Co. *v.* Trempealeau County Sup'rs, 93 U. S. 595.

The legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting, the power. The power to grant charters of incorporation with exemptions from taxation that are binding upon the state, so that the charter, after acceptance, becomes a contract and irrepealable, falls properly under the head of legislative power. *Knoxville & O. R. Co.* v. *Hicks*, 9 *Baxt.* (*Tenn.*) 442.

The provision in Tenn. Const. requiring all property to be taxed according to its value, it seems, forbids the exemption of any from taxation. *Louisville & N. R. Co.* v. *State*, 8 *Heisk.* (*Tenn.*) 663, 19 *Am. Ry. Rep.* 107.

The legislature has not unlimited power, under Tenn. Const., to authorize the county courts to exempt or release railway property from taxation for county purposes. *Nashville & K. R. Co.* v. *Wilson County*, 48 *Am. & Eng. R. Cas.* 648, 89 *Tenn.* 597, 15 *S. W. Rep.* 446.

The power of exemption from taxation, as well as the power of taxation, is one of the essential elements of sovereignty. *Com.* v. *Richmond & P. R. Co.*, 24 *Am. & Eng. R. Cas.* 482, 81 *Va.* 355.—QUOTING Richmond *v.* Richmond & D. R. Co., 21 Gratt. (Va.) 604.

138. Power of congress to exempt railways from state taxation.—As to the right of the states to tax corporations created by the general government, or instrumentalities employed directly by the government, see *M'Culloch* v. *Maryland*, 4 *Wheat.* (*U. S.*) 316. *Weston* v. *Charleston City Council*, 2 *Pet.* (*U. S.*) 467. *Banks* v. *Mayor, etc., of N. Y.*, 7 *Wall.* (*U. S.*) 24. *Bank* v. *New York County Sup'rs*, 7 *Wall.* 28. *Van Allen* v. *Assessors*, 3 *Wall.* 573. *Bradley* v. *People*, 4 *Wall.* 459. *People* v. *Commissioners*, 4 *Wall.* 244. *National Bank* v. *Com.*, 9 *Wall.* 353. *Lionberger* v. *Rouse*, 9 *Wall.* 468.

Congress may, in the exercise of powers incidental to the express power granted, make or authorize contracts with individuals or corporations for services to the government; may grant aid by money or land in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution, and may exempt the agencies employed in such services from state taxation which will prevent or impair the performance of them. *Thomson* v. *Union Pac. R. Co.*, 9 *Wall.* (*U. S.*) 579.

But the above rule does not apply to one of the Pacific railroads which derives its corporate existence from state law, and exercises its franchise thereunder, and holds its property within state jurisdiction and under state protection, merely because the general government has granted aid to it, and reserved the right to use the road for certain governmental purposes. *Thomson* v. *Union Pac. R. Co.*, 9 *Wall.* (*U. S.*) 579.—DISTINGUISHED IN California *v.* Central Pac. R. Co., 33 Am. & Eng. R. Cas. 451, 127 U. S. 1; Central Pac. R. Co. *v.* Board of Equalization, 13 Am. & Eng. R. Cas. 256, 60 Cal. 35; San Benito County *v.* Southern Pac. R. Co., 37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827. RECONCILED IN People *v.* Central Pac. R. Co., 43 Cal. 398.

A railroad corporation, organized under the laws of a state, cannot claim an exemption of its property, lying within the limits of a state, from state taxation because the corporation thus created has been subse-

quently adopted by the federal government, and is employed in the service of the general government, in the carriage of mails, munitions of war, etc. *People* v. *Central Pac. R. Co.*, 43 *Cal.* 398.

139. Power of county court to allow exemption.—No statute has, in terms or by implication, authorized county courts to exempt or release, upon any pretext or consideration whatever, the property of a company, consisting of its roadbed, rolling stock, etc., from its just proportion of taxation for county purposes. *Nashville & K. R. Co.* v. *Wilson County*, 48 *Am. & Eng. R. Cas.* 648, 89 *Tenn.* 597, 15 *S. W. Rep.* 446.

Such release is none the less *ultra vires* and void because it was offered as an inducement for the location and building of a railroad, which was accordingly constructed by non-residents, resulting in great benefits, in a general way, to the county. *Nashville & K. R. Co.* v. *Wilson County*, 48 *Am. & Eng. R. Cas.* 648, 89 *Tenn.* 597, 15 *S. W. Rep.* 446.

140. Charter exemption an inviolable contract.*—A state granted a supplementary charter in which a specific rate of taxation was prescribed, which was to be in lieu and satisfaction of all other taxation. It was specially provided that the act was not to come into effect or be binding upon the company until it should execute an acceptance under seal and file the same in the office of the secretary of state. *Held*, that the whole proceeding showed an intention to make a formal contract, and to exclude the right of the state to revoke it thereafter. *New Jersey* v. *Yard*, 95 *U. S.* 104.—DISTINGUISHED IN Little *v.* Bowers, 17 Am. & Eng. R. Cas. 405, 46 N. J. L. 300.—NOT FOLLOWED IN State Board of Assessors *v.* Paterson & R. R. Co., 33 Am. & Eng. R. Cas. 468, 50 N. J. L. 446.

The perpetual exemption from taxation, by the provisions of its charter, of the capital stock of a railroad corporation covers the individual interest therein of the stockholders; and the subsequent law imposing a tax on the shares owned by them impairs the obligation of the contract between them and the state, and is unconstitutional and void. *Tennessee* v. *Whitworth*, 17 *Am. & Eng. R. Cas.* 411, 22 *Fed. Rep.* 75, 117 *U. S.* 139, 6 *Sup. Ct. Rep.* 643.—FOLLOWED IN Tennessee *v.* Whitworth, 17 Am. & Eng. R. Cas. 417, 22 Fed. Rep. 81, 117 U. S. 139, 6 Sup. Ct. Rep. 649.

An exemption from taxation in a charter amounts to a contract, and is protected by that clause of the federal Constitution which forbids state laws impairing the obligation of contracts. *Memphis & L. R. R. Co.* v. *Berry*, 41 *Ark.* 436.—FOLLOWING Oliver *v.* Memphis & L. R. R. Co., 30 Ark. 129. QUOTING Thorpe *v.* Rutland & B. R. Co., 27 Vt. 143; Minot *v.* Philadelphia, W. & B. R. Co., 18 Wall. (U. S.) 225; Ohio L. I. & T. Co. *v.* Debolt, 16 How. (U. S.) 435; Hoge *v.* Richmond & D. R. Co., 99 U. S. 355; Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 666. REVIEWING Atlantic & G. R. Co. *v.* Allen, 15 Fla. 637.

The charter of a company providing that "said railroad and its appurtenances, and all property therewith connected, shall not be taxed higher than one half of one per cent. upon its annual net income" is a contract between the state and the company, the obligation of which cannot be impaired by subsequent action of the state. Upon the amendment of such charter authorizing the company to construct a branch road, the right of exemption granted in the original charter attaches to the branch road. *Atlantic & G. R. Co.* v. *Allen*, 15 *Fla.* 637.—FOLLOWING Wilmington & R. R. Co. *v.* Reid, 13 Wall. (U. S.) 264.—REVIEWED IN Memphis & L. R. R. Co. *v.* Berry, 41 Ark. 436.

A railroad charter, after specifying what taxes the company should be required to pay, added that no other tax should ever be levied or assessed upon the corporation or any of its privileges or franchises. *Held*, that this created an express limitation upon the power of the legislature to tax, and secured to the company a perpetual exemption from any taxation other than that prescribed. *State* v. *Dexter & N. R. Co.*, 69 *Me.* 44.—EXPLAINING State *v.* Maine C. R. Co., 66 Me. 488.

An exemption from taxation contained in the charter of an corporation organized under it is irrepealable and inviolable. *Mobile & O. R. Co.* v. *Moseley*, 52 *Miss.* 127.

A grant of lands of the state to a corporation by an act of the legislature, for an actual consideration, is a conveyance, and the grantee takes, not as the recipient of corporate franchises, but as owner by the

* Charter contracts exempting from taxation, see note, 17 AM. & ENG. R. CAS. 398.

same title as would be acquired by an individual grantee, and with all the rights and privileges annexed. An exemption from general taxation contained in such legislative grant is a right which gives value to the estate, and is part of the thing granted, and cannot be modified or repealed without the consent of the grantee. *State* (*United R. & C. Co., Pros.*) v. *Com'rs R. Taxation*, 37 *N. J. L.* 240.

The charter of defendant company exempts its property from any public charge or tax whatever, and a franchise is property. *Worth* v. *Petersburg R. Co.*, 89 *N. Car.* 301.—FOLLOWED IN Worth *v.* Seaboard & R. R. Co., 89 N. Car. 310.

A charter which declares that "the property of a railroad company, and the shares therein, shall be exempt from any public charge or tax whatever" exempts said company from all taxation, whether upon its gross receipts or its capital stock. Such charter is a contract, and is protected by the Federal Constitution. *Worth* v. *Wilmington & W. R. Co.*, 13 *Am. & Eng. R. Cas.* 286, 89 *N. Car.* 291, 45 *Am. Rep.* 679. —QUOTING Greenwood *v.* Union Freight R. Co., 105 U. S. 13.

A charter exemption from taxation, granted and accepted prior to the adoption of Tenn. Const. of 1870, constitutes an inviolable contract binding upon the state, which cannot be impaired by subsequent legislation. *Memphis* v. *Union & P. Bank*, 91 *Tenn.* 546, 19 *S. W. Rep.* 758.

It is settled law that an exemption from taxation granted in the charter of a company constitutes a contract which is protected by the federal Constitution and is irrepealable, unless the power of repeal has been reserved or subsequently acquired. *Com.* v. *Richmond & P. R. Co.*, 24 *Am. & Eng. R. Cas.* 482, 81 *Va.* 355.

141. Amendment and repeal, generally.—An exemption from taxation contained in a charter cannot be repealed without the consent of the corporation; but it might be otherwise if the exemption were not contained in the charter. *St. Louis, I. M. & S. R. Co.* v. *Loftin*, 30 *Ark.* 693.

A railroad charter provided that its stock should be exempt from all taxation, except such as was then imposed upon bank stock. Subsequently the company accepted an amendment to its charter providing that its stock should at all times be subject to such taxes as the legislature might levy. *Held*, that the amendment repealed the former provision as to taxation, and the property was taxable at the will of the legislature. *Macon & A. R. Co.* v. *Goldsmith*, 62 *Ga.* 463.

An act changing the name of a company, and continuing to it under the new name all its rights, privileges, etc., under its former name, did not revive provisions of the charter granting exemption from taxation which had been repealed by prior amendments. If otherwise, the reviving act, being passed after the adoption of the Ga. Code, would not interpose a constitutional barrier so as to prevent the legislature from taxing the company like a natural person. *Macon & A. R. Co.* v. *Goldsmith*, 62 *Ga.* 463.

The amendment of a town charter authorizing it to levy a tax upon the property of railroad companies in the limits of the town did not operate as a constructive repeal of the charter of a company passed since the statute of 1856, by which the property of the company was exempted from taxation until the road was completed. *Elizabethtown & P. R. Co.* v. *Elizabethtown*, 12 *Bush* (*Ky.*) 233.—FOLLOWED IN Henderson Bridge Co. *v.* Henderson, 90 Ky. 498.

The charter of a company exempting its stock from taxation is not repealed by a constitutional provision adopted after acceptance of the charter, declaring that "no property shall be exempt from taxation except," etc. *Scotland County* v. *Missouri, I. & N. R. Co.*, 65 *Mo.* 123.

A provision of a charter that stock of a company shall be exempt from county taxes is not affected by a subsequent statute granting lands to the corporation and accepted by it which provides that the company shall each year "pay into the treasury of the state a sum of money equal to the amount of state tax on other real and personal property of a like value for that year, upon the actual value of the roadbed * * * and other property of said company." *State ex rel.* v. *Hannibal & St. J. R. Co.*, (*Mo.*) 39 *Am. & Eng. R. Cas.* 547, 11 *S. W. Rep.* 746.

Railroads, like other real estate and chattels, are not exempted from taxation by their owner's indebtedness, or by the manner in which that indebtedness is secured. *Boston, C. & M. R. Co.* v. *State*, 62 *N. H.* 648.

The amended Constitution of 1875 abrogates all prior special or local laws exempting property from taxation, unless they

constitute irrepealable contracts. *State* v. *Clark*, 53 *N. J. L.* 332, 21 *Atl. Rep.* 302.

142. Effect of reserved power to amend or repeal in charter or general law.*—A company was incorporated in South Carolina in 1851, with the usual powers of railway companies. The general statute of 1841 was then in force, providing that all charters, or amendments or modifications thereof, should be subject to "amendment, alteration, or repeal," unless expressly provided otherwise. In 1855 the charter was amended so as to grant a total exemption from taxation, but there was nothing to except it from the operation of the statute of 1841. In 1868 the state Constitution was amended so as to provide for taxing corporations generally. Under a statute passed in pursuance of this Constitution, the company's property was taxed. *Held*, that the tax was legal and constitutional. The statute of 1841 reserved to the state the power to alter a charter as originally granted, or as amended, or entirely to revoke it. *Tomlinson* v. *Jessup*, 15 *Wall.* (*U. S.*) 454, 3 *Am. Ry. Rep.* 201.

The object of the above reservation was to prevent a grant of corporate rights and privileges in a form which would preclude legislative interference with their exercise, if the public interests should at any time require such interference, and to preserve to the state control over its contract with the corporators, which would otherwise be irrepealable and protected from any measures affecting its obligation. *Tomlinson* v. *Jessup*, 15 *Wall.* (*U. S.*) 454, 3 *Am. Ry. Rep.* 201.

Immunity from taxation constituting a part of the contract between the government and corporators or stockholders was, by the reservation of power contained in the law of 1841, subject to be revoked equally with any other provision of the charter, whenever the legislature might deem it expedient for the public interest that the revocation should be made. The revocation affected the entire relation between the state and the corporation, and placed under legislative control all rights, privileges, and immunities derived by its charter directly from the state. *Tomlinson* v. *Jessup*, 15 *Wall.* (*U. S.*) 454, 3 *Am. Ry. Rep.* 201. — FOLLOWED IN Greenwood *v.* Union Freight R. Co., 105 U. S. 13. [illegible] IFIED IN Hoge *v.* Richmond & D. R. Co., 99 U. S. 348. REVIEWED IN Hewitt *v.* New York & O. M. R. Co., 12 Blatchf. (U. S.) 452.

143. Charter amendable where the exemption is a mere gratuity.—An act of the legislature exempting property of a railroad from taxation is not a "contract" to exempt it, unless there be a consideration for the act. An agreement where there is no consideration is a nude pact—the promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure; and this rule of law applies to the agreements of states made without consideration as well as to those of persons. *Tucker* v. *Ferguson*, 22 *W* (*U. S.*) 527.

Where lands were granted to a sta aid in building a railroad, and in the conveyance by the state to the road it was stipulated that the lands should remain exempt from taxation for a term of years, unless sooner sold, and it appeared that such exemption was a mere gratuity, it was competent for the state to amend or repeal the law before the expiration of the time. *West Wis. R. Co.* v. *Trempealeau County Sup'rs*, 93 *U. S.* 595.—DISTINGUISHED IN Santa Fé County Com'rs *v.* New Mexico & S. P. R. Co., 3 N. Mex. 116. QUOTED IN Lee *v.* Sturges, 46 Ohio St. 153.

Where legislation limiting taxation is of such a character that there is no positive declaration of a permanent and irrevocable exemption or commutation, and nothing is exacted from the corporation which must operate as a consideration therefor, it is a gratuity, not a contract. *State Board of Assessors* v. *Paterson & R. R. Co.*, 33 *Am. & Eng. R. Cas.* 468, 50 *N. J. L.* 446, 14 *Atl. Rep.* 610.

144. Construction of exemptions, generally.—A provision in a charter exempting a road and equipments from taxes until the income should amount to a certain per cent. per annum on the cost of construction and equipments implies an accounting by the company to the state, showing the cost of construction and equipments and the annual receipts and expenditures of the road, as a means of ascertaining when the right to tax it accrues. *St. Louis, I. M. & S. R. Co.* v. *Berry*, 41 *Ark.* 509.—QUOTING Maine C. R. Co. *v.* Maine, 96 U. S. 499.

The exception in Ill. Revenue Act of 1872, § 41, does not authorize the exclusion of

* Charter subject to reserve power of amendment; taxation may be imposed notwithstanding exemption clause, see note, 17 AM. & ENG. R. CAS. 410.

town and city lots from the estimate of right of way. Its only purpose is to release the company from giving the description by the United States surveys of the property occupied as right of way, when the right of way is located over town and city lots. *Chicago & N. W. R. Co.* v. *Miller*, 72 *Ill.* 144.

A charter exemption of the property of a company from taxation until the road is completed exempts it from all taxation imposed by authority of the state government, whether for general or local purposes. *Elizabethtown & P. R. Co.* v. *Elizabethtown*, 12 *Bush* (*Ky.*) 233.

A charter exempted the property of the company from taxation for ten years after the completion of the road. The road was never completed. *Held*, that there was no exemption. *Baton Rouge, G. T. & O. R. Co.* v. *Kirkland*, 33 *La. Ann.* 622.—FOLLOWED IN Dennis *v.* Vicksburg, S. & P. R. Co., 34 La. Ann. 954.

Under a charter declaring that the property of the company shall be exempt from taxation for ten years after the completion of the road, the corporation cannot claim immunity from the beginning of its existence up to the completion of the road. *Dennis* v. *Vicksburg, S. & P. R. Co.*, 34 *La. Ann.* 954.—FOLLOWING Baton Rouge, G. T. & O. R. Co. *v.* Kirkland, 33 La. Ann. 622.

A statute provided that shares of railroad stock should be exempt from taxation, "except that portion of the permanent and fixed works of the company within the state, * * * and that any tax which shall hereafter be levied upon such section shall not exceed the rate of any general tax which may at the same time be imposed upon similar real and personal estate within this state, for state purposes." *Held*, that no tax could be imposed which should exceed the rate of general taxation; but that the permanent and fixed works of the company were subject to taxation for both state and county purposes. *Philadelphia, W. & B. R. Co.* v. *Bayless*, 2 *Gill* (*Md.*) 355.—APPROVED IN Memphis & C. R. Co. *v.* Gaines, 3 Tenn. Ch. 604. REVIEWED IN State *v.* Philadelphia, W. & B. R. Co., 45 Md. 361.

Minn. Gen. St. 1878, ch. 11, §§ 128, 129, control in respect to the taxability of the property of a railway corporation which has accepted the provisions of that act. *Ramsey County* v. *Chicago, M. & St. P. R. Co.*, 33 *Minn.* 537, 24 *N. W. Rep.* 313.

Where an exemption from taxation is claimed by a corporation, of property which clearly falls within the descriptive words of the act which imposes the tax, the exemption must be a plain one. But when it is doubtful whether the property in question falls within the description used by the law, it is proper to resort to other statutes relating to the subject in order to ascertain the intention of the legislature. *Hannibal & St. J. R. Co.* v. *Shacklett*, 30 *Mo.* 550.

Mo. Act of 1868 to aid the building of branch railroads (Laws 1868, p. 90) did not attempt to exempt such roads from taxation. (Const. 1865, art. 11, § 16.) *State ex rel.* v. *Chicago, B. & K. C. R. Co.*, 89 *Mo.* 523, 14 *S. W. Rep.* 522.

New Jersey Act of April 2, 1873, § 10 (P. L. 1873, p. 112), providing that whereas certain railroad corporations, then owning and occupying railroads in the state, claimed exemption from all taxation beyond that which was provided for by their charters or by special laws, therefore any such corporation might surrender all claims to exemption from taxation, and accept the provisions of that act in lieu thereof, does not apply to a railroad having a repealable charter. *State Board of Assessors* v. *Paterson & R. R. Co.*, 33 *Am. & Eng. R. Cas.* 468, 50 *N. J. L.* 446, 14 *Atl. Rep.* 610.—FOLLOWING State (Morris & E. R. Co., Pros.) *v.* Com'rs of R. Taxation, 38 N. J. L. 472. NOT FOLLOWING New Jersey *v.* Yard, 95 U. S. 104.

N. Car. Revenue Law of 1875, ch. 184, 185, does not authorize the collection of a tax against a company whose charter exempts its property from taxation and where the reserved power to alter such charter has not been exercised by the legislature. *Petersburg R. Co.* v. *Northampton County Com'rs*, 81 *N. Car.* 487.

N. Dak. Laws of 1883, ch. 99, known as the "Gross Earnings Law," did not exempt from taxation the property of a company not embraced in any land grant and not used for railroad purposes. *Fargo & S. W. R. Co.* v. *Brewer*, 3 *N. Dak.* 34, 53 *N. W. Rep.* 177.

Where a corporation, under an "omnibus" charter, had the right, among other things, to build and operate railroads, and also to build and employ steamships in domestic and foreign trade, and, having built a short railroad, it sold the same to another corporation, and thereafter its principal business was operating a line of steamships to a

foreign port, said company was held not to be a "railroad company" within the exception in an act which imposed a bonus upon capital stock, or an increase thereof, of all corporations except "railroad * * * companies." *International Nav. Co.* v. *Com.*, 104 *Pa. St.* 38.

Railroad companies are not within Tenn. Act of 1873, ch. 118, § 8, exempting any bank, banking association, or any other joint-stock company from taxation, and laying the tax on the stockholders. *Louisville & N. R. Co.* v. *State*, 8 *Heisk.* (*Tenn.*) 663, 19 *Am. Ry. Rep.* 107.

Va. Act of March 18, 1856, § 25, imposing taxes for the support of the state government, does not exempt railroad companies, complying with said section, from taxation by a city government. *Orange & A. R. Co.* v. *Alexandria City Council*, 17 *Gratt.* (*Va.*) 176.

145. Grant of exemption must be in clear and explicit terms.*—(1) *Federal decisions.*—A state legislature may grant to a railroad exemption from taxation; and such a grant may be in the nature of a contract, and inviolable. But such grant must be expressed in clear and unmistakable language, or it will not be enforced. It cannot be aided by presumption or inference. *Minot* v. *Philadelphia, W. & B. R. Co.*, 18 *Wall.* (*U. S.*) 206, 7 *Am. Ry. Rep.* 312; *affirming* 7 *Phila.* (*Pa.*) 555, 2 *Abb.* (*U. S.*) 323.—QUOTED IN Memphis & L. R. R. Co. *v.* Berry, 41 Ark. 436; Wilmington & W. R. Co. *v.* Alsbrook, 110 N. Car. 137.

A contract by a state to relinquish its right to tax property can only be made by words which clearly and unequivocally show such intention. *North Mo. R. Co.* v. *Maguire*, 20 *Wall.* (*U. S.*) 46, 6 *Am. Ry. Rep.* 445.

Unless exempted, in terms which amount to a contract not to tax, the property, privileges, and franchises of a corporation are as much the legitimate subjects of taxation as any other property of the citizens which is within the sovereign power of the state. In respect to such corporations, the taxing power of the state is never presumed to be relinquished; it exists unless the intention to relinquish it is declared in clear and unambiguous terms. *North Mo. R. Co.* v. *Maguire* 20 *Wall.* (*U. S.*) 46, 6 *Am. Ry. Rep.* 445. *Bailey* v. *Magwire*, 22 *Wall.* (*U. S.*) 215, 11 *Am. Ry. Rep.* 470.

No presumption can be made in favor of an exemption from taxation; and if there is a reasonable doubt it must be solved in favor of the state. The mere fact that an amendment to a railroad charter makes special provision for taxes to the state, but says nothing about other taxes, is not in itself enough to relieve the corporation from the payment of all taxes except to the state. Mere silence as to other taxes cannot be construed as a waiver of the right to impose them. *Bailey* v. *Magwire*, 22 *Wall.* (*U. S.*) 215, 11 *Am. Ry. Rep.* 470.

And a provision that the taxes due the state shall be assessed in a particular manner, as upon a report or statement under oath made by the president of the company to the state auditor, does not amount to a contract that the state will never pass a law to assess and tax the property in a different way. *Bailey* v. *Magwire*, 22 *Wall.* (*U. S.*) 215, 11 *Am. Ry. Rep.* 470.

(2) *State decisions.*—Exemption from taxation is the exception to the rule of taxation, and can be sustained only from the strictest construction. *Atlantic & P. R. Co.* v. *Lesueur*, (*Ariz.*) 37 *Am. & Eng. R. Cas.* 368, 19 *Pac. Rep.* 157.

Whenever, on any fair construction of the legislation under which an exemption from taxation is claimed, there is a reasonable doubt whether the claim is made out, that doubt must be solved in favor of the sovereign. In other words, the language used must be of such a character as when fairly interpreted leaves no room for controversy. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217.

Exemption from taxation must be granted in terms too plain to be mistaken. Such exemption is a personal privilege, and cannot be assigned except by legislative authority. *State ex rel.* v. *Kookuk & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 694, 99 *Mo.* 30, 6 *L. R. A.* 222, 12 *S. W. Rep.* 290.—APPROVING Chicago, B. & K. C. R. Co. *v.* Guffey, 120 U. S. 568; St. Louis *v.* Boatmen's I. & T. Co., 47 Mo. 150. REVIEWING Scotland County *v.* Missouri, I. & N. R. Co. 65 Mo. 123.

The grant of a perpetual exemption from taxation has indeed been held invalid by courts of the highest respectability. *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N.*

* Exemption from taxation to be strictly construed, see note, 1 L. R. A. 244.

Car. 137, 14 *S. E. Rep.* 632.—QUOTING Washington University *v.* Rouse, 8 Wall. U. S.) 441; Minot *v.* Philadelphia, W. & B. R. Co., 18 Wall. 206.—See also *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 437, 14 *S. E. Rep.* 1007.

The power of taxation is an essential attribute of sovereignty, reaching to all property and persons belonging to a body politic. If the legislature grant an exemption from taxation to some corporations, nothing should be left to implication, but the extent of the intended relief must appear, and be clearly expressed in the legislative act. *State* (*New Jersey R. & T. Co., Pros.*) v. *Collectors*, 26 *N. J. L.* 519; *affirming* 25 *N. J. L.* 315.

Exemptions from taxation are regarded as in derogation of sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*. *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 137, 14 *S. E. Rep.* 652.—QUOTING Providence Bank *v.* Billings, 4 Pet. (U. S.) 514; Vicksburg, S. & P. R. Co. *v.* Dennis, 116 U. S. 668; Minot *v.* Philadelphia, W. & B. R. Co., 18 Wall. (U. S.) 206.—See also *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 437, 14 *S. E. Rep.* 1007.

A surrender of a taxing power by the legislature is not to be presumed, unless the intention is evinced by clear and explicit terms. Where, however, the legislature has exercised the power by taxing all the property of a corporation in a specified manner, and has intimated no design to subject it to further burdens, its property will be exempt from taxes imposed by general laws. *New York & E. R. Co.* v. *Sabin*, 26 *Pa. St.* 242.—DISTINGUISHED IN Erie R. Co. *v.* Pennsylvania, 21 Wall. (U. S.) 492. FOLLOWED IN New Orleans *v.* Orleans R. Co., 42 La. Ann. 4.

Exemptions from taxation are contrary to public policy, and can only be allowed when granted in clear and unmistakable terms. The benefit of doubts must be given the state. *Nashville, C. & St. L. R. Co.* v. *Hodges*, 7 *Lea* (*Tenn.*) 663. *Wilson* v. *Gaines*, 9 *Baxt.* (*Tenn.*) 546, 16 *Am. Ry. Rep.* 316. *Memphis* v. *Union & P. Bank*, 91 *Tenn.* 546, 19 *S. W. Rep.* 758.

The power of exemption, as well as the power of taxation, is an essential element of sovereignty, and can only be surrendered or diminished in plain and explicit terms. *Richmond* v. *Richmond & D. R. Co.*, 21 *Gratt.* (*Va.*) 604. *Baltimore & O. R. Co.* v. *Marshall County Sup'rs*, 3 *W. Va.* 319.

146. Exemption never presumed or implied.—(1) *Federal decisions.*—All exemptions from taxation are to be construed strictly. Exemptions are never granted by implication. *Providence Bank* v. *Billings*, 4 *Pet.* (*U. S.*) 514.—QUOTED IN Wilmington & W. R. Co. *v.* Alsbrook, 110 N. Car. 137; Richmond, F. & P. R. Co. *v.* Richmond, 26 Gratt. (Va.) 83.

There is no reason why the property of a corporation should be presumed to be exempted from its share of necessary public burdens, there being no express exemption. *Philadelphia & W. R. Co.* v. *Maryland*, 10 *How.* (*U. S.*) 376.

The taxing power of a state should never be presumed to be relinquished, unless the intention is declared in clear and unambiguous terms. *Philadelphia & W. R. Co.* v. *Maryland*, 10 *How.* (*U. S.*) 376.

A claim of exemption from county and municipal taxation cannot be supported, any more than a claim from state taxation, except upon language so strong as that, fairly interpreted, no room is left for controversy. No presumption can be made in favor of the exemption; and if there be reasonable doubt, the doubt is to be solved in favor of the state. *Bailey* v. *Magwire*, 22 *Wall.* (*U. S.*) 215, 11 *Am. Ry. Rep.* 470. —QUOTED IN Baltimore & O. R. Co. *v.* District of Columbia, 3 MacArth. (D. C.) 122.—*Hoge* v. *Richmond & D. R. Co.*, 99 *U. S.* 348.

A corporation cannot claim an exemption from taxation unless it be clearly so stated in its charter. Exemptions are never granted by implication. *Memphis Gas Light Co.* v. *Shelby County Tax. Dist.*, 109 *U. S.* 398, 3 *Sup. Ct. Rep.* 205.—FOLLOWED IN New Orleans City & L. R. Co. *v.* New Orleans, 143 U. S. 192, 12 Sup. Ct. Rep. 406.

The omission of taxing officers to assess certain railroad property cannot control the duty imposed by law upon their successors, or the power of the legislature to tax the property, or the legal construction of a statute under which its exemption from taxation is claimed. *Vicksburg, S. & P. R. Co.* v. *Dennis*, 24 *Am. & Eng. R. Cas.* 500, 116 *U. S.* 665, 6 *Sup. Ct. Rep.* 625.

An exemption from taxation cannot be implied from the apparent spirit or general

purpose of a statute. It must be certain and explicit; every well-founded doubt must be resolved in favor of the state. But this rule does not call for a strained construction adverse to the real intention of the legislature. *Louisville & N. R. Co.* v. *Gaines*, 2 *Flipp.* (*U. S.*) 621, 3 *Fed. Rep.* 266.

(2) *State decisions.*—An intention to surrender the power of taxation will not be imputed to the state unless the language leaves no alternative. *Kentucky C. R. Co.* v. *Bourbon County*, 82 *Ky.* 497.

Minn. Special Laws of 1870, ch. 65, § 1, do not exempt the interest of defendant company in a certain railroad from taxation, so as to relieve it from liability to pay the three-per-cent. tax on its gross earnings received by its operating the road. To exempt a company the language of the statute must clearly confer an exemption. *State* v. *Northern Pac. R. Co.*, 17 *Am. & Eng. R. Cas.* 475, 32 *Minn.* 294, 20 *N. W. Rep.* 234.

Where an act does not pretend to grant an exemption from taxation in express terms, the courts will not presume that the state intended to abandon or surrender the right of taxation. The abandonment of such right can never be presumed; it must appear in clear and unequivocal terms. *North Mo. R. Co.* v. *Maguire*, 49 *Mo.* 490.

The presumption is against a state binding itself by an irrevocable charter not to tax a railroad. *State Board of Assessors* v. *Paterson & R. R. Co.*, 33 *Am. & Eng. R. Cas.* 468, 50 *N. J. L.* 446, 14 *Atl. Rep.* 610.

147. Exemption from taxes, when exemption from local assessments.—An exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay special assessments, imposed to pay the cost of local improvements, and charged upon contiguous property upon the theory that it is benefited thereby. *Illinois C. R. Co.* v. *Decatur*, 54 *Am. & Eng. R. Cas.* 282, 147 *U. S.* 190, 13 *Sup. Ct. Rep.* 293; *affirming* 37 *Am. & Eng. R. Cas.* 395, 126 *Ill.* 92, 18 *N. E. Rep.* 315.

Under the charter of a company which exempts its property (other than its land grant) from all assessments and taxes whatever, by the territory or future state, or by any county, city, town, village, or other municipal authority in the territory or state, the property held by it for the purposes of its railroad is not subject to assessments for local improvements. *First Div. St. P. & P. R. Co.* v. *St. Paul*, 21 *Minn.* 526, 18 *Am. Ry. Rep.* 435.—REVIEWED IN St. Paul *v.* St. Paul & S. C. R. Co., 23 Minn. 469.

The charter of the prosecutor provides for the payment by the company of a state tax, and contains a proviso that "no other tax or impost shall be levied or assessed upon said company." *Held:* (1) that the word "assessed" in the proviso cannot have the force and meaning of describing special levies for public improvements, but is used merely to describe the act of levying the tax or impost; (2) that the company is not, by the proviso, exempt from assessments for local improvements. *State* (*New Jersey Midland R. Co., Pros.*) v. *Mayor, etc., of Jersey City*, 1 *Am. & Eng. R. Cas.* 406, 42 *N. J. L.* 97.

Where provision is made in a grant to a company by the former territory of Minnesota, while the territory of Dakota was a part thereof, exempting its property from "all taxation," the real estate of the company is not thereby exempted from an assessment for local municipal improvements. Such an assessment is not taxation, within the meaning of the grant. *Winona & St. P. R. Co.* v. *Watertown*, 1 *S. Dak.* 46, 44 *N. W. Rep.* 1072.—QUOTING People *v.* Mayor, etc., of Brooklyn, 6 Barb. (N. Y.) 214. REVIEWING Winona & St. P. R. Co. *v.* Deuel County, 3 Dak. 1, 12 N. W. Rep. 561.

148. Grant of "rights, powers, and privileges" of previously chartered company.—(1) *Federal decisions.*—A company was chartered, "for the purpose of making and using its road," with all the powers, rights, and privileges of another company, which, by its charter, enjoyed immunity from taxation. *Held*, not to convey a like immunity. *Memphis & C. R. Co.* v. *Gaines*, 97 *U. S.* 697.—FOLLOWING Humphrey *v.* Pegues, 16 Wall. (U. S.) 244; Morgan *v.* Louisiana, 93 U. S. 217.—FOLLOWED IN Tennessee *v.* Whitworth, 117 U. S. 139. QUOTED IN Louisville & N. R. Co. *v.* Gaines, 2 Flipp. (U. S.) 621, 3 Fed. Rep. 266.

A railroad was chartered in South Carolina at a time when a general law declared all charters to be "subject to amendment, alteration, or repeal" unless expressly excepted. The charter contained no express exception, but provided that the company should enjoy "all the rights, privileges, and immunities" of a certain other company,

which was expressly excepted from the general law, and had an immunity from taxation for thirty-six years. *Held*, that the charter must be construed to grant an immunity from taxation for thirty-six years also, unless the legislature should in the meantime withdraw the exemption. *Hoge* v. *Richmond & D. R. Co.*, 99 *U. S.* 348.—MODIFYING Tomlinson *v.* Jessup, 15 Wall. 459.—QUOTED IN Charlotte, C. & A. R. Co. *v.* Gibbes, 31 Am. & Eng. R. Cas. 464, 27 So. Car. 385, 4 S. E. Rep. 49; Memphis & L. R. R. Co. *v.* Berry, 41 Ark. 436.

In such case, if it be conceded that the company acquired an exemption from future legislative control, it was lost when the company subsequently obtained an amendment to its charter, which did not exempt it from the operation of the general law. *Hoge* v. *Richmond & D. R. Co.*, 99 *U. S.* 348.

The charter of plaintiff corporation provided that it should have all the powers and privileges and be subject to all the obligations given to and imposed upon another railroad corporation in certain sections of the act of incorporation, and among the provisions of those sections was one exempting its property from taxation. *Held*, that such provision did not exempt the property of plaintiff from taxation. *Annapolis & E. R. R. Co.* v. *Anne Arundel County Com'rs*, 1 *Am. & Eng. R. Cas.* 403, 2 *Am. & Eng. R. Cas.* 422, 103 *U. S.* 1.

The charters of the earlier railroad companies incorporated by the state of Tennessee contained exemptions from taxation; but in later charters the legislature, to save repetition, instead of enumerating all the powers and immunities intended to be granted, was content to refer to some earlier charter, and give to the new company "all the rights, powers, and privileges" of the old. *Held*, that the legislature intended to confer these "rights, powers, and privileges" as fully as if specifically repeated in the new charter, and such was the recognized construction of such charters by all the departments of the state government for more than twenty years. *Louisville & N. R. Co.* v. *Gaines*, 2 *Flipp.* (*U. S.*) 621, 3 *Fed. Rep.* 266.

(2) *State decisions.*—Where a company is chartered with an exemption from taxation, and a second company is chartered with the same "rights and privileges" as the former company, an exemption from taxation will not be included as "rights and privileges." *Wilson* v. *Gaines*, 9 *Baxt.* (*Tenn.*) 546, 16 *Am. Ry. Rep.* 316.—REVIEWED IN State *v.* Nashville, C. & St. L. R. Co., 12 Lea (Tenn.) 583.

In Tennessee, where the Constitution makes a distinction between rights and privileges, and immunities and exemptions, the legislative grant to one company of all the "rights, powers, and privileges" conferred upon another company by the act incorporating it will not carry an exemption from taxation included in the latter act. *Wilson* v. *Gaines*, 3 *Tenn. Ch.* 597. — FOLLOWING East Tenn., V. & G. R. Co. *v.* Hamblen County, 102 U. S. 273.

An exemption from taxation in one charter of a company will not pass by the grant of its rights and privileges to another company. *Wilson* v. *Gaines*, 3 *Tenn. Ch.* 597.

The original charter of a company gave to it exemption from taxation, which could not be taken away without its consent; but afterwards the company accepted benefits from the legislature on condition that it should reserve the right to tax the property of the company. Still later plaintiff company succeeded it with "all its privileges and obligations." *Held*, that the property was subject to general taxation. *Seaboard & R. R. Co.* v. *Norfolk County Sup'rs*, 83 *Va.* 195, 2 *S. E. Rep.* 278.

149. Provision for payment of given sum in lieu of taxes.—A statute provided that railroad companies should pay a tax on the "market value of their stock and of their funded and floating debt," which should be "in lieu of all other taxes on railroad property and franchises within this state." *Held*, that this did not exempt from taxation railroad bonds held by individuals. *Bridgeport* v. *Bishop*, 33 *Conn.* 187.

But under the above statute all the property of a company, whether used for railroad purposes or not, is exempted from taxation. *Osborn* v. *New York & N. H. R. Co.*, 40 *Conn.* 491, 5 *Am. Ry. Rep.* 218.

Del. Act of April 11, 1873, exempting the Philadelphia, W. & B. R. Co. from "all taxes * * * under any and all laws" upon payment of a certain commutation therein provided for, includes county as well as state taxes. *Neary* v. *Philadelphia, W. & B. R. Co.*, (*Del.*) 9 *Atl. Rep.* 405; *affirming* 5 *Del. Ch.* 600, 8 *Atl. Rep.* 363.—APPROVING Minot *v.* Philadelphia, W. & B. R. Co., 18 Wall. (U. S.) 225; Orange & A. R. Co. *v.*

Alexandria, 17 Gratt. (Va.) 181; Dunlieth & D. Bridge Co. *v.* Dubuque, 32 Iowa 429; People *v.* Davenport, 91 N. Y. 584.

Where a charter provides that the company shall pay a certain tax to the state based on its net income, and that "no other tax than herein is provided shall be levied or assessed on said corporation, or on any of their privileges, property, or franchises," the company is not liable to general taxation. *State* v. *Knox & L. R. Co.*, 78 *Me.* 92, 2 *Atl. Rep.* 846.

By the act under which a city railway company was incorporated, the company was required to pay annually a certain specific tax, which was declared to be in "lieu of all other taxes upon all the property of said company." *Held*, that the company was exempt from all other taxes. *Le Roy* v. *East Saginaw City R. Co.*, 18 *Mich.* 233.

Under the amended charter of defendant corporation, granting in terms an exemption from all taxation and from all assessments in respect to its railroad and its appurtenances and appendages, and all other property, estate, and effects of said company, and also its capital and stock, and declaring that the payment by it of the *per centum* of gross earnings as therein provided, annually, "shall be and is in full of all taxation and assessment whatever," no special assessment for any local improvement can be imposed upon any portion of its railroad, or any of its real estate used in connection therewith. *St. Paul* v. *St. Paul & S. C. R. Co.*, 23 *Minn.* 469, 17 *Am. Ry. Rep.* 177. — FOLLOWED IN Stevens County *v.* St. Paul, M. & M. R. Co., 29 Am. & Eng. R. Cas. 225, 36 Minn. 467, 31 N. W. Rep. 942.

The rule that "taxation," and "all taxes," when found in a state law granting an exemption from being taxed, are understood to mean only general or ordinary taxes, and do not include special or local assessments, does not apply when the statute is not a grant of exemption, but merely provides a mode of commutation therefor, based upon a percentage of earnings or income agreed upon as a just equivalent, equally advantageous and beneficial to the state. An exemption must be strictly construed; not so a commutation. *St. Paul* v. *St. Paul & S. C. R. Co.*, 23 *Minn.* 469, 17 *Am. Ry. Rep.* 177.

Minn. Special Laws 1857, ch. 1, § 18, providing that the company on or before March 1st in each year pay into the state treasury three per cent. of its gross earnings, that sum to be in lieu of all taxes and assessments —*held*, to deprive the state of the right to assess the land in specie. *Hennepin County* v. *St. Paul, M. & M. R. Co.*, 33 *Minn.* 534, 24 *N. W. Rep.* 196.—DISTINGUISHED IN Martin County *v.* Drake, 37 Am. & Eng. R. Cas. 389, 40 Minn. 137, 41 N. W. Rep. 942.

If a railroad corporation situated in another state pays a specific tax upon all its capital invested or expended, whether represented by capital stock or indebtedness of the corporation, and such taxation is declared to be in lieu of all state, county, township, or other taxes in that state, and it appears that such specific tax was intended to be a fair equivalent for the taxes that would otherwise be laid on such property by the ordinary means of taxation, such property should not again be taxed in this state to the owners of shares of the capital stock of such corporation. *Kimball* v. *Milford*, 54 *N. H.* 406.

The charter of a company provided for the payment to the state treasurer of ten cents for each passenger, and fifteen cents for each ton of merchandise, transported on the road; and declared that "no other tax or impost shall be levied or assessed upon the company." *Held*, that the company is exempt from any tax for state, county, or township purposes. *Camden & A. R. Co.* v. *Hillegas*, 18 *N. J. L.* 11.—DISTINGUISHED IN State (Camden & A. R. & T. Co., Pros.) *v.* Mansfield Com'rs, 23 N. J. L. 510.

A company whose charter provides a certain mode of taxation in lieu of other taxes is not liable to be assessed in the ordinary manner. *Douglass* v. *State* (*Orange & N. H. C. R. Co., Pros.*), 34 *N. J. L.* 485; *affirming* 34 *N. J. L.* 82.

Where there are express terms of exemption from all other tax, although the prescribed method of taxation is future and contingent in effect, yet no tax can be claimed until the condition upon which the special tax becomes payable is fulfilled. *McGavisk* v. *State* (*Morris & E. R. Co., Pros.*), 34 *N. J. L.* 509.

Where, by a supplement to its charter, a railroad company is required to pay to the state a tax of one half of one *per centum* on the cost of its road, in lieu of all other taxes on any property purchased, held, or used by the company for the purposes of its charter, it is exempt from taxation by a municipal corporation in which a portion

of its property is situated. *State* (*Morris & E. R. Co., Pros.*) v. *Haight*, 35 *N. J. L.* 40.—DISTINGUISHING State (Camden & A. R. & T. Co., Pros.) *v.* Mansfield Com'rs, 23 N. J. L. 510; State (New Jersey R. & T. Co., Pros.) *v.* Newark, 25 N. J. L. 315, 26 N. J. L. 519.

The rule that a statute granting an exemption from taxation must be strictly construed against the taxpayer does not apply where a company is released from other taxation upon payment of a certain percentage of its annual income, where the legislature seems to have regarded such tax as the equivalent of other taxes. *Milwaukee & St. P. R. Co.* v. *Crawford County Sup'rs*, 29 *Wis.* 116, 12 *Am. Ry. Rep.* 210.—REVIEWED IN Milwaukee & St. P. R. Co. *v.* Milwaukee, 34 Wis. 271.

150. Exemptions under the Florida Improvement Act.—An exemption from taxation granted to a company by Florida Act of Jan. 6, 1855, "to provide for and encourage a liberal system of internal improvements," was not assignable, and the Act of March 5, 1881, imposing a tax on the Louisville and Nashville railroad, that had succeeded through several grants to such property, is not unconstitutional as impairing the obligation of a contract. *Louisville & N. R. Co.* v. *Palmes*, 13 *Am. & Eng. R. Cas.* 380, 109 *U. S.* 244, 3 *Sup. Ct. Rep.* 193.—APPROVING Wilson *v.* Gaines, 103 U. S. 417; Morgan *v.* Louisiana, 93 U. S. 217.—APPLIED IN Keokuk & W. R. Co. *v.* Scotland County Court, 41 Fed. Rep. 305. FOLLOWED IN St. Louis, I. M. & S. R. Co. *v.* Berry, 113 U. S. 465; Tennessee *v.* Whitworth, 117 U. S. 139. REFERRED TO IN Citizens' St. R. Co. *v.* Memphis, 53 Fed. Rep. 715. REVIEWED IN State Board of Assessors *v.* Morris & E. R. Co., 49 N. J. L. 193.

The railroads exempted from taxation under the above statute, section 18, were such roads only as were a part of the state system thereby created, and the railroad from Live Oak, Florida, to Lawton, Georgia, was not embraced therein. *Atlantic & G. R. Co.* v. *Allen*, 15 *Fla.* 637.

The Constitution of Florida in force in 1855 made it the duty of the legislature to designate objects of improvement which should constitute a state system. The legislature designated certain railroads as the proper objects to be aided from a trust fund created by it; and each road was exempt from taxation during its construction and for thirty-five years from its completion. *Held*, that this exemption rested in contract and attached to the property and could not subsequently be divested by the state. *Gonzales* v. *Sullivan*, 16 *Fla.* 791.—FOLLOWED IN Palmes *v.* Louisville & N. R. Co., 19 Fla. 231.

The Fla. Improvement and Railroad Act of 1855 is not organic law, but is subject to modification by subsequent legislatures, within the constitutional limitations. *Gonsales* v. *Sullivan*, 16 *Fla.* 791.

Fla. Const. of 1839, art. 11, § 2, makes it the duty of the legislature to encourage a system of internal improvements, and to provide for the application of a certain internal improvement fund. Article 8, § 1, makes it the duty of the legislature to adopt a revenue system "having regard to an equal and uniform mode of taxation to be general throughout the state." *Held*, that the legislature might exempt a railroad aided by the improvement fund from taxation under the former section, regardless of the latter section. *Palmes* v. *Louisville & N. R. Co.*, 19 *Fla.* 231.—FOLLOWING Gonzales *v.* Sullivan, 16 Fla. 791. REFERRING TO Wilson *v.* Gaines, 103 U. S. 417.

151. Period of exemption—Extensions.—A railroad was chartered with a provision that its "capital stock" should be forever exempt from taxation, and that "the road with its fixtures and appurtenances" should be exempt for twenty years. *Held*, that this did not exempt property of the road which had been bought with the capital from taxation after twenty years. *Memphis & C. R. Co.* v. *Gaines*, 97 *U. S.* 697.—FOLLOWED IN Tennessee *v.* Whitworth, 117 U. S. 129.

An Arkansas statute provided that certain swamp lands should "be exempt from taxation for ten years or until reclaimed." *Held*, that the exemption continued for ten years if the lands were not sooner reclaimed, but that it ceased on reclamation. *Memphis & St. L. R. Co.* v. *Loftin*, 13 *Am. & Eng. R. Cas.* 377, 105 *U. S.* 258.—FOLLOWING State *v.* Crittenden County, 19 Ark. 360; McGehee *v.* Mathis, 21 Ark. 58.

A provision in a railroad charter by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances shall be exempt from taxation for ten years after the completion of said road within the

limits of this state" does not exempt the road, fixtures, and appurtenances from taxation before such completion of the road. *Vicksburg, S. & P. R. Co.* v. *Dennis*, 24 *Am. & Eng. R. Cas.* 500, 116 *U. S.* 665, 6 *Sup. Ct. Rep.* 625.—FOLLOWED IN Yazoo & M. V. R. Co. *v.* Thomas, 41 Am. & Eng. R. Cas. 599, 132 U. S. 174, 10 Sup. Ct. Rep. 68. QUOTED IN Wilmington & W. R. Co. *v.* Alsbrook, 110 N. Car. 137.

Under Ala. Act approved February 23, 1876, known as the "Debt Settlement Act" (Sess. Acts 1875-76, p. 130), certain lands granted by congress to aid in the construction of railroads, and afterwards acquired by the state under mortgages to secure its indorsement of railroad bonds, were to be disposed of to said railroads, or for their benefit; and it was declared that "the lands which may be acquired by the holders of the bonds mentioned in the fifteenth section of this act, or by the trustees hereinafter provided for the use of said bondholders under the terms of this act, shall remain exempt from taxation by this state, for the term of eight years from the first day of May, 1876." *Held*, that as the lands were not subject to taxation from January 1 to May 1, 1876, while they were the property of the state, and as no provision was made by law for taxing lands acquired after January 1st, the year 1876 was not to be computed as one of the eight years during which the lands were exempt from taxation, but the term commenced with the year 1877. *Swann* v. *State*, 77 *Ala.* 545.

A railroad was by charter exempt from taxation for twenty years, which ended in March, 1877. The taxes assessed for 1877 were assessed in April. The company paid a *pro rata*. *Held*, that the company was liable for all the taxes assessed for 1877. When the taxes were assessed no exemption existed. *McClellan* v. *Memphis & C. R. Co.*, 11 *Lea* (*Tenn.*) 336.

While certain lands were held by the state in trust for the building of a proposed railroad (now owned by plaintiff), and hence were not subject to taxation, the legislature had the power, in furtherance of that object and in execution of the trust, to exempt such lands from taxation for a term of years; and such power, having been exercised, could, within the discretion of the legislature, be exercised anew by granting an extension of the exemption. (Orton, J., dissenting.) *Wisconsin C. R. Co.* v. *Taylor County*, 1 *Am. & Eng. R. Cas.* 532, 52 *Wis.* 37, 8 *N. W. Rep.* 833.

Wis. Laws of 1877, ch. 24, entitled "An act to extend the time of exemption from assessment and taxation of certain lands, fixed in the act incorporating the Winnebago and Lake Superior railroad company, approved April 6, 1866, and in the act incorporating the Portage and Superior railroad company, approved April 9, 1866," is valid. *Wisconsin C. R. Co.* v. *Taylor County*, 1 *Am. & Eng. R. Cas.* 532, 52 *Wis.* 37, 8 *N. W. Rep.* 833.

The lands of a company were exempt from taxation for a period of ten years. By a subsequent statute the time was extended three years. *Held*, that the second term of three years runs three years from the termination of the original exemption, and not three years from the date of the approval of the act. *Wisconsin C. R. Co.* v. *Comstock*, 71 *Wis.* 88, 36 *N. W. Rep.* 843.

When, by statute, lands are granted to a company to aid in the construction of its road, and it is provided that patents for the lands earned shall be issued on completion of each section of twenty miles, and a subsequent statute provides that all lands theretofore patented, or which might thereafter be patented by the state to the company, "are hereby exempted and shall remain exempt from taxation * * * for the period of ten years," the exemption takes effect immediately as to all lands acquired by the company under the grant, and is limited to a period of ten years from the date of the statute conferring it, and does not extend to a period of ten years from the date of the respective patents for the lands. *State ex rel.* v. *Harshaw*, 41 *Am. & Eng. R. Cas.* 685, 76 *Wis.* 230, 45 *N. W. Rep.* 308.

152. Leasing road, when extinguishes exemption.—Where a company, exempt by its charter from taxation, absolutely transfers its property for 1000 years under the guise of a lease to another company in consideration of the latter company completing the road, and no provision is made for the reversion of the property, the right of exemption from taxation is extinguished. *Com.* v. *Nashville, C. & St. L. R. Co.*, (*Ky.*) 54 *Am. & Eng. R. Cas.* 294, 20 *S. W. Rep.* 383.

153. How pleaded.—A party alleging the exemption of his lands from taxation must show in his pleadings the facts that

constitute such exemption. *Cairo & F. R. Co.* v. *Parks*, 32 *Ark.* 131.—APPROVED IN Denver & R. G. R. Co. *v.* Outcalt, 2 Colo. App. 395. FOLLOWED IN Cateril *v.* Union Pac. R. Co., 2 Idaho 540; Bielenberg *v.* Montana Union R. Co., 38 Am. & Eng. R. Cas. 275, 8 Mont. 271. REVIEWED IN Little Rock & Ft. S. R. Co. *v.* Payne, 33 Ark. 816.

154. Assignability of exemptions.* —Exemption from taxation granted to a company is not attached to the road and property and does not pass with it, but is a personal annuity and incapable of transfer without express statutory authority. *Memphis & L. R. R. Co.* v. *Berry*, 41 *Ark.* 436. —FOLLOWING Morgan *v.* Louisiana, 93 U. S. 217; Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244, 3 Sup. Ct. Rep. 193. QUOTING Coe *v.* Columbus, P. & I. R. Co., 10 Ohio St. 372; State ex rel. *v.* Sherman, 22 Ohio St. 428.

Exemption from taxation is a personal privilege to the person to whom, or the corporation to which, it is given, and is incapable of transfer, unless there is express statutory authority for it. *State ex rel.* v. *Chicago, B. & K. C. R. Co.*, 89 *Mo.* 523, 14 *S. W. Rep.* 522. *Wilson* v. *Gaines*, 9 *Baxt.* (*Tenn.*) 546.

It is a privilege entirely distinct from the franchises of the corporation, and will not pass by a transfer under legislative authority empowering the corporation to assign and transfer its franchises and property. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826.—QUOTING Morgan *v.* Louisiana, 93 U. S. 217; Memphis & L. R. R. Co. *v.* Railroad Com'rs, 112 U. S. 609.

Where the enabling act empowering a corporation to transfer its property and franchises includes its privileges and immunities in the enumeration of the powers granted, immunity from taxation possessed by such a corporation will accompany the property and franchises, and such property and franchises will continue to be held under the immunity from taxation which was possessed by the original corporation, unless a constitutional provision against exemption from taxation has interdicted it, or the contract of exemption has, in the altered condition assumed by the corporation, become impossible of performance. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826. — DISTINGUISHING Maine C. R. Co. *v.* Maine, 96 U. S. 499; Chesapeake & O. R. Co. *v.* Miller, 114 U. S. 176. REVIEWING Tomlinson *v.* Branch, 15 Wall. (U. S.) 460; Humphrey *v.* Pegues, 16 Wall. 244; Trask *v.* Maguire, 18 Wall. 391; Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244.

155. When pass to purchasers, generally.*—The franchises of a corporation are rights or privileges which are essential to the operation of the corporation and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. Immunity from taxation is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property. *Morgan* v. *Louisiana*, 93 *U. S.* 217.—DISTINGUISHED IN East Tenn., V. & G. R. Co. *v.* Hamblen County, 102 U. S. 273. REVIEWED IN Louisville & N. R. Co. *v.* Gaines, 2 Flipp. (U. S.) 621, 3 Fed. Rep. 266.

Where a company which has an exemption from taxation constructs and then buys a road which has no exemption, it cannot extend the exemption which it enjoys to the road so constructed and purchased. *Burlington & S. W. R. Co.* v. *Putnam, S. & L. Counties*, 5 *Dill.* (*U. S.*) 289.

A foreign company which has acquired its rights in Missouri under the Act of March 24, 1870, and has purchased a road in the state, is subject to taxation on said road, although the road may have been previously exempt from taxation. *Burlington & S. W. R. Co.* v. *Putnam, S. & L. Counties*, 5 *Dill.* (*U. S.*) 289.

Ordinarily an exemption from taxation will not pass to a purchaser of the property, but it is otherwise where the statute authorizing the purchase so provides. *Picard* v. *East Tenn., V. & G. R. Co.*, 24 *Fed. Rep.* 614; *reversed in* 130 *U. S.* 637, 9 *Sup. Ct. Rep.* 640.

Where a company whose charter provides that it shall be taxed as other railroads in the state purchases the rights and franchises of another company which was forever exempt from taxation, by authority

* Assignment and transfer of exemption, see note, 17 AM. & ENG. R. CAS. 430.

* Taxing road in hands of purchasers where road was exempt under original charter, see 33 AM. & ENG. R. CAS. 475, *abstr.*

of law, the purchasing company is not exempt from taxation. *Evansville, H. & N. R. Co.* v. *Com.*, 9 *Bush* (*Ky.*) 438.—QUOTING AND APPROVING Philadelphia & W. R. Co. *v.* Maryland, 10 How. (U. S.) 376.

Where a railroad charter contains an immunity from taxation, it is only a personal privilege, pertaining alone to the original company, and cannot be transferred. But where it provides, as an inducement to purchasers, that they shall have immunity from taxation until the road be completed, the purchaser is not bound for revenue until the completion of the road. *Com.* v. *Owensboro & N. R. Co.*, 17 *Am. & Eng. R. Cas.* 428, 81 *Ky.* 572.

The sale of a railroad, together with all its property and franchises, will not carry an exemption from taxation contained in its charter, unless authorized by a legislative act. *Wilson* v. *Gaines*, 3 *Tenn. Ch.* 597.—REVIEWING Knoxville & O. R. Co. *v.* Hicks, 9 Baxt. (Tenn.) 442.

156. When pass to purchasers at judicial sale.*—Upon a sale of the property and franchises of a railroad corporation, under a decree founded upon a mortgage which, in terms, covers the franchises, or under a process upon a money judgment against the company, immunity from taxation upon the property of the company, provided in the act of incorporation, does not accompany the property in its transfer to the purchaser. The immunity from taxation, in such cases, is a personal privilege of the company, and not transferable. *Morgan* v. *Louisiana*, 93 *U. S.* 217.—APPROVED IN Lawrence *v.* Morgan's L. & T. R. & S. Co., 30 Am. & Eng. R. Cas. 309, 39 La. Ann. 427, 2 So. Rep. 69; Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244. FOLLOWED IN Memphis & L. R. R. Co. *v.* Berry, 41 Ark. 436; Memphis & C. R. Co. *v.* Gaines, 97 U. S. 697. QUOTED IN State Board of Assessors *v.* Morris & E. R. Co., 49 N. J. L. 193; In re Toronto St. R. Co., 22 Ont. 374.

The purchasers of railroad property at a judicial sale do not necessarily succeed to an immunity from taxation enjoyed by the original company. *Wilson* v. *Gaines*, 103 *U. S.* 417.—RECONCILING Knoxville & O. R. Co. *v.* Hicks, 9 Baxt. (Tenn.) 442.—APPROVED IN Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244. FOLLOWED IN Tennessee *v.* Whitworth, 117 U. S. 139. REFERRED TO IN Palmes *v.* Louisville & N. R. Co., 19 Fla. 231.

Under a decree to enforce a statutory lien retained by the state, the property and franchises of a railroad were sold. *Held*, that the property was thereafter subject to taxation under the laws of the state, as immunity therefrom, if possessed by the company, did not pass to the purchaser. *East Tenn., V. & G. R. Co.* v. *Hamblen County*, 102 *U. S.* 273. — DISTINGUISHING Humphrey *v.* Pegues, 16 Wall. (U. S.) 244; Morgan *v.* Louisiana, 93 U. S. 217. EXPLAINING Knoxville & O. R. Co. *v.* Hicks, 9 Baxt. (Tenn.) 442.—FOLLOWED IN Tennessee *v.* Whitworth, 117 U. S. 139; Picard *v.* East Tenn., V. & G. R. Co., 130 U. S. 637.

By the sale and conveyance of the "property and franchises" of a company, in a suit by the state to enforce a statutory lien, immunity from taxation conferred by the charter of the company does not pass to the purchaser. The immunity is not transferable, unless by special statutory enactment. *Picard* v. *East Tenn., V. & G. R. Co.*; 39 *Am. & Eng. R. Cas.* 551, 130 *U. S.* 637, 9 *Sup. Ct. Rep.* 640; *reversing* 24 *Fed. Rep.* 614.—FOLLOWING East Tenn., V. & G. R. Co. *v.* Hamblen County, 102 U. S. 273.

Where a railroad, exempt for a certain period from taxation, is sold under proceedings instituted by the state to enforce its lien or statutory mortgage, such proceedings being authorized by statute and providing for the sale of the road, franchises, etc., and providing that all the rights, privileges, and immunities appertaining to the franchise shall be transferred to and vested in said purchaser, and decree of sale so directing, the state is estopped to tax said road during the time the original company was exempt from taxation. In such a case the immunity from taxation of the company passed by sale to the purchaser. *State* v. *Nashville, C. & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 420, 12 *Lea* (*Tenn.*) 583.—DISTINGUISHING Shields *v.* Ohio, 95 U. S. 319; Atlantic & G. R. Co. *v.* Georgia, 98 U. S. 359. REVIEWING Wilson *v.* Gaines, 9 Baxt. (Tenn.) 546; Knoxville & O. R. Co. *v.* Hicks, 9 Baxt. 442.—REFERRED TO IN State *v.* Nashville, C. & St. L. R. Co., 86 Tenn. 438, 6 S. W. Rep. 880.

Where a statute declares that a company and its successors and assigns shall be ex-

* Exemption not transferable to purchaser at foreclosure sale, see note, 13 AM. & ENG. R. CAS. 389.

empt from taxation for a certain term, the property is exempt in the hands of purchasers at a foreclosure sale. *International & G. N. R. Co.* v. *Smith County*, 65 *Tex.* 21.—FOLLOWING International & G. N. R. Co. *v.* Anderson County, 59 Tex. 654.

157. When pass to reorganized road.—Where a company by its charter is granted an exemption from taxation for a limited period, and is afterwards merged in another company which becomes invested with all its property, rights, and privileges, the exemption and its limitation accompany the property, and a perpetual exemption from taxation in the charter of the latter company will not be extended to the property so acquired without express words or necessary intendment to that effect. *Tomlinson* v. *Branch*, 15 *Wall.* (*U. S.*) 460, 3 *Am. Ry. Rep.* 207.—APPLIED IN Citizens' St. R. Co. *v.* Memphis, 53 Fed. Rep. 715. DISTINGUISHED IN People ex rel. *v.* Tax, etc., Com'rs, 2 Am. & Eng. R. Cas. 343, 82 N. Y. 459. FOLLOWED IN Charleston *v.* Branch, 15 Wall. (U. S.) 470, *n.* RECONCILED IN Wilmer *v.* Atlanta & R. A. L. R. Co., 2 Woods (U. S.) 447. REVIEWED IN Henderson *v.* Central Pass. R. Co., 20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358; State Board of Assessors *v.* Morris & E. R. Co., 49 N. J. L. 193.

A railroad was chartered in South Carolina without any exemption from taxation, but by a subsequent statute its property was exempted. Subsequently a company that had been formerly incorporated but which had not built its road was given all the rights, privileges, and powers granted by the charter of the former company. *Held*, that the property of the second company was exempt from taxation; and that the amendment to the charter of the first company which granted the exemption could not be repealed so as to subject the road to taxation. *Humphrey* v. *Pegues*, 16 *Wall.* (*U. S.*) 244, 3 *Am. Ry. Rep.* 218.—DISTINGUISHED IN East Tenn., V. & G. R. Co. *v.* Hamblen County, 102 U. S. 273; People ex rel. *v.* Tax, etc., Com'rs, 2 Am. & Eng. R. Cas. 343, 82 N. Y. 459. FOLLOWED IN Memphis & C. R. Co. *v.* Gaines, 97 U. S. 697. QUOTED IN Winona & St. P. R. Co. *v.* Deuel County, 7 Am. & Eng. R. Cas. 348, 3 Dak. 1. REVIEWED IN Hewitt *v.* New York & O. M. R. Co., 12 Blatchf. (U. S.) 452; State Board of Assessors *v.* Morris & E. R. Co., 49 N. J. L. 193.

A state chartered a railroad with a provision forever exempting it from taxation. The state made a loan of its bonds to the company, taking a lien on the road to secure payment. The lien was foreclosed, and the state bid in the property, and afterwards sold it, the purchasers becoming incorporated with all the "rights, franchises, privileges, and immunities" enjoyed by the former company. At the time this new company was chartered the Constitution in force provided that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to the state, counties, or municipal corporations." *Held*, that the exemption from taxation did not pass to the new company. *Trask* v. *Maguire*, 18 *Wall.* (*U. S.*) 391.—REVIEWED IN State Board of Assessors *v.* Morris & E. R Co., 49 N. J. L. 193.

Where a railroad which enjoys an immunity from taxation is sold under a mortgage foreclosure, a new company organized by the purchasers does not succeed to the immunity, where the state Constitution in force at the time requires that railroad property be taxed the same as other property. *Memphis & L. R. R. Co.* v. *Railroad Com'rs*, 112 *U. S.* 609, 5 *Sup. Ct. Rep.* 299.—FOLLOWING Atlantic & G. R. Co. *v.* Georgia, 98 U. S. 359. QUOTING Hall *v.* Sullivan R. Co., Brun. Col. Cas. (U. S.) 613.—APPROVED IN St. Louis, I. M. & S. R. Co. *v.* Berry, 113 U. S. 465. FOLLOWED IN People ex rel. *v.* Cook, 110 N. Y. 443. QUOTED IN State Board of Assessors *v.* Morris & E. R. Co., 49 N. J. L. 193; People *v.* O'Brien, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173; In re New York El. R. Co., 17 N. Y. Supp. 778, 63 Hun 629, 43 N. Y. S. R. 651.

A statute conferring on a new corporation, formed of purchasers of railroad property, "all the franchises, rights, and privileges" of the old one, does not confer an exemption from taxation enjoyed by the old one, being granted at a time when the Constitution and general law of the state reserved the right to alter or repeal any charter. *Chesapeake & O. R. Co.* v. *Miller*, 114 *U. S.* 176, 5 *Sup. Ct. Rep.* 813.—APPLIED IN Keokuk & W. R. Co. *v.* Scotland County Court, 41 Fed. Rep. 305. DISTINGUISHED IN State Board of Assessors *v.* Morris & E. R. Co., 49 N. J. L. 193. FOLLOWED IN Tennessee *v.*

Whitworth, 117 U. S. 139; Hoard *v.* Chesapeake & O. R. Co., 123 U. S. 222.

158. When pass to new road on consolidation.*—(1) *Federal decisions.*—Where two companies are consolidated, the presumption is that each of the two united lines will be held with the privileges and burdens originally attaching thereto, unless the contrary is expressed. *Tomlinson* v. *Branch*, 15 *Wall.* (*U. S.*) 460, 3 *Am. Ry. Rep.* 207. — APPROVED IN State ex rel. *v.* Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290. FOLLOWED IN Charleston *v.* Branch, 15 Wall. (U. S.) 470. REVIEWED IN State ex rel. *v.* Greene County, 54 Mo. 540; State ex rel. *v.* Garroutte, 67 Mo. 445.—*Charleston* v. *Branch*, 15 *Wall.* (*U. S.*) 470, *n.*

Where a company, by its charter, is granted an exemption for a limited time, and is afterwards merged in another company which becomes vested with its property, the limitation and the exemption accompany the property, and a perpetual exemption from taxation in the charter of the latter company will not be extended to the property so acquired. *Charleston* v. *Branch*, 15 *Wall.* (*U. S.*) 470, *n.*—FOLLOWING Tomlinson *v.* Branch, 15 Wall. 460.

Where two companies unite without forming a new corporation, but the powers of one company are enlarged, and the consolidated company succeeds to all rights and privileges of the former companies, an exemption from taxation is not thereby lost. *Southwestern R. Co.* v. *Georgia*, 92 *U. S.* 676.—FOLLOWING Central R. & B. Co. *v.* Georgia, 92 U. S. 665.—FOLLOWED in Tennessee *v.* Whitworth, 117 U. S. 139.

Each of two railroads enjoyed by charter an immunity from taxation until their annual net income should exceed ten per cent. Afterwards they consolidated under a statute providing that the new corporation should have "all the powers, privileges, and immunities" possessed by either of the consolidating companies. *Held*, that a new corporation was thus formed subject to the general law that the state might alter or amend charters, and it was competent for the legislature to provide a different mode of taxation for the company. *Maine C. R. Co.* v. *Maine*, 96 *U. S.* 499.—DISTINGUISHING Minot v. Philadelphia, W. & B. R. Co., 18 Wall. 206; Central R. & B. Co. *v.* Georgia, 92 U. S. 665; Chesapeake & O. R. Co. *v.* Virginia, 94 U. S. 718.—DISAPPROVED IN Natchez, J. & C. R. Co. *v.* Tambert, 70 Miss. 779. DISTINGUISHED IN State Board of Assessors *v.* Morris & E. R. Co., 49 N. J. L. 193. FOLLOWED IN Greenwood *v.* Union Freight R. Co., 105 U. S. 13. QUOTED IN St. Louis, I. M. & S. R. Co. *v.* Berry, 41 Ark. 509. REFERRED TO IN Citizens' St. R. Co. *v.* Memphis, 53 Fed. Rep. 715. REVIEWED IN Henderson *v.* Central Pass. R. Co., 20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358.

A company coming into existence by the consolidation of other roads, at a time when the Constitution of the state subjects railroad property to taxation the same as the property of individuals, does not succeed to an immunity from taxation enjoyed by one of the consolidating companies. *St. Louis, I. M. & S. R. Co.* v. *Berry*, 113 *U. S.* 465, 5 *Sup. Ct. Rep.* 529.—FOLLOWING Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244.—APPLIED IN Keokuk & W. R. Co. *v.* Scotland County Court, 41 Fed. Rep. 305. REFERRED TO IN Citizens' St. R. Co. *v.* Memphis, 53 Fed. Rep. 715.

When two corporations whose shares are by a state statute exempt from taxation consolidate into a new company under a state law which makes no provision to the contrary, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation passes into the new shares and into each of them. *Tennessee* v. *Whitworth*, 29 *Am. & Eng. R. Cas.* 205, 117 *U. S.* 129, 6 *Sup. Ct. Rep.* 645.

An act consolidating two railroads with "all the rights, powers, and privileges" of the old companies carries into the consolidated company an immunity from taxation enjoyed by the old companies, or by either of them. *Tennessee* v. *Whitworth*, 29 *Am. & Eng. R. Cas.* 211, 117 *U. S.* 139, 6 *Sup. Ct. Rep.* 649.—FOLLOWING Philadelphia & W. R. Co. *v.* Maryland, 10 How. (U. S.) 394; Southwestern R. Co. *v.* Georgia, 92 U. S. 676, *n.*; Central R. & B. Co. *v.* Georgia, 92 U. S. 665, Memphis & C. R. Co. *v.* Gaines, 97 U. S. 711; Atlantic & G. R. Co. *v.* Georgia, 98 U. S. 359; East Tenn., V. & G. R. Co. *v.* Hamblen County, 102 U. S. 277; Wilson *v.* Gaines, 103 U. S. 417; Louisville & N. R.

*Effect of consolidation on exemption, see note, 17 AM. & ENG. R. CAS. 436.

Effect of consolidation on a provision for exemption from taxation, see 41 AM. & ENG. R. CAS. 702, *abstr.*

Co. *v.* Palmes, 109 U. S. 253; Chesapeake & O. R. Co. *v.* Miller, 114 U. S. 185.

Nor do the provisions of Tenn. Constitution, prohibiting the legislature from granting special privileges, but conferring the power to grant such charters of corporations as it may deem expedient for the public good, prohibit the exemption. *Tennessee* v. *Whitworth*, 29 *Am. & Eng. R. Cas.* 211, 117 *U. S.* 139, 6 *Sup. Ct. Rep.* 649.

Where two companies are consolidated under a statute which operates as the creation of a new corporation, and the state Constitution in force at the time prohibits legislative exemptions from taxation, the consolidated company does not acquire an immunity from taxation formerly granted to one of the old companies. *Keokuk & W. R. Co.* v. *Scotland County Court*, 41 *Fed. Rep.* 305.—APPLYING St. Louis, I. M. & S. R. Co. *v.* Berry, 113 U. S. 465, 5 Sup. Ct. Rep. 529; Chesapeake & O. R. Co. *v.* Miller, 114 U. S. 176, 5 Sup. Ct. Rep. 813; Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244, 3 Sup. Ct. Rep. 193. NOT FOLLOWING Scotland County *v.* Missouri, I. & N. R. Co., 65 Mo. 123; Secor *v.* Singleton, 9 Fed. Rep. 809.

(2) *State decisions.*—The immunity from taxation granted to a company does not pass to a new company with which it becomes consolidated unless the statute granting the immunity so clearly provides for its transfer as to leave no room for controversy. *St. Louis, I. M. & S. R. Co.* v. *Berry*, 41 *Ark.* 509.—QUOTING Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244, 3 Sup. Ct. Rep. 193.

An exemption from taxation is a personal privilege, and is lost by a company by consolidating so as to form a new corporation. *Arkansas Midland R. Co.* v. *Berry*, 44 *Ark.* 17.—EXPLAINING Lewis *v.* Clarendon, 5 Dill. U. S.) 329.

Where two companies unite under a statute so as to form a new corporation, which at least has a *de facto* existence, its property is subject to taxation under the general law; and a defect in the statute authorizing the consolidation cannot be set up by the new corporation to defeat the payment of taxes to the state. *Atlanta & R. A. L. R. Co.* v. *State*, 1 *Am. & Eng. R. Cas.* 399, 63 *Ga.* 483.

When two or more corporations with a special immunity from general taxation—the amount of taxation being dependent upon certain precedent acts to be done by such corporations thus to be exempted—are incorporated into a new corporation, which is neither required nor able to do and perform the acts which are to precede such limited and special exemption from taxation, the new corporation thus created cannot claim such special exemption. *State* v. *Maine C. R. Co.*, 66 *Me.* 488.—EXPLAINED IN State *v.* Dexter & N. R. Co., 69 Me. 44.

2. *What is Exempt.*

159. In general.—The provision of N. Car. Const. art. 5, § 6, exempting property belonging to the state from taxation, does not embrace the interest of the state in business enterprises, such as railroads and the like, but applies to property held for state purposes. *Atlantic & N. C. R. Co.* v. *Carteret County Com'rs*, 75 *N. Car.* 474.

A railroad charter provided that "all machines, wagons, vehicles, and carriages purchased * * * with the funds of the company, and all their works constructed under the authority of this act, and all profits which shall accrue from the same, * * * shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever." *Held*, that all the property, profits, and shares of stock were exempt from taxation, whether state, county, or municipal, and that the state was without power to repeal the exemption. *Com.* v. *Richmond & P. R. Co.*, 24 *Am. & Eng. R. Cas.* 482, 81 *Va.* 355.—QUOTING Richmond *v.* Richmond & D. R. Co., 21 Gratt. (VA.) 604.

160. Franchise.*—The charter of a company created in North Carolina in 1853 provided that the shares of stock should be personal property; "and the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." *Held*, that this not only exempted the rolling stock and real estate of the company required for the successful prosecution of its business, but its franchise also. *Wilmington & R. R. Co.* v. *Reid*, 13 *Wall.* (*U. S.*) 264, 3 *Am. Ry. Rep.* 195; *reversing* 64 *N. Car.* 226.—APPROVED IN Memphis & C. R. Co. *v.* Gaines, 3 Tenn. Ch. 604. DISTINGUISHED IN Wilmington & W. R. Co. *v.* Alsbrook, 146 U. S. 279. FOLLOWED IN Atlantic & G. R. Co. *v.*

* Valuation of franchises as a basis of taxation, see note, 33 AM. & ENG. R. CAS. 447.

Allen, 15 Fla. 637. QUOTED IN Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 561; Richmond & D R. Co. *v.* Brogden, 74 N. Car. 707; Worth *v.* Wilmington & W. R. Co., 13 Am. & Eng. R. Cas. 286, 89 N. Car. 291, 45 Am. Rep. 679. REVIEWED IN Hewitt *v.* New York & O. M. R. Co., 12 Blatchf. (U. S.) 452; State *v.* Philadelphia, W. & B. R. Co., 45 Md. 361; Wilmington & W. R. Co. *v.* Alsbrook, 110 N. Car. 137.

161. Real estate, generally.* — Where an individual buys land and pays the consideration therefor with his own money, and takes the deed to himself, an oral agreement entered into, binding him to lease the land to a railroad company for 1000 years, does not make the company the equitable owner of the land, so as to bring it within the provisions of a law exempting the lands of the company from taxation. *Com.* v. *Maysville & B. S. R. Co.*, (*Ky.*) 21 *S. W. Rep.* 342.

Under Neb. Const. of 1875, art. 9, § 2, all that can be exempted from taxation on account of forest and fruit-tree culture is the increased value to the land in consequence thereof. *Burlington & M. R. R. Co.* v. *Seward County Com'rs*, 10 *Neb.* 211, 4 *N. W. Rep.* 1016.

A statutory exemption of real property of a railroad company covers only property owned and used by it for railroad purposes. *Richmond & D. R. Co.* v. *Alamance County Com'rs*, 76 *N. Car.* 212, 14 *Am. Ry. Rep.* 304.—QUOTED IN Belo *v.* Forsyth County Com'rs, 82 N. Car. 415; Richmond & D. R. Co. *v.* Alamance County Com'rs, 7 Am. & Eng. R. Cas. 339, 84 N. Car. 504.

A railroad charter provided for the payment to the state of a stated percentage of its gross earnings, in lieu of all taxes and assessments, and that, in consideration of such payment, the company should be forever exempt from all assessments and taxes whatever upon its stock, franchises, or estate, real, personal, or mixed. *Held*, that such exemption was not applicable to large tracts of timber land purchased by the corporation, from which to take timber to be converted into ties and lumber for the use of the corporation. *Todd County* v. *St. Paul, M. & M. R. Co.*, 31 *Am. & Eng. R. Cas.* 482, 38 *Minn.* 163, 36 *N. W. Rep.* 109. —QUOTING Bank of Commerce *v.* Tennessee, 104 U. S. 493. REFERRING TO Vermont C. R. Co. *v.* Burlington, 28 Vt. 193; Worcester *v.* Western R. Corp., 4 Metc. (Mass.) 564; Milwaukee & St. P. R. Co. *v.* Milwaukee, 34 Wis. 271. REVIEWING Ramsey County *v.* Chicago, M. & St. P. R. Co., 33 Minn. 537, 24 N. W. Rep. 313; In re Swigert, 119 Ill. 83.—FOLLOWED IN St. Paul *v.* St. Paul, M. & M. R. Co., 39 Minn. 112, 38 N. W. Rep. 925; Hennepin County *v.* St. Paul, M. & M. R. Co., 41 Am. & Eng. R. Cas. 625, 42 Minn. 238, 44 N. W. Rep. 63.

As a general rule, the exemption of railroad property from taxation is coextensive with the right of the company to take property by condemnation. *So held*, when the question related to the exemption of real property. *Milwaukee & St. P. R. Co.* v. *Milwaukee*, 34 *Wis.* 271.

Where the statute exempts all property "necessarily used in operating any railroad," all lots or parcels of land necessarily used for repair shops, or yards, or depot grounds, or for the preservation and protection of the roadbed, or for the purpose of obtaining gravel and earth therefrom for the road (the same being adjacent to the road), are exempt from taxation; but dwelling houses and the land occupied by them are not exempt. *Milwaukee & St. P. R. Co.* v. *Milwaukee*, 34 *Wis.* 271.

162. Right of way. — The exemption of a right of way from taxation does not exempt the superstructure, i. e., the railway thereon. *Atlantic & P. R. Co. v. Lesueur*, (*Ariz.*) 37 *Am. & Eng. R. Cas.* 368, 19 *Pac. Rep.* 157.—FOLLOWED IN Atlantic & P. R. Co. *v.* Yavapai County (Ariz.), 39 Am. & Eng. R. Cas. 543, 21 Pac. Rep. 768.—*Atlantic & P. R. Co.* v. *Yavapai County*, (*Ariz.*) 39 *Am. & Eng. R. Cas.* 543, 21 *Pac. Rep.* 768. FOLLOWING Atlantic & P. R. Co. *v.* Lesueur, (Ariz.) 37 Am. & Eng. R. Cas. 368, 19 Pac. Rep. 157.

163. Roadbed, track, etc.—The first section of N. J. Act of April 2, 1873, entitled "An act to establish just rules for the taxation of railroad corporations, and to induce their acceptance and uniform adoption," exempts from township and municipal taxation the main stem or roadbed and track of such corporations, not exceeding 100 feet in width. *State* (*Central R. Co., Pros.*) v. *Mutchler*, 41 *N. J. L.* 96.

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* When company's real estate is exempt, see note, 17 AM. & ENG. R. CAS. 445.

Exemption of land bought for railway purposes, see 33 AM. & ENG. R. CAS. 472, *abstr.*

Taxation of logs cut from railroad lands exempt from taxation, see 33 AM. & ENG. R. CAS. 473, *abstr.*

The above section does not enlarge or restrict the power of companies subject to its provisions to acquire or hold lands for roadway. Such companies are exempt from local taxation upon their road width, as allowed by their acts of incorporation, and all structures thereon suitable and proper in use for the purposes of the corporation, and not otherwise used. Upon all lands outside such roadbed, intermediate between the *termini*, they are subject to local taxation. *State* (*Pennsylvania R. Co., Pros.*) v. *Wetherill*, 41 *N. J. L.* 147.

The payment of the tax upon the franchise of a railroad corporation, under N. Car. Act of 1872-73, ch. 115, does not exempt the corporation from the payment of county and state taxes, properly levied upon its roadbed, superstructure, etc. *Wilmington R. Bridge Co.* v. *New Hanover County Com'rs*, 72 *N. Car.* 15. — APPROVING Wilmington, C. & A. R. Co. *v.* Brunswick County Com'rs, 72 N. Car. 10.

164. Land grants.*—(1) *Federal decisions.*—The case of Kansas Pacific R. Co. *v.* Prescott, 16 Wall. 603, affirmed so far as it holds that lands for which the United States has not issued a patent, and on which the costs of survey have not been paid, are exempt from state taxation; but overruled so far as it holds that a contingent right of pre-emption in lands granted to the Pacific railroad constitutes such exemption. *Union Pac. R. Co.* v *McShane*, 22 *Wall.* (*U. S.*) 444, 11 *Am. Ry. Rep.* 456.—DISTINGUISHED IN Cass County *v.* Morrison, 28 Minn. 257 FOLLOWED IN Northern Pac. R. Co. *v.* Traill County, 25 Am. & Eng. R. Cas. 364, 115 U. S. 600. REVIEWED IN Wisconsin C. R. Co. *v.* Taylor County, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37.

Under a charter of a railroad exempting its capital stock and dividends to a certain amount from taxation, lands granted to the company by a state to aid in the construction of the railroad are not exempt. *Memphis & St. L. R. Co.* v. *Loftin*, 13 *Am. & Eng. R. Cas.* 377, 105 *U. S.* 258.

(2) *State decisions.*—Under Ark. Act of April 8, 1869, lands acquired by grant, donation, or subscription in aid of a railroad are exempt from taxation until conveyed to an actual purchaser. *Cairo & F. R. Co.* v. *Parks*, 32 *Ark.* 131.

Where a company enters into a contract of sale of lands, no conveyance being made, and the purchasers fail to pay the purchase money according to the terms of the contract, whereupon the company declares a forfeiture of the contract of sale, the lands are not subject to taxation. They have not been "sold and conveyed," within the meaning of section 22 of the charter. *Illinois C. R. Co.* v. *Goodwin*, 94 *Ill.* 262.

And a person purchasing such land at tax sale after such forfeiture, and paying subsequent taxes thereon, will be entitled to have the payments so made refunded to him, as provided in Ill. Rev. St. ch. 120, § 268, and may recover the same of the county in which the land is situated. *Champaign County* v. *Reed*, 106 *Ill.* 389.

An act of the legislature was entitled "An act to authorize and empower the board of control of state swamp lands to make an appropriation of state swamp lands to aid in the construction of a railroad" between given points. *Held*, sufficient to cover the exemption from taxation, for a limited time, of the lands granted. *Chippewa County Sup'rs* v. *Auditor-General*, 65 *Mich.* 408, 32 *N. W. Rep.* 651.

If the real intention of the parties was in accordance with the agreement, legally construed—that is, as averred by the plaintiff, merely to afford security for an indebtedness of the corporation to its stockholders in the manner specified in the agreement—the transaction would not constitute a contract for the sale of the land, or a conveyance of the same, so as to remove the exemption from taxation which attached to the land while it remained the property of the corporation. But an act of the corporation conferring upon its stockholders the entire beneficial interest in the land, even though the bare legal title is retained by the corporation, would remove the exemption and subject the property to taxation. So, if the transaction was intended by the parties effectually to confer upon the stockholders such interest in the property, but a form of ownership, or a declared equity of redemption, was reserved for the purpose of preserving the exemption from taxation, the purpose being fraudulent as to the state, the reservation would be ineffectual, and the land would become taxable. *St. Paul & S. C. R. Co.* v. *McDonald*, 22 *Am. & Eng. R. Cas.* 208, 34 *Minn.* 182, 25 *N. W. Rep.* 57. — FOLLOWED IN Sioux City & St.

*Land grant; exemption of. "Sale or conveyance," see note, 39 AM. & ENG. R. CAS. 509.

P. R. Co. *v.* Robinson, 39 Am. & Eng. R. Cas. 510, 41 Minn. 452, 43 N. W. Rep. 326.

The right to hold land granted to a railroad in aid of its principal enterprise exempt from taxation is a franchise, but ancillary and subordinate; and the right of a company to exercise such franchise, and to continue its corporate existence for such purposes only, cannot lawfully survive after a sale of its railroad, and the abandonment of its principal business as a railroad corporation, unless by the authority of the legislature expressed or clearly implied. The rights of the state are not lost by delay merely, nor can they be waived by its executive officers. *State ex rel.* v. *Minnesota C. R. Co.*, 29 *Am. & Eng. R. Cas.* 440, 36 *Minn.* 246, 30 *N. W. Rep.* 816.

After the courts had declared the charter of a company forfeited (36 Minn. 246), the legislature passed an act continuing such corporations for three years for the purpose of disposing of their property, etc. (Minn. Gen. St. 1878, ch. 34, § 416). *Held*, that lands acquired by the company under the land grant of 1857, and legislation subsequent thereto, are exempt from taxation during said period of three years, unless leased or sold, or contracted to be sold within that time. *Minnesota C. R. Co.* v. *Donaldson*, 38 *Minn.* 115, 35 *N. W. Rep.* 725.—REVIEWING Minnesota C. R. Co. *v.* Melvin, 21 Minn. 339.

By a contract entered into by a company "special land stock" was created and divided gratuitously among the common stockholders. The special stock gave to the holder no rights in the corporate property or management, but simply entitled him to a proportionate share in the proceeds of lands set apart to be disposed of for the benefit of all the holders. A trustee for the holders was designated by the instrument, and an irrevocable power of attorney was made to another person to sell the lands and apply the proceeds. The holders of the "special stock" were authorized to remove all officers and agents connected with the management of the property, and also to remove the land trustee and attorney in fact and appoint others; but until the exercise of these powers the powers of the trustee were vested in the company. There was never any reasonable expectation of any residuary benefit resulting to the company. *Held*, that, although the legal title to the lands remained in the company, the effect of the contract was to transfer the entire beneficial interest therein to the stockholders without reserve, notwithstanding the formal provision for a resulting interest, and the reservation of power of redemption, and that the lands were no longer exempt from taxation as part of the unconveyed land grant of the company. *St. Paul & S. C. R. Co.* v. *Robinson*, 39 *Am. & Eng. R. Cas.* 502, 40 *Minn.* 360, 42 *N. W. Rep.* 79.

An instrument by which a company conveys a part of its land grant to trustees, that the lands may be sold and the proceeds devoted to the satisfaction of bonds issued at the same time and sold in open market, in order that funds may be obtained with which to build a portion of the railway, and which bonds are sold to many persons who at no time were interested in the road, and who took no part in the transaction before investing in the securities, does not amount to a conveyance of the lands, within Minn. Gen. Laws 1865, ch. 15, when the evidence shows that such was not the intention; and they are not taxable under section 5 of that chapter. *Sioux City & St. P. R. Co.* v. *Robinson*, 39 *Am. & Eng. R. Cas.* 510, 41 *Minn.* 452, 43 *N. W. Rep.* 326.—FOLLOWING St. Paul & S. C. R. Co. *v.* McDonald, 34 Minn. 182, 25 N. W. Rep. 57.—DISTINGUISHED IN Chippewa County *v.* St. Paul, S. & T. F. R. Co., 41 Am. & Eng. R. Cas. 619, 42 Minn. 295, 44 N. W. Rep. 70.

A provision in a charter exempting the "railroad" of a company from taxation includes the rolling stock and various property used in, and necessary for, operating the road; but it does not extend to lands which have been granted by the United States through the state to aid the road, and which are held by the company for sale. *Mobile & O. R. Co.* v. *Moseley*, 52 *Miss.* 127.

Unsurveyed public lands acquired by a company under the Acts of Congress of July 1, 1862, and July 2, 1864, are exempted from taxation by the state. *State* v. *Central Pac. R. Co.*, 21 *Nev.* 94, 25 *Pac. Rep.* 442.

The provisions of the Dak. Sess. Laws 1883, ch. 99, imposing upon railroad companies a tax of a percentage of their gross earnings in lieu of any and all other taxes upon the railroad, equipments, appurtenances, or appendages, or other property belonging to the corporation, or upon its capital stock, or business transactions, and that the lands of any railroad company shall

become subject to taxation in the same manner as other similar property as soon as sold, leased, or contracted to be sold, exempt from taxation lands granted to a railroad company, although not held by it for railroad purposes. *Northern Pac. R. Co.* v. *Barnes*, 53 *Am. & Eng. R. Cas.* 616, 2 *N. Dak.* 310, 51 *N. W. Rep.* 386. — FOLLOWED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 395; Northern Pac. R. Co. *v.* Strong, 2 N. Dak. 395; Northern Pac. R. Co. *v.* Brewer, 2 N. Dak. 396; Northern Pac. R. Co. *v.* Tressler, 2 N. Dak. 397.

165. Leased land. — A tract of land owned by a company, upon which it had constructed a pier or wharf, renting the same to another corporation, engaged in the business of selling and shipping coal, and for the purposes of such business, is not exempt from ordinary taxation as property held and used for railway purposes, although by the terms of the lease the tenant was under obligation to perform certain service in its line of business for the railway corporation, and was also obliged to furnish a certain amount of freight annually for transportation over its railway. *St. Louis County* v. *St. Paul & D. R. Co.*, 45 *Minn.* 510, 48 *N. W. Rep.* 334.

Vacant land outside of the sixty-three feet authorized to be taken by condemnation, and property of any nature held by tenants, and not at the time necessary for the existence of the road or for effecting the purposes of the incorporation, are not exempt from taxation. *State* (*New Jersey R. & T. Co., Pros.*) v. *Collectors*, 26 *N. J. L.* 519; *affirming* 25 *N. J. L.* 315.—DISTINGUISHED IN United N. J. R. & C. Co. *v.* Jersey City, 53 N. J. L. 547.

The exemption from taxation in the prosecutors' charter only applies to such estate or property of the company as is possessed, occupied, and used for the actual and necessary purposes of canal navigation. Lots of land leased to others for their exclusive use and occupancy in discharging and shipping coal carried over the canal are not exempt. *State* (*Morris C. & B. Co., Pros.*) v. *Love*, 37 *N. J. L.* 60.

A statute provided for a certain tax upon all the real property of a company "used or owned for the purposes of their road." *Held*, that this included only such property as may be necessary or convenient for the legitimate purposes of the company under its charter. And the exemption from taxation of a tract of land at the terminus of the road not exceeding ten acres, with the buildings and improvements thereon, does not extend to a tract at the terminus bought for use in connection with the business of the road, but which was not at the time so used, but was leased to a private person for his own private business. *State* (*Delaware, L. & W. R. Co., Pros.*) v. *Fuller*, 40 *N. J. L.* 328, 17 *Am. Ry. Rep.* 347.—QUOTING State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537.

Where any of the lands or buildings of a railroad are rented to others, or used for purposes not authorized by its charter, there will be no exemption from taxation, and such rent or use may be ascertained, if necessary, by reference to a commissioner. *State* (*United N. J. R. & C. Co., Pros.*) v. *Mayor, etc., of Jersey City*, 41 *N. J. L.* 471.

166. Branch roads. — A former decision holding that the main line of a railroad is exempt from taxation is not a controlling authority as to the right to tax a branch built under a different charter, when the causes of action and the facts litigated are not identical. *Wilmington & W. R. Co.* v. *Alsbrook*, 53 *Am. & Eng. R. Cas.* 687, 146 *U. S.* 279, 13 *Sup. Ct. Rep.* 72.—DISTINGUISHING Wilmington & R. R. Co. *v.* Reid, 13 Wall. (U. S.) 264.

A company is entitled to an exemption of $1000 from taxation, but the company is not entitled to an exemption upon each road purchased or leased, or upon its different branches. The owner of different railroads is no more entitled to double exemption than is the owner of several farms. *Louisville & N. R. Co.* v. *Bate*, 17 *Am. & Eng. R. Cas.* 494, 12 *Lea* (*Tenn.*) 573.

167. Subsequently acquired roads. —An exemption from taxation in a railroad charter will only extend to roads built under that charter, and not to lines subsequently acquired or built. *Southwestern R. Co.* v. *Wright*, 116 *U. S.* 231, 6 *Sup. Ct. Rep.* 375.

168. Buildings, generally. — The reservoirs created by the Delaware and Hudson canal company for supplying the canal with water are not taxable for county and state purposes; nor are houses and gardens occupied by the lock tenders and collectors along the canal and railroad; nor the engines and machinery for raising cars up the planes, and the engine houses; nor houses and gardens occupied by the engineers attending the engines; nor the collector's

and engineer's office in Honesdale; but buildings in Honesdale at the junction of the canal and railroad, used for receiving and transshipping goods and merchandise to and from the canal and railroad, and houses used as boarding-houses for workmen, and horses for drawing the cars on the railroad, and the barns and stables for them, are liable to taxation for county and state purposes. *Wayne County Com'rs* v. *Delaware & H. Canal Co.*, 15 *Pa. St.* 351. — DISTINGUISHED IN Pennsylvania R. Co. *v.* Pittsburg, 104 Pa. St. 522. REVIEWED IN Citizens' Pass. R. Co. *v.* Donohugh, 15 Phila. (Pa.) 258.

169. Depots and station grounds. —A depot and grounds are not exempt from assessment for a public improvement because the company's right of way with the tracks thereon runs into such depot. *Chicago, R. I. & P. R. Co.* v. *Chicago*, 139 *Ill.* 573, 28 *N. E. Rep.* 1108.

The property of a company is not exempt from taxation; and grounds held by a company, subject to the condition that they shall be used for depot purposes, are subject to taxation. *Burlington & M. R. R. Co.* v. *Spearman*, 12 *Iowa* 112. — REVIEWED IN Ludlow *v.* Cincinnati Southern R. Co., 7 Am. & Eng. R. Cas. 231, 78 Ky. 357.

Mass. Act of 1884, ch. 157, § 2, authorized plaintiff company to take so much of certain land "as it may deem necessary or suitable for station purposes, and for tracks and yard room, to be used in connection therewith." *Held*, that it would be presumed that the whole of a strip of land taken under the statute was for station purposes, in determining whether it was exempt from taxation or not. *Norwich & W. R. Co.* v. *Worcester County Com'rs*, 151 *Mass.* 69, 23 *N. E. Rep.* 721.

Where, by mistake of boundaries, part of the depot grounds of a company is built upon by another, and is inclosed and occupied for years as a distinct lot, not used in operating the railroad, it is not exempt from general taxation on payment of a privilege tax by the company. *Vicksburg & M. R. Co.* v. *Lewis*, 68 *Miss.* 29, 10 *So. Rep.* 32.

The charter of a company provided that "all machines, wagons, vehicles, or carriages belonging to the company, with all their works and all profits which shall accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatsoever." *Held*, that real estate owned and used by the company for the purposes of its business for depots, etc., is embraced in the provision, and is personal estate. All the property, real and personal, is exempt from taxation, both state and municipal. The exemption from taxation of the real estate of the company in the city of Richmond is not unconstitutional as being in conflict with the charter of the city, previously granted, giving to the city the power to tax real estate for the purposes stated in the city charter, the city having ample means of taxation left for the payment of her expenses and debts. *Richmond* v. *Richmond & D. R. Co.*, 21 *Gratt.* (*Va.*) 604. —QUOTING Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.) 288. REVIEWING Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535; Gilman *v.* Sheboygan, 2 Black (U. S.) 570.—QUOTED IN Com. *v.* Richmond & P. R. Co., 24 Am. & Eng. R. Cas. 482, 81 Va. 355.

Where a statute provides that all property "necessarily used in operating any railroad" shall be exempt from taxation, lots adjoining a company's track in a city, which seem to have been a part of its depot grounds, but upon which an individual was permitted from time to time, without charge, to pile salt, mainly for shipment over the road — *held*, exempt from taxation. *Milwaukee & St. P. R. Co.* v. *Milwaukee*, 34 *Wis.* 271.

170. Elevators, freight houses, wharves, etc.* — If an elevator of the Illinois Central railroad company is used exclusively by it in receiving grain for shipment, or for storing it after shipment, without any additional charge therefor, except on neglect of the owner to take it away within a reasonable time after its arrival, it is clearly exempt under section 22 of the charter of the company. *In re Swigert*, 24 *Am. & Eng. R. Cas.* 494, 119 *Ill.* 83, 6 *N. E. Rep.* 469. *Illinois C. R. Co.* v. *People ex rel.*, 119 *Ill.* 137, 6 *N. E. Rep.* 451.

It appeared that the company erected on its right of way in a city, and near a river, a grain elevator, and leased the same to private parties, who received tolls and compensation for all grain stored therein. It

* Exemption of elevator situated some distance from road, see 33 AM. & ENG. R. CAS. 474, *adstr.*

was shown that such elevator was quite convenient and beneficial to the company in its business, but not more so than if built and owned by private persons. *Held*, that under the company's charter such elevator was not exempt from taxation, it not being devoted exclusively to the business of the company as a common carrier, and not being essential to the operation of its road. *In re Swigert*, 24 *Am. & Eng. R. Cas.* 494, 119 *Ill.* 83, 6 *N. E. Rep.* 469.—REVIEWING Illinois C. R. Co. *v.* Irvin, 72 Ill. 452.

Freight houses, elevators, etc., constructed and used solely for the purpose of enabling the company to perform its duties as a common carrier, are exempt from taxation under the charter of the company. But property devoted to a use not contemplated by the charter, as for the business of warehousing for private gain, or merchandising, is not within the exemption. *Illinois C. R. Co.* v. *People ex rel.*, 119 *Ill.* 137, 6 *N. E. Rep.* 451.—FOLLOWING Illinois C. R. Co. *v.* Irvin, 72 Ill. 452.

Elevators, wharves, piers, and docks owned by the Baltimore and Ohio road, being necessary for its business of receiving and storing grain and freight shipped over its road after the same had reached the place of destination, and previous to its delivery to the consignee or owner, are exempt from taxation; but, as a common carrier, the company had no right to own and use these structures for the storage of grain and freight after the owner or consignee had had a reasonable time to remove the same. *State* v. *Baltimore & O. R. Co.*, 48 *Md.* 49.

A grain elevator erected upon its property by a union depot company organized under the Union Depot Act of 1881 (How. Mich. St. ch. 93), and used as a grain warehouse in connection with its general business as a common carrier, is a necessary part of the equipment, and is not liable to taxation under the general tax law of the state. *Detroit Union R. D. & S. Co.* v. *Detroit*, 88 *Mich.* 347, 50 *N. W. Rep.* 302.

Under a railroad charter exempting from taxation the road and its appurtenances, including warehouses, etc., an elevator, though situated outside the right of way, if necessary and used as a depot or warehouse, and located at such a distance on account of natural disadvantages, is exempt, together with the side tracks, etc., necessary to connect it with the road, and the land on which both are constructed. *State* v. *Nashville, C. & St. L. R. Co.*, 86 *Tenn.* 438, 6 *S. W. Rep.* 880.—REFERRING TO State *v.* Nashville, C. & St. L. R. Co., 12 Lea (Tenn.) 583.

Where a statute exempts property "necessarily used in operating any railroad," warehouses and sheds belonging to a company in a city, principally used for storage of freight received from propellers and consigned to the company for transportation, or of freight carried to the city by the company and designed for shipment by propellers, and the land on which they are situate, are exempt from taxation, notwithstanding they are to some extent in charge of agents or propeller lines, who store in them goods from propellers consigned to parties in the city, and in some cases charge storage thereon. *Milwaukee & St. P. R. Co.* v. *Milwaukee*, 34 *Wis.* 271.

171. Hotels, inns, and boarding houses.—A hotel owned by a railroad corporation, and kept by its lessee as a hotel and place of summer resort — *held*, not included within the exemption from ordinary taxation enjoyed by the corporation in respect to such of its property as is held and used for railroad purposes. *Hennepin County* v. *St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 625, 42 *Minn.* 238, 44 *N. W. Rep.* 63.—FOLLOWING Todd County *v.* St. Paul, M. & M. R. Co., 38 Minn. 163, 36 N. W. Rep. 109.

Tenn. Act of 1864, exempting from taxation the capital stock of a company "and the road, with fixtures and appurtenances," does not extend to a hotel building erected on the company's right of way, under a lease from the company, though it is a convenience to passengers, and a means of profit to the road. But ticket offices in the building are exempt. *Day* v. *Joiner*, 6 *Baxt.* (*Tenn.*) 441.

Where a statute exempts property "necessarily used in operating any railroad," inns and boarding houses maintained by railroad companies at their stations for the use of persons arriving and departing on their trains appear to be necessary, and when employed exclusively for that purpose might it seems, be exempt. *Milwaukee & St. P. R. Co.* v. *Crawford County Sup'rs*, 29 *Wis.* 116, 12 *Am. Ry. Rep.* 210.—QUOTED IN State ex rel. *v.* McFetridge, 64 Wis. 130.

But when the inn is kept for the accommodation of all persons applying, and not merely for persons arriving and departing

on trains, the property is liable to taxation. *Milwaukee & St. P. R. Co.* v. *Crawford County Sup'rs*, 29 *Wis.* 116, 12 *Am. Ry. Rep.* 210.

In such case, the courts cannot hold distinct portions of the property taxable and the residue exempt, but will hold the whole to be taxable. *Milwaukee & St. P. R. Co.* v. *Crawford County Sup'rs*, 29 *Wis.* 116, 12 *Am. Ry. Rep.* 210.

172. Stables, shops, and storehouses. — Under a contract between a municipality and a street-railroad company providing that "the road, rolling and live stock of said company" should be exempt from taxation, stables, shops, houses for storage of lumber, and other like conveniences are not exempted; and this construction is not altered by the fact that the president of the road and other interested witnesses testified that they understood when the franchise was granted that it included such appurtenances or conveniences as the above. *Atlanta St. R. Co.* v. *Atlanta*, 66 *Ga.* 104.

A company has as clear a right to contract to house a car of another when at its depot, and to receive payment therefor, as to carry the car over its road for pay, and using its car house to shelter such car is not a use for purposes outside the proper functions of the company and subjecting the house to taxation. *State* (*Pennsylvania R. Co., Pros.*) v. *Wetherill*, 41 *N. J. L.* 147.

173. Personal property, generally. —The state board of equalization cannot assess for taxation any personal property owned by railway companies which is not used in the direct operation of the respective railroads, even though such property may be employed indirectly in carrying on the business. *Denver & R. G. R. Co.* v. *Church*, 48 *Am. & Eng. R. Cas.* 627, 17 *Colo.* 1, 28 *Pac. Rep.* 468.

The exemption of train [tram] railways from ordinary local taxation does not include exemption from liability to pay the tax on dogs. *Hendrie* v. *Kalthoff*, 48 *Mich.* 306, 12 *N. W. Rep.* 191.

The phrase "road, with its appendages," in a railroad charter tax provision, does not include the equipments, cars, engines, or other personal property of the company, but is applied to the real estate. *State Treasurer* v. *Somerville & E. R. Co.*, 28 *N. J. L.* 21.—QUOTED IN Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 714. REVIEWED IN Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

Assuming that the personal property of a corporation located outside of the state is in any event entitled to exemption from taxation, a temporary absence is not sufficient to create the exemption; the change of location must be permanent, positive, and unequivocal. *People ex rel.* v. *Com'rs of Taxes*, 64 *N. Y.* 541; *affirming* 5 *Hun* 200.

174. Bonds.—The exemption from taxation, by the state of Pennsylvania, of bonds issued to and held by non-residents of that state, citizens of other states, is not affected by the fact that the bonds are secured by a mortgage executed simultaneously with them, and only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce the payment of his demand. This right has no locality independent of the party in whom it resides. *Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 15 *Wall.* (*U. S.*) 300, 4 *Am. Ry. Rep.* 368.

Bonds of the Baltimore and Ohio railroad company, and of the Northern Central railway company, not alleged to be secured by mortgages upon property within the state, are not embraced in the terms of the exemption contained in Md. Act of 1876, ch. 260, § 1, which exempted from taxation "mortgages upon property in this state, and the mortgage debts respectively secured thereon." *Appeal Tax Court* v. *Gill*, 50 *Md.* 377.

The bonds of an incorporated company which by its charter is exempt from taxation are not exempt from taxation in the hands of individual bondholders, creditors of the corporation, whether such bondholders are also stockholders or not. *State* (*Fish, Pros.*) v. *Branin*, 23 *N. J. L.* 484.

175. Capital stock. — A provision in a charter exempting the "capital stock" of a company from taxation extends to any property necessary and proper for building and sustaining the company's road, but not to other property. *Bibb County* v. *Central R. & B. Co.*, 40 *Ga.* 646.—APPROVED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310. EXPLAINED IN Memphis & C. R. Co. *v.* Gaines, 3 Tenn. Ch. 604.

Ill. Act of May 1, 1873, entitled "An act to provide for the assessment and taxation of bridges across navigable waters on the borders of this state," does not exempt the

companies owning such structures from the payment of taxes upon their capital stock. The sole object of the act is to declare such structures real estate, for the purpose of sale for taxes of the corporation. *Quincy R. Bridge Co.* v. *Adams County*, 88 *Ill.* 615, 21 *Am. Ry. Rep.* 378.

Exemption of the capital stock of a corporation from taxation operates as an exemption of so much of the property of the corporation as the corporation is fairly authorized to hold for the proper exercise of its franchises. *Anne Arundel County Com'rs* v. *Annapolis & E. R. R. Co.*, 47 *Md.* 592, 18 *Am. Ry. Rep.* 359.—APPROVED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310.

The capital stock of a company is included in the exemption of "all the property of every kind and description," granted by the Acts of Feb. 2, 12, and 15, 1878, and when the conditions are complied with, it cannot be taxed during the period specified. *Santa Fé County Com'rs* v. *New Mexico & S. P. R. Co.*, 3 *N. Mex.* 116, 2 *Pac. Rep.* 376.—QUOTING Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.) 288.

All the property of a company devoted to such use is necessarily represented by its "capital stock," and it has repeatedly been held that where a statute exempts such "capital stock" from taxation this exemption includes all the real estate, rolling stock, and other property actually and necessarily used in the operation of such road. *Northern Pac. R. Co.* v. *Barnes*, 53 *Am. & Eng. R. Cas.* 616, 2 *N. Dak.* 310, 51 *N. W. Rep.* 386.—APPROVING Scotland County *v.* Missouri, I. & N. R. Co., 65 Mo. 123; Hannibal & St. J. R. Co. *v.* Shacklett, 30 Mo. 550; Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.) 288; Rome R. Co. *v.* Mayor, etc., of Rome, 14 Ga. 275; New Haven *v.* City Bank, 31 Conn. 106; Anne Arundel County Com'rs *v.* Annapolis & E. R. R. Co., 47 Md. 592; Bibb County *v.* Central R. & B. Co., 40 Ga. 646; Bank Tax Case, 2 Wall. (U. S.) 200.—FOLLOWED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 395; Northern Pac. R. Co. *v.* Strong, 2 N. Dak. 395; Northern Pac. R. Co. *v.* Brewer, 2 N. Dak. 396; Northern Pac. R. Co. *v.* Tressler, 2 N. Dak. 397.

A railway charter contained a provision that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road and no longer." *Held*, that whatever meaning may be given to the words "capital stock," which is forever exempt from taxation, "the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation," becomes liable to taxation, like other similar property, upon the expiration of the limitation of twenty years. *Memphis & C. R. Co.* v. *Gaines*, 3 *Tenn. Ch.* 604.—APPROVING Wilmington & R. R. Co. *v.* Reid, 13 Wall. (U. S.) 268; Vermont C. R. Co. *v.* Burlington, 28 Vt. 193; Philadelphia, W. & B. R. Co. *v.* Bayless, 2 Gill (Md.) 355. EXPLAINING Bibb County *v.* Central R. & B. Co., 40 Ga. 646.—QUOTED IN Mayor, etc., of Chattanooga *v.* Nashville, C. & St. L. R. Co., 7 Lea (Tenn.) 561.

176. Increased capital.—A company was chartered with a limited capital, with a provision that its capital stock should be exempt from taxation until the company was able to pay a six per cent. dividend. Its capital stock was afterwards increased from time to time to double the original amount. It was still further increased by additional stock called "preferred stock," the holders of the old stock to be entitled to new by the surrender of their old stock, and paying a certain proportion upon the new. Under this authority nearly the whole of the old stock was surrendered for preferred stock. *Held*, that the original exemption from taxation applied to the increased capital upon every authorized increase of the same, without any express provision to that effect in the statutes authorizing the increase; and the new stock issued as preferred stock was also exempt. *State* v. *Norwich & W. R. Co.*, 30 *Conn.* 290.

In such case the provision as to the payment of a six-per-cent. dividend was not satisfied when the revenue was sufficient to pay a dividend on the original capital, but must be sufficient to pay a dividend upon the entire or increased capital. *State* v. *Norwich & W. R. Co.*, 30 *Conn.* 290.

And the fact that the receipts of the road amounted to six per cent. per annum on the entire capital would not subject the company to taxation, unless they were sufficient to pay a dividend of that amount after deducting all reasonable and necessary expenses of the company for the year. *State* v. *Norwich & W. R. Co.*, 30 *Conn.* 290.

177. Stock in hands of stockholders.*—A railroad was chartered with an exemption from taxation for fifteen years, and thereafter the state reserved the right to tax the shares of stock whenever the annual profits should exceed eight per cent. *Held*, that the state could not tax such shares so long as the annual profits were less than eight per cent. *Raleigh & G. R. Co.* v. *Reid*, 13 *Wall.* (*U. S.*) 269, 3 *Am. Ry. Rep.* 199; *reversing* 64 *N. Car.* 155.

A state statute incorporating a company, which provides that the capital stock of the company shall be forever exempt from taxation, and that the road with all its fixtures and appurtenances shall be exempt from taxation for the period of twenty years and no longer, exempts the road, its fixtures and appurtenances, from taxation only for the term named in the act; but forever exempts shares in the capital stock of the company, in the hands of the various holders, from taxation in the state. *Tennessee* v. *Whitworth*, 29 *Am. & Eng. R. Cas.* 205, 117 *U. S.* 129, 6 *Sup. Ct. Rep.* 645.—FOLLOWING Memphis & C. R. Co. *v.* Gaines, 97 U. S. 697 —APPROVED IN Natchez, J. & C. R. Co. *v.* Lambert, 70 Miss. 779.

The legislature of a state may distinguish between the interest of a corporate body in its capital or capital stock and that of the individual shareholder as separate subjects of taxation; so that one may be taxed and the other exempt, or both governed by the same rule of taxation or exemption at its discretion. *Tennessee* v. *Whitworth*, 17 *Am. & Eng. R. Cas.* 411, 22 *Fed. Rep.* 75, 117 *U. S.* 129, 6 *Sup. Ct. Rep.* 645.

When a company is, by its charter, exempt from taxation, the stock of the company in the hands of the stockholders cannot be taxed; it represents, and is the title to, the property of the company, and therefore is included in the exemption. *State* (*Fish, Pros.*) v. *Branin*, 23 *N. J. L.* 484.

The stock of a company, when the company by its charter is exempt from taxation, is also exempt from taxation in the hands of stockholders. *State* (*Vail, Pros.*) v. *Bentley*, 23 *N. J. L.* 532.

Where plaintiff company's charter contains the provision that the property of the company shall be vested in the company for the use of the individual stockholders, and that the same shall be personal estate and shall be exempt from any public charge or tax, for a term of years, the investment of money derived from the earnings of the road in preferred stock of another company divests it of the character of non-taxable profits; neither is the rolling stock of the other company exempt from taxation under plaintiff's charter, but it is otherwise as to a sinking fund. *Raleigh & G. R. Co.* v. *Wake County Com'rs*, 17 *Am. & Eng. R. Cas.* 466, 87 *N. Car.* 414.

But the guaranteed stock of plaintiff, held under a guaranty of the payment of semi-annual dividends, is "stock," and not a credit to be diminished by outstanding indebtedness under the revenue act. No deduction from the value of shares is allowed on account of debts owing by the taxpayer. *Raleigh & G. R. Co.* v. *Wake County Com'rs*, 17 *Am. & Eng. R. Cas.* 466, 87 *N. Car.* 414.

Plaintiff's charter authorized the addition to its capital by conversion into stock of certain moneys. *Held*, that the increased stock thereby became capital stock and was included in the above exemption clause. Stock belonging to resident shareholders must be listed by them and not by the corporation, and they are allowed to deduct from the tax on their shares a ratable part of the tax paid upon the corporate property of the corporation itself. *Raleigh & G. R. Co.* v. *Wake County Com'rs*, 17 *Am. & Eng. R. Cas.* 466, 87 *N. Car.* 414.

Under the above provision the tax can be levied from time to time as often as the profits reach the limit of the *per centum* prescribed in the charter; but the tax on the value of the stock is to be abated to the extent of the tax on the corporate property. *Raleigh & G. R. Co.* v. *Wake County Com'rs*, 17 *Am. & Eng. R. Cas.* 466, 87 *N. Car.* 414.

Where the charter vests the corporate property in the stockholders, and exempts it from taxation, the individual stock is also exempt. *Worth* v. *Petersburg R. Co.*, 89 *N. Car.* 301.

The capital stock of a corporation and its shares of stock in the hands of its stockholders are separate and distinct property interests, and separate and distinct subjects of taxation; and the taxation of both is not double taxation, nor the exemption of one necessarily an exemption of the other. *Memphis* v. *Union & P. Bank*, 91 *Tenn.* 546, 19 *S. W. Rep.* 758.

* Exemption of stock from taxation by charter precludes taxation in hands of stockholders, see note, 17 AM. & ENG. R. CAS. 417.

178. Expenses of obtaining loans.—Where the charter of a company provides for a specific tax to the state, among other things, upon all loans made to the company for the purpose of constructing the road, the company cannot claim exemption from taxation on money paid out for commissions and other expenses in negotiating its bonds and procuring a loan. *Michigan S. & N. I. R. Co.* v. *Auditor-General*, 9 *Mich.* 448.

Neither can it claim exemption for money which it borrowed, and afterwards loaned to others, and secured by worthless securities. *Michigan S. & N. I. R. Co.* v. *Auditor-General*, 9 *Mich.* 448.

179. Income.—A railroad charter exempting the "stock" of the company from taxation exempts also its "gross income." Such income is but an accessory of the stock, which is the principal thing—the aggregate of the property and effects of the corporation. *State ex rel.* v. *Hood*, 15 *Rich.* (*So. Car.*) 177.—QUOTED IN St. Louis, I. M. & S. R. Co. *v.* Loftin, 30 Ark. 693.

180. Rentals.—A provision in a charter that a company will pay to the state three per cent. on its gross earnings for the year, in lieu of all other taxes, does not include the compensation paid by it to another company for the right to run trains over its line. *State* v. *St. Paul, M. & M. R. Co.*, 30 *Minn.* 311, 15 *N. W. Rep.* 307.

181. Property necessary to exercise of corporate functions.*—A company whose stock is by law exempt from taxation cannot be taxed on property owned and used by it in the corporation of its railway and necessary for that purpose. The stock is but the representative of the property. *Scotland County* v. *Missouri, I. & N. R. Co.*, 65 *Mo.* 123.—FOLLOWING Hannibal & St. J. R. Co. *v.* Shacklett, 30 Mo. 550.—APPROVED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310.

Where the charter of a company enacts, after reserving certain imposts, that "no other tax or impost shall be levied or assessed on the said company," this exempts from taxation all property held by it necessary to effect the purposes of its incorporation; other property held, being convenient (though not necessary) appendages to the road and its business, will not be exempt from taxation. *State* (*Camden & A. R. & T. Co., Pros.*) v. *Mansfield Com'rs*, 23 *N. J. L.* 510.—DISTINGUISHED IN State (Morris & E. R. Co., Pros.) *v.* Haight, 35 N. J. L. 40. QUOTED IN Vermont C. R. Co. *v.* Burlington, 28 Vt. 193. RECONCILED IN Land *v.* Coffman, 50 Mo. 243.

In applying clauses of exemption from taxation to the property of companies in whose charters they are contained, the test of actual use by the company, for its purposes, may be a proper test, where the company has completed its road and appendages so far as is in the present contemplated. But where a company has not completed its road and appendages, and is engaged in the work of construction, the test of actual work is inapplicable, and the exemptive words must be extended to property not actually used for other purposes, which has been acquired as the means of carrying into effect the objects of the charter, and is fairly within the plan upon which the work is being executed, and will be necessary for the business of the company when its contemplated improvements are completed. *State* (*Morris & E. R. Co., Pros.*) v. *Haight*, 35 *N. J. L.* 40.

What is necessary for the uses of a company in the sense in which that word has been interpreted, and therefore exempt from taxation, must be determined by the court according to the facts of each particular case. *State* (*Camden & A. R. & T. Co., Pros.*) v. *Woodruff*, 36 *N. J. L.* 94, 12 *Am. Ry. Rep.* 424.

Railroad corporations are not liable to be taxed for the land, not exceeding the width prescribed by the charter, over which they are authorized to lay out their roads; nor for buildings erected thereon, if convenient for the uses to which the road can be applied under the charter. *State* (*Cape May & M. R. Co., Pros.*) v. *Collector*, 38 *N. J. L.* 270, 13 *Am. Ry. Rep.* 47.

The property belonging to a company, or its representatives, necessarily used in connection with the railroad, in executing its purposes and objects, to accomplish which the company was chartered, is exempt from ordinary taxation for state or municipal purposes. *State* (*Pennsylvania R. Co., Pros.*) v. *Elizabeth*, 41 *N. J. L.* 319.—FOLLOWED IN State (United N. J. R. & C. Co., Pros.) *v.* Binninger, 1 Am. & Eng. R. Cas. 410, 42 N. J. L. 528.

Assessments against the United Railroad and Canal companies vacated, because the

* What property is necessary to exercise of corporate franchise for purposes of local taxation, see note, 17 L. R. A. 92.

possession of the land assessed was appropriate to the enjoyment of the company's franchise. *State* (*United N. J. R. & C. Co., Pros.*) v. *Binninger*, 1 *Am. & Eng. R. Cas.* 410, 42 *N. J. L.* 528. — FOLLOWING State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537; State (Pennsylvania R. Co., Pros.) *v.* Elizabeth, 41 N. J. L. 319.

Under the Pennsylvania statutes only property necessary for the construction and use of a railroad is exempt from taxation. Property which is only necessary for profits is taxable, such as property which only affords facilities for carrying on the business of the company. *Reading R. Co.* v. *Berks County*, 6 *Pa. St.* 70. — DISTINGUISHED IN State (Camden & A. R. & T. Co., Pros.) *v.* Mansfield Com'rs, 23 N. J. L. 510; State (Pennsylvania R. Co., Pros.) *v.* Mayor, etc., of Jersey City, 49 N. J. L. 540, 9 Atl. Rep. 782, 8 Cent. Rep. 633. FOLLOWED IN Pennsylvania & N. Y. C. & R. Co. *v.* Vandyke, 137 Pa. St. 249. REVIEWED IN Hamilton *v.* Annapolis & E. R. R. Co., 1 Md. 553; Vermont C. R. Co. *v.* Burlington, 28 Vt. 193.

By the acts authorizing a company, incorporated by another state, to locate a part of its road within this commonwealth, it was required to pay to this state annually a certain sum for the privilege, and also a corporation tax on so much of its capital stock as should be equal to the cost of the construction of that part of the road and its appurtenances as were within this state. *Held*, that the machine shops, foundries, freight and passenger houses of the company which were used to carry on the business of the road, and the expense of their erection charged to the cost of construction, were not subject to assessment and taxation for state and county purposes, under Pa. Acts of April 15, 1834, and April 29, 1844. *New York & E. R. Co.* v. *Sabin*, 26 *Pa. St.* 242.—DISTINGUISHED IN Pennsylvania & N. Y. C. & R. Co. *v.* Vandyke, 137 Pa. St. 249. QUOTED IN Cook *v.* State (Camden & B. County R. Co., Pros.), 33 N. J. L. 474. RECONCILED IN Erie R. Co. *v.* Com., 66 Pa. St. 84.

The property of canal and railroad companies, and other *quasi*-public corporations, necessary for the exercise of their several franchises, as depots, toll houses, and water stations, is not taxable for local purposes. The reason for this exemption is that these things enter into the very composition of the works of these corporations and are essential to the exercise of their corporate functions, and for this reason are taxed by the state as included in the capital of the corporation. *Northampton County* v. *Easton Pass. R. Co.*, 148 *Pa. St.* 282, 23 *Atl. Rep.* 895.

Wisconsin Act of 1860, ch. 173, declaring that the "track, right of way, depot grounds and buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad in this state" shall be exempt from taxation, includes all property the use of which is requisite for the full performance of the duty which a company owes to the public as a common carrier. *Milwaukee & St. P. R. Co.* v. *Milwaukee*, 34 *Wis.* 271.—REVIEWING Milwaukee & St. P. R Co. *v.* Crawford County Sup'rs, 29 Wis. 116.—QUOTED IN Chicago, M. & St. P. R. Co. *v.* Crawford County Sup'rs, 48 Wis. 666. REFERRED TO IN Todd County *v.* St. Paul, M. & M. R. Co., 31 Am. & Eng. R. Cas. 482, 38 Minn. 163, 36 N. W. Rep. 109. REVIEWED IN St. Louis, I. M. & S. R. Co. *v.* Loftin, 30 Ark. 693.

182. Property not used for railway purposes.*— A statute which provides for a tax upon the gross earnings of a railroad, and exempts from further taxation "all other property, estate, and effects of said corporation, held or used for, in, or about the construction, equipment, renewal, or repair, or maintaining or operating its railroad, including lands granted to the company," does not apply to land not occupied by the railroad, but by private persons with its consent, though it is probable that such land would be needed by the railroad in the future. *Ramsey County* v. *Chicago, M. & St. P. R. Co.*, 33 *Minn.* 537, 24 *N. W. Rep.* 313.—FOLLOWED IN St. Paul *v.* St. Paul, M. & M. R. Co., 39 Minn. 112, 38 N. W. Rep. 925. REVIEWED IN Todd County *v.* St. Paul, M. & M. R. Co., 31 Am. & Eng. R. Cas. 482, 38 Minn. 163, 36 N. W. Rep. 109.

A statute provided that all the taxes to which a company should be subjected for a period of thirty years should be applied to the payment of its debts and liabilities, and made it the duty of the tax collector in every county in each year to give to the com-

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* Exemption of railroad property from taxation. Property not used for railroad purposes, see 54 AM. & ENG. R. CAS. 296, *abstr.*

pany a receipt in full for the amount of said taxes, upon receiving an affidavit that the amount of the taxes had been applied by the company during the year in payment of debts incurred or money borrowed by it. *Held*, that this did not include taxes on outlying lands not used in the construction, operation, or physical maintenance of the road. *McCulloch* v. *Stone*, 64 *Miss.* 378, 8 *So. Rep.* 236.

The exemption from taxation of a railroad, under a privilege tax, will not be rigidly confined to lands actually and continuously used in operating the road; but it will not embrace land that is not used, though it is in proximity to a depot and may in future be needed for the operation of the road. *Lewis* v. *Vicksburg & M. R. Co.*, 67 *Miss.* 82, 6 *So. Rep.* 773.—DISTINGUISHING Vicksburg & M. R. Co. *v.* Bradley, 66 Miss. 518.

An instruction which makes nonuser of the land by the company at the time of the tax sale the test of exemption is improper; but if the same facts existed the year before, when the land was assessed, the result being right, the error is immaterial. *Vicksburg & M. R. Co.* v. *Lewis*, 68 *Miss.* 29, 10 *So. Rep.* 32.

Under Wash. Act of Nov. 28, 1883 (Gross Earnings Law), all the property of railroads is exempted, whether actually used in the operation of the roads or not. *Columbia & P. S. R. Co.* v. *Chilberg*, 6 *Wash.* 612, 34 *Pac. Rep.* 163.

Where property is necessarily used by a company in operating its road, it is not required, in order to exempt it from local taxation under Wis. Laws 1868, ch. 130, § 2, subd. 13, to be used exclusively for railroad purposes, but it is sufficient if that is clearly shown to be its principal use. *Chicago, M. & St. P. R. Co.* v. *Crawford County Sup'rs*, 48 *Wis.* 666, 5 *N. W. Rep.* 3.—QUOTING Milwaukee & St. P. R. Co. *v.* Milwaukee, 34 Wis. 271.

Thus, where it appeared that it was necessary, in 1873, for the proper accommodation of persons traveling by a railroad, that the company should maintain an eating and lodging house for them at A., adjacent to its road, and that a certain building owned by the company, upon its land adjacent to its road, was principally used for that purpose, more than nine tenths of its business, probably, consisting in furnishing entertainment to travelers by and employés upon said railroad, such building —*held*, exempt from local taxation; the facts that the company's tenant (not charged with rent) by whom it was conducted took the profits thereof, and that commercial travelers reaching and leaving A. by railroad were entertained at the house for one or more days, while transacting their business in that vicinity, would not prevent such exemption, where the house was not kept as a general hotel for the accommodation of the whole public. *Chicago, M. & St. P. R. Co.* v. *Crawford County Sup'rs*, 48 *Wis.* 666, 5 *N. W. Rep.* 3.

183. Property not necessary or indispensable.—Under an act exempting a railroad from taxation no property will be exempt except that which is necessary and indispensable to the road. So a steamboat owned and used to facilitate business will not be exempt. *Illinois C. R. Co.* v. *Irvin*, 72 *Ill.* 452.—QUOTING State *v.* Newark, 26 N. J. L. 520.—FOLLOWED IN Illinois C. R. Co. *v.* People ex rel., 119 Ill. 137. REVIEWED IN Re Swigert, 24 Am. & Eng. R. Cas. 494, 119 Ill. 83.

184. Property of non-residents.—Property of railroads acquired under authority of Mo. Act of 1870, § 2 (Laws, p. 90), is not exempt from taxation. *State ex rel.* v. *Chicago, B. & K. C. R. Co.*, 89 *Mo.* 523, 14 *S. W. Rep.* 522.

Mo. Rev. St. § 5012, exempting from road tax the property of all persons residing within the limits of an incorporated village or town, embraces the property of non-residents. *State ex rel.* v. *Wabash, St. L. & P. R. Co.*, 90 *Mo.* 166, 2 *S. W. Rep.* 275.

3. *Particular Railroads.*

185. Alexandria & Bloomfield R. Co. — Mo. Corporation Law, § 7 (Rev. St. 1855, p. 371), declares that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." The Railroad Law, §§ 56, 57 (Rev. St. 1855, p. 438), declares that "the legislature may at any time alter or amend this act, but such alterations or amendment shall not impair the rights of companies previously organized"; that in future all railroad companies shall have "all the * * * privileges contained in this act." In 1857 the legislature chartered the above company free from taxation for a term of

six years. *Held*, that the right of amendment reserved to the legislature was that contained in section 56 only, and that the exemption could not be withdrawn after the company had organized. *Scotland County* v. *Missouri, I. & N. R. Co.*, 65 *Mo.* 123.—NOT FOLLOWED IN Keokuk & W. R. Co. *v.* Scotland County Court, 41 Fed. Rep. 305. REVIEWED IN State ex rel. *v.* Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.

186. Annapolis & Elk Ridge R. Co. —Maryland Act of 1836, ch. 298, chartering the above company, gave to the president and directors all the "powers and privileges" conferred by the charter of a certain other company, one provision of which exempted the company from taxation. *Held*, that this exemption was not one of the privileges necessary for the construction and maintenance of the company's road. *Anne Arundel County Com'rs* v. *Annapolis & E. R. R. Co.*, 47 *Md.* 592, 18 *Am. Ry. Rep.* 359.

187. Baltimore & Ohio R. Co.— The original Maryland act incorporating the company provided that the shares of stock were to be considered personal estate and exempt from any tax by the state assenting to the law. On Feb. 23, 1831, this statute was amended so as to enable the company to construct a branch road to the line of the District of Columbia, with an amendment that it should not be construed to preclude the legislature from imposing reasonable and just taxes. By Act of Congress of March 2, 1831, the company was authorized to extend this branch to the city of Washington, subject to the same rights and immunities contained in its charter. *Held*, that congress had reference to the original charter of the company as amended, and that its property lying in the District of Columbia is subject to taxation the same as the property of individuals. *Baltimore & O. R. Co.* v. *District of Columbia*, 3 *MacArth.* (*D. C.*) 122. — FOLLOWING Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.) 296. QUOTING Bailey *v.* Magwire, 22 Wall. (U. S.) 226.—REVIEWED IN District of Columbia *v.* Washington & G. R. Co., 4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361.

Md. Act of 1826, ch. 123, § 18, chartering the above company, declares that the shares of the capital stock of the company shall be considered personal estate, and exempt from any tax or burden, and the state's right to tax the stock, and the right of all corporations created by the state to tax it, are excluded by the comprehensive and universal terms of the exemption *Mayor, etc. of Baltimore* v. *Baltimore & O. R. Co.*, 6 *Gill* (*Md.*) 288. — APPROVED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310. DISTINGUISHED IN People ex rel. *v.* Com'rs of Taxes, 2 Am. & Eng. R. Cas. 343, 82 N. Y. 459; Baltimore & O. R. Co. *v.* Marshall County Sup'rs, 3 W. Va. 319. FOLLOWED IN Baltimore & O. R. Co. *v.* District of Columbia, 3 MacArth. (D. C.) 122. QUOTED IN Santa Fé County Com'rs *v.* New Mexico & S. P. R. Co., 3 N. Mex. 116; Richmond *v.* Richmond & D. R. Co., 21 Gratt. (Va.) 604. REVIEWED IN State *v.* Cumberland & P. R. Co., 40 Md. 22; State *v.* Baltimore & O. R. Co., 48 Md. 49.

The specific property of the corporation is as much an ingredient in the shares of its stock, and a component part of their value, as is any portion of the corporate property. In the case of this company both are exempt from taxation. *Mayor, etc., of Baltimore* v. *Baltimore & O. R. Co.*, 6 *Gill* (*Md.*) 288.

The right to tax the stock or the specific property of the company was not reinvested in the state by Md. Act of 1835, ch. 395, § 15. *Mayor, etc., of Baltimore* v. *Baltimore & O. R. Co.*, 6 *Gill* (*Md.*) 288.

The exemption from taxation granted in the original charter of the company (Md. Act of 1826, ch. 123, § 18) was a contract between the state and the corporators within the protection of the Constitution of the United States, and therefore beyond the power of a subsequent legislature to repeal or in any manner impair. *State* v. *Baltimore & O. R. Co.*, 48 *Md.* 49. — REVIEWING Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.) 292.

Under the above section the property and franchises of the company were exempt from taxation; and, the franchises being exempt, the gross receipts derived from the exercise of such franchises were also exempt. *State* v. *Baltimore & O. R. Co.*, 48 *Md.* 49.

The gross receipts of the entire road from Baltimore to the Ohio river, and the gross receipts from the lateral roads built by the company, and from all buildings and works necessary and expedient to the operation of the road, are exempt from any tax or burden; and this, too, whether said road, or roads, buildings, and works, were constructed with money derived from the subscription

to its capital stock, or from sales of its shares of stock, or from money borrowed and secured by a mortgage, or from the undistributed profits of the company, or from all these sources combined. *State* v. *Baltimore & O. R. Co.*, 48 *Md.* 49.

The buildings and works necessary and expedient to the operation of the road, within the meaning of the company's charter, or such buildings and works as are reasonably convenient and appropriate to the maintenance and operation of the road, would include elevators, wharves, piers, and docks necessary for the business of the company as a common carrier. *State* v. *Baltimore & O. R. Co.*, 48 *Md.* 49.

While the company was not authorized by its charter to build and conduct hotels for the accommodation of the public generally, hotels or buildings for the accommodation of passengers over its line are necessary to its business, and are therefore within its charter exemption. *State* v. *Baltimore & O. R. Co.*, 48 *Md.* 49.

The Cumberland and Viaduct hotels of the company being used largely for the accommodation of passengers and for offices, the gross receipts derived therefrom are exempt from taxation; but it is otherwise as to the Oakland and Deer Park hotels, used primarily as summer resorts. *State* v. *Baltimore & O. R. Co.*, 48 *Md.* 49.

Va. Act of March 6, 1847, § 7—*held*, to mean that taxes may be assessed whenever the net income of the entire road of the company shall exceed six per cent. per annum on the capital invested, and not when the net income on that portion of the road within the state of Virginia, and West Virginia since its creation, exceeds that amount on the capital invested in said states of Virginia and West Virginia. Also that the net income for the year 1863-64 did exceed six per cent. on the capital invested. *Baltimore & O. R. Co.* v. *Marshall County Sup'rs*, 3 *W. Va.* 319.—DISTINGUISHING Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.) 288. QUOTING Philadelphia & W. R. Co. *v.* Maryland, 10 How. (U. S.) 393.

The question as to when the property of the company became taxable under the proviso of said section 7 is a question of fact, to be determined, if disputed, by a resort to the judicial tribunals of the state. No act or resolution of the legislature is required by the terms of the proviso, nor would be conclusive of the fact and binding on the company. *Baltimore & O. R. Co.* v. *Marshall County Sup'rs*, 3 *W. Va.* 319.

188. Baltimore & Susquehanna R. Co.—As the stock is the representative of the property of a company, the exemption of the one must be considered as the exemption of both, unless the exemption be made on the ground of selection, to show which is intended to be taxed to the exclusion of the other. *Tax Cases*, 12 *Gill & J.* (*Md.*) 117.

By Md. Act of 1827, ch. 72, § 20, the stock of the company is expressly exempted, and the whole object would be defeated by taxing the property; the mortgage executed to the state cannot exempt the property mortgaged from taxation in the hands of the company mortgagor. *Tax Cases*, 12 *Gill & J.* (*Md.*) 117.

189. Boston & Maine R. Co.—The flats lying between the channels of Charles and Miller's rivers, outside of the location of the road of the Boston and Maine railroad extension company, and filled up by said company, pursuant to the authority given by the act of 1845, ch. 224, § 1, for the location of engine houses and wood-houses, and other purposes for the use of its road, and used, when so filled up, exclusively for such purposes, are not exempt from taxation. *Boston & M. R. Co.* v. *Cambridge*, 8 *Cush.* (*Mass.*) 237.

190. Cairo & Fulton R. Co.—Ark. Act of Jan. 12, 1853, incorporating the above company, and exempting forever its capital stock and dividends from taxation, does not so exempt the lands granted by congress Feb. 9, 1853 (10 U. S. St. 155), to the state, and by her transferred to the company, although they were granted to aid the road and used in lieu of capital, and to that extent relieved the company from the necessity of raising money through stock subscriptions. *St. Louis, I. M. & S. R. Co.* v. *Loftin*, 98 *U. S.* 559.

191. Camden & Amboy R. & T. Co.—The tax of $30,000, or stipulation by the company to pay that sum to the state annually, is not merely a tax on its franchises; and the charter exempts not only those franchises, but all other property of the company, from any other tax. *Camden & A. R. & T. Co.* v. *Appeal Com'rs*, 18 *N. J. L.* 71.—DISTINGUISHED IN State (Camden & A. R. & T. Co., Pros.) *v.* Mansfield Com'rs, 23 N. J. L. 510.

Under the charter of the company, the exemption from taxation extends to all property "suitable and proper for carrying into execution the powers granted to the corporate body." *State* (*Camden & A. R. & T. Co., Pros.*) v. *Woodruff*, 36 *N. J. L.* 94, 12 *Am. Ry. Rep.* 417. — FOLLOWING State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537.

192. Cedar Rapids & M. R. R. Co. — Lands granted to the company by Iowa Laws of 1860, ch. 37, were not, prior to their certification, taxable as belonging to the company, until the company had complied with sections 6 and 7 of said act in respect to the construction of its road. That the road had been completed such a distance west from Cedar Rapids as would earn the land in controversy upon the basis of 120 sections for every 20 miles would not be sufficient. *Goodrich* v. *Beaman*, 37 *Iowa* 563.—RECONCILED IN Cedar Rapids & M. R. R. Co. *v.* Carroll County, 41 Iowa 153.

193. Central Pacific R. Co. — The company is not exempt from taxation by the state of California, on the ground that it is an instrumentality created in pursuance of acts of congress and employed by the national government for transportation of the mails, armies of the United States, munitions of war, etc. *Huntington* v. *Central Pac. R. Co.*, 2 *Sawy.* (*U. S.*) 503.

Since the Act of Congress of July 10, 1886, the surveyed but unpatented lands within the grant to the company are no longer exempt from taxation by reason of the government lien thereon for the costs of surveying, etc. The conditions contained in that act, to the effect that the lien shall continue, and that the United States may become a preferred purchaser at any tax sale of such land, controls such sales, and there is no necessity for a legislative acceptance by the states of the conditions of the act. *State* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 275, 21 *Nev* 247, 30 *Pac. Rep.* 686.

Under section 1108, Gen. St., it is a good answer for a defendant, when assessed for a possessory claim to land, to deny such claim, and plead that whatever claim it has is exempt from taxation. *State* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 275, 21 *Nev.* 247, 30 *Pac. Rep.* 686.

194. Chesapeake & Ohio R. Co.—Chesapeake & Ohio Canal Co.—The charter of the company does not exempt that portion of the road of the company between Richmond and Covington from taxation. *Chesapeake & O. R. Co.* v. *Virginia*, 94 *U. S.* 718, 16 *Am. Ry. Rep.* 155.

The Act of Congress of March 3, 1825, declared the property of the Chesapeake and Ohio canal company exempt from taxation. Congress reserved the right to authorize the extension of the canal "into or through the District of Columbia * * * upon the same terms and conditions, and with all the rights, privileges, and powers of every kind that the company incorporated by this act have to make the Chesapeake and Ohio canal." Afterwards the Alexandria canal company was incorporated by congress and authorized to construct a canal from the terminus of the Chesapeake and Ohio canal in Georgetown across the Potomac river. Subsequently the property was leased, and the lessees conveyed their rights to complainant company. Later congress gave to it permission to construct a bridge over the aqueduct, and the District of Columbia assessed this bridge for taxation. *Held*, that the rights, privileges, and powers communicated to the Alexandria canal company were those which the Chesapeake and Ohio canal company had to make the canal, and that these might be exercised independently of any exemption from taxation, and could not be held to include any immunity therefrom. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217.

Even if the Alexandria canal company had been entitled to immunity from taxation, that could not be claimed by its lessees, as the exemption from taxation was a privilege of the company itself, and did not pass to purchasers of its property and franchises. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217.

The state has not, either by statute or contract, relinquished her right to tax that portion of the railroad which lies between the city of Richmond and the town of Covington and all the property of the company, real and personal, belonging to that part of the road, and a fair proportion of its rolling stock, and of the earnings of the company to be ascertained and apportioned in such mode as may be prescribed by law. But she has relinquished the right to tax the property of the company lying west of Covington *Com.* v. *Chesapeake & O R. Co.*, 27 *Gratt* (*Va.*) 344.—QUOTING Richmond,

F. & P. R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71. REVIEWING Thorpe *v.* Rutland & B. R. Co., 27 Vt. 140.—DISTINGUISHED IN Chesapeake & O. R. Co. *v.* Miller, 19 W. Va. 408.

195. Fitchburg R. Co.—A new location of the company, duly made and filed, in conformity with its actual construction, under Mass. Act. of 1855, ch. 240, exempts the land within its limits from taxation. *Charlestown* v. *Middlesex County Com'rs*, 1 *Allen* (*Mass.*) 199.

196. Galveston, Harrisburg & S. A. R. Co.—The company is not exempt from state taxes. *Galveston, H. & S. A. R. Co.* v. *State*, 38 *Tex.* 224.

197. Georgia R. & B. Co.—By reason of the exemption given in the charter of the company, it is not within the power of the city council of Augusta to impose a tax upon any portion of the stock of the road. *Augusta City Council* v. *Georgia R. & B. Co.*, 26 *Ga.* 651.

198. Hannibal & St. Joseph R. Co.—The exemption of the stock of the above company from all state and county taxes, contained in its original charter, is modified by the acceptance on the part of the company of Missouri Act of Sept. 20, 1852, and the corporate property of the company, although representing the stock, is subject to taxation as provided in section 3 of the act. *Hannibal & St. J. R. Co.* v. *Shacklett*, 30 *Mo.* 550.—APPROVED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310. DISTINGUISHED IN St. Louis Mut. L. Ins. Co. *v.* Board of Assessors, 56 Mo. 503; State *v.* Hannibal & St. J. R. Co., 60 Mo. 143. FOLLOWED IN Livingston County *v.* Hannibal & St. J. R. Co., 60 Mo. 516; Scotland County *v.* Missouri, I. & N. R. Co., 65 Mo. 123. REVIEWED IN St. Louis, I. M. & S. R. Co. *v.* Loftin, 30 Ark. 693; State *v.* Hannibal & St. J. R. Co., 37 Mo. 265; St. Joseph *v.* Hannibal & St. J. R. Co., 39 Mo. 476.

The roadbed, machinery, and depots of the company, and the other property used by it in operating its road, are to be considered as a part of its capital stock, and not liable to taxation under Missouri Revenue Laws of 1855, subjecting to taxation "all property owned by incorporated companies over and above their capital stock." *Hannibal & St. J. R. Co.* v. *Shacklett*, 30 *Mo.* 550.

The city of St. Joseph, by its charter (Mo. Sess. Acts 1863-64, p. 431), had authority to levy and collect a tax upon the real property of the company situate within the chartered limits of the city. The exemption of the company, by its charter, from state and county taxation upon its stock, did not prevent the legislature from repealing the exemption, or subjecting the corporation to further taxation. Subjecting the property of said company to taxation for municipal purposes was not double taxation. *St. Joseph* v. *Hannibal & St. J. R. Co.*, 39 *Mo.* 476.—DISTINGUISHING State *v.* Hannibal & St. J. R. Co., 37 Mo. 265. REVIEWING Hannibal & St. J. R. Co. *v.* Shacklett, 30 Mo. 560.—DISTINGUISHED IN State ex rel. *v.* Macon County Court, 41 Mo. 453. QUOTED IN Webb *v.* Lafayette County, 67 Mo. 353.

A provision of the law incorporating the company exempted its stock "from state and county taxes." *Held*, that the exemption included a tax levied to pay bonds given by it for stock in a railroad company, and this although the bonds can only be paid out of the tax levied for the special purpose. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.—RECONCILING Livingston County *v.* Hannibal & St. J. R. Co., 60 Mo. 519.

Neither the general assembly nor a constitutional convention could repeal said exemption without the consent of the company. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.—FOLLOWED IN State ex rel. *v.* Hannibal & St. J. R. Co., 113 Mo. 297.

The term "county taxes" includes road taxes within the meaning of the provision of the charter of the company exempting it from county taxes. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 263, 101 *Mo.* 120, 13 *S. W. Rep.* 406.

199. Illinois Central R. Co.—The provisions in Ill. Act. of 1851, § 22, incorporating the company, exempting it from taxation, do not exempt it from the payment of a municipal assessment upon its lands within a municipality in the state, laid for the purpose of grading and paving a street therein. *Illinois C. R. Co.* v. *Decatur*, 54 *Am. & Eng. R. Cas.* 282, 147 *U. S.* 190, 13 *Sup. Ct. Rep.* 293; *affirming* 37 *Am. & Eng. R. Cas.* 395, 126 *Ill.* 92, 18 *N. E. Rep.* 315, 1 *L. R. A* 613.

The above charter, in so far as it declares certain exemptions of the property of the

company from taxation, is a contract between the state and the company, which cannot be changed or annulled without the consent of both contracting parties. *Neustadt* v. *Illinois C. R. Co.*, 31 *Ill.* 484.—APPROVED IN Chicago *v.* Sheldon, 9 Wall. (U. S.) 50. QUOTED IN Illinois C. R. Co. *v.* Irvin, 72 Ill. 452. REVIEWED IN Winona & St. P. R. Co. *v.* Watertown, 1 S. Dak. 46.

And no city or town can impose a tax for municipal purposes on the property of the company which may be within its limits. *Neustadt* v. *Illinois C. R. Co.*, 31 *Ill.* 484.

The taxes from which the legislature intended to relieve the company, by the act incorporating it, § 22, are only such taxes as it, as a railroad corporation, would be otherwise liable to pay upon its property, acquired in the prosecution of its business in constructing and operating the lines of road authorized by said act to be constructed and operated. *Illinois C. R. Co.* v. *Irvin*, 72 *Ill.* 452.—QUOTING Neustadt *v.* Illinois C. R. Co., 31 Ill. 484.

The charter of the company, § 22, providing that lands selected under the Act of Congress approved September 20, 1850, granting lands to certain states named, in aid of a railroad from Chicago to Mobile, should be "exempt from all taxation under the laws of this state until sold and conveyed by said corporation," is constitutional, and is a contract between the company and the state which the legislature cannot disregard or impair. *Illinois C. R. Co.* v. *Goodwin*, 94 *Ill.* 262.

Section 22 of the charter of the company, after providing for a limited state tax upon its stock, property, and assets, declared that "said corporation is hereby exempted from all taxation of every kind, except as herein provided for." *Held*, that this broad language should not be construed alone, but considered with reference to and in connection with the objects and purposes of the whole act. *In re Swigert*, 24 *Am. & Eng. R. Cas.* 494, 119 *Ill.* 83, 6 *N. E. Rep.* 469.—REVIEWED IN Todd County *v.* St. Paul, M. & M. R. Co., 31 Am. & Eng. R. Cas. 482, 38 Minn. 163, 36 N. W. Rep. 109.

The property of the company which is exempted from taxation by section 22 of its charter is such as has been acquired in the prosecution of its business in constructing and operating its road as authorized by its charter. *Illinois C. R. Co.* v. *People ex rel.*, 119 *Ill.* 137, 6 *N. E. Rep.* 451.

The provision in the charter of the company exempting it from all taxation of every kind, except as therein provided, has no application to special assessments or special taxation of contiguous property for local improvements. As affecting this question there is no difference between a special assessment and special taxation of contiguous property, neither being included within the meaning of the general word "taxation." *Illinois C. R. Co.* v. *Decatur*, 37 *Am. & Eng. R. Cas.* 395, 126 *Ill.* 92, 1 *L. R. A.* 13, 18 *N. E. Rep.* 315; *affirmed in* 54 *Am. & Eng. R. Cas.* 282, 147 *U. S.* 190, 13 *Sup. Ct. Rep.* 293.—QUOTING Illinois & M. Canal *v.* Chicago, 12 Ill. 403; Mix *v.* Ross, 57 Ill. 121; White *v.* People ex rel., 94 Ill. 607; Craw *v.* Tolono, 96 Ill. 255. REVIEWING Sterling *v.* Galt, 117 Ill. 11.—FOLLOWED IN Illinois C. R. Co. *v.* Mattoon, 141 Ill. 32.—*Illinois C. R. Co.* v. *Mattoon*, 141 *Ill.* 32, 30 *N. E. Rep.* 773.—FOLLOWING Illinois C. R. Co. *v.* Decatur, 126 Ill. 92.

200. International & G. N. R. Co.—Money earned by the company after its consolidation with the H. & G. N. R. Co. was deposited in bank, and assessed for taxes, and levy made to enforce the collection of the taxes thus assessed. The receiver having enjoined, and in his petition alleged that all the money (for the taxes assessed against which the levy was made) was earned by the company, and not by virtue of the charter of the G. N. R. or the H. & G. N. R. Co.—*held*, that such money is not exempted from taxation under the Compromise Act of March 10, 1875, which by its terms specified the exemptions from taxation granted to the consolidated company. *Campbell* v. *Wiggins*, 2 *Tex. Civ. App.* 1, 20 *S. W. Rep.* 730.

201. International R. Co.—Texas Act of March 10, 1875, does not exempt from taxation any property not exclusively acquired by virtue of the charter of the company. Money deposited in a bank by the receiver, not being shown to have been acquired exclusively under the charter of the company, is not exempt from taxation under said act. *Campbell* v. *Wiggins*, 85 *Tex.* 424, 21 *S. W. Rep.* 599.

The exemption of the consolidated road and its successors, and "its capital stock, rights, franchises, etc.," does not give any greater scope to the exemption than as to the property enumerated as exempt, for if such were the purpose, it would be useless

to enumerate the property that was exempted. In order to leave no doubt as to what property should be exempted, the law, after expressing as plainly as it could that it was to be only such property as the new company was entitled to by reason of its acquisition of the charter, rights, and privileges of the company, expressly provides that the exemption should not apply to the lands of the H. & G. N. R. Co., or to the franchise, roadbed, rolling stock, or any property acquired or to be acquired by virtue of the charter of that company. *Campbell* v. *Wiggins*, 2 *Tex. Civ. App.* 1, 20 *S. W. Rep.* 730.—QUOTING International & G. N. R. Co. *v.* Anderson County, 59 Tex. 661.

202. Knox & Lincoln R. Co.—The company is exempt from taxes other than as specified in its charter. *State* v. *Knox & L. R. Co.*, 78 *Me.* 92, 2 *Atl. Rep.* 846.

203. Knoxville & Kentucky R. Co.—By its charter, granted Feb. 25, 1856, the above company was granted exemption from taxation until its stock should pay a dividend equal to the legal rate of interest. *Held*, that the legislature had power, under the Tennessee Constitution of 1834, then in force, to grant the exemption, and that the exemption existed in favor of a company organized by individuals who had purchased the road at judicial sale under proceedings instituted by the state to enforce its lien for interest on bonds. *Knoxville & O. R. Co.* v. *Hicks*, 9 *Baxt.* (*Tenn.*) 442.—EXPLAINED IN East Tenn., V. & G. R. Co. *v.* Hamblen County, 102 U. S. 273. REVIEWED IN State *v.* Nashville, C. & St. L. R. Co., 12 Lea (Tenn.) 583.

204. Macon & Western R. Co.—Ga. Act of December 29, 1869, providing that the stock of the company shall thereafter pay the same annual tax to the state as the other railroad companies of the state, does not confer on the company an exemption of its property within the city of Macon from liability to be taxed by the city authorities as it was before the passage of said act. *Macon City Council* v. *Central R. & B. Co.*, 50 *Ga.* 620.

205. Memphis & Little Rock R. Co.—The provisions of the charter of the company, exempting its property from taxation, could not be repealed by a subsequent legislature or constitutional convention. *Oliver* v. *Memphis & L. R. R. Co.*, 30 *Ark.* 128.—FOLLOWED IN Memphis & L. R. R. Co. *v.* Berry, 41 Ark. 436.

206. Memphis & Vicksburg R. Co.—The company formed, by consolidation under legislative act (Miss. Laws 1882, p. 1011), of the Memphis & Vicksburg R. Co. and the M. V. & S. I. R. Co. is entitled to the exemption from taxation secured by the Act of July 20, 1870, § 21, incorporating the Mobile & Northwestern R. Co. *Louisville, N. O. & T. R. Co.* v. *Taylor*, 68 *Miss.* 361, 8 *So. Rep.* 675.—REVIEWING McCulloch *v.* Stone, 64 Miss. 378.

The exemption from taxation secured by charter to said company extends to a short track or spur and steam digger used in reaching and getting gravel for the purpose of repairing its roadbed, although the track and gravel pit are on land not owned by it, and the track runs out from the line of another railroad. *Louisville, N. O. & T. R. Co.* v. *Taylor*, 68 *Miss.* 361, 8 *So. Rep.* 675.

207. Minnesota & Pacific R. Co.—The exemption from taxation, in section 18 of the charter of the company, of the lands granted by the United States in aid of its road was not repugnant to section 6 of the act of congress organizing the territory of Minnesota, and it was binding upon the future state. This exemption passed to the state upon the foreclosure of the mortgage, and the forfeiture, as a right appendant to the lands, was held by the state without extinguishment, and by Minn. Act of March 10, 1862, passed with the lands transferred to the persons in the act mentioned, and vested in the corporation organized by them, the St. Paul and Pacific railroad company, and upon the transfer by that company and the organization of the first division of the St. Paul and Pacific railroad company passed to and vested in the latter company, so far as related to the lands applicable to the portions of the lines of road so transferred. *First Div. St. P. & P. R. Co.* v. *Parcher*, 14 *Minn.* 297 (*Gil.* 224).—APPROVED IN Winona & St. P. R. Co. *v.* Deuel County, 7 Am. & Eng. R. Cas. 348, 3 Dak. 1. FOLLOWED IN Stevens County *v.* St. Paul, M. & M. R. Co., 29 Am. & Eng. R. Cas. 225, 36 Minn. 467, 31 N. W. Rep. 942; State *v.* Winona & St. P. R. Co., 21 Minn. 315.

The exemption from ordinary taxation originally created in favor of the above company passed, with the lands to which it was appendant, to the St. Paul and Pacific railroad company, and to the first division of that company. *Stevens County* v. *St.*

Paul, M. & M. R. Co., 29 *Am. & Eng. R. Cas.* 225, 36 *Minn.* 467, 31 *N. W. Rep.* 942. —FOLLOWING First Div. St. P. & P. R. Co. *v.* Parcher, 14 Minn. 297; State *v.* Winona & St. P. R. Co., 21 Minn. 315; Minnesota C. R. Co. *v.* Melvin, 21 Minn. 339; Chicago, M. & St. P. R. Co. *v.* Pfaender, 23 Minn. 217; St. Paul *v.* St. Paul & S. C. R. Co., 23 Minn. 469; Nobles County *v.* Sioux City & St. P. R. Co., 26 Minn. 294, 3 N. W. Rep. 701.

Minnesota Act of March 4, 1865, relating to taxation of the company, was not repealed by the General Tax Law of 1878. *Stevens County* v. *St. Paul, M. & M. R. Co.*, 29 *Am. & Eng. R. Cas.* 225, 36 *Minn.* 467, 31 *N. W. Rep.* 942.

208. Missouri Pacific R. Co. — There is no legislative exemption of the company from taxation by the state under Mo. Act of Dec. 25, 1852, § 12. *Paul* v. *Missouri Pac. R. Co.*, 3 *Dill.* (*U. S.*) 25.

The specific exemption from taxation claimed by the company and by the Atlantic and Pacific railroad under Mo. Act of Dec. 25, 1852, § 12, is not well founded. *Parmley* v. *St. Louis, I. M. & S. R. Co.*, 3 *Dill.* (*U. S.*) 25.

The company is not exempt from the tax of ten or fifteen per cent. imposed upon it by the ordinance of April 8, 1865 (Mo. Gen. St. 1865, p. 52); nor does the act of Feb. 10, 1864 (Sess. Acts 1863-64, p. 50), amount to such a contract as limits the right of the state to impose the tax. *Pacific R. Co.* v. *Maguire*, 51 *Mo.* 142.—FOLLOWING North Mo. R. Co. *v.* Maguire, 49 Mo. 490.

209. Mobile & N. W. R. Co.—Miss. Act of July 20, 1870, § 21 (Laws, p. 255), incorporating the company and providing that all taxes to which it might be subject for thirty years should be applied to payment for constructing the road or debts incurred therefor, unless its annual net earnings should exceed eight per cent., and that the affidavit of the president or cashier that such application had been made should be accepted by tax collectors in lieu of money for such taxes, was, in effect, an exemption from taxation upon the conditions named, and this exemption the legislature had the power to confer, but not to make irrepealable *Natchez, J. & C. R. Co.* v. *Lambert*, 70 *Miss.* 779, 13 *So. Rep.* 33. — APPROVING Tennessee *v.* Whitworth, 117 U. S. 139. DISAPPROVING Maine C. R. Co. *v.* Maine, 96 U. S. 499.

210. Mobile & Spring Hill R. Co. —Under Ala. Act of Feb. 23, 1860, incorporating the company (Sess. Acts 1859-60, p. 265), while it is declared that, in consideration of the privilege thereby granted, "the property of the company, and capital actually paid in, shall at all times be liable to the same rates of taxation as the property of individuals, and shall be taxed in no other way," the corporate authorities of the city of Mobile are authorized and empowered "to impose an annual taxation of one dollar on every one hundred dollars of the gross earnings of said company, which said tax," it is declared, "shall be in full and in lieu of all taxation by said city on such railway, its rolling stock, equipments, and appendages." *Held*, that these provisions indicate a clear legislative intent to exempt the corporation, to the extent specified, from all other municipal taxation than that expressly authorized. *Mobile & S. H. R. Co.* v. *Kennerly*, 74 *Ala.* 566.

211. Morris & Essex R. Co. — The charter of the company provides that as soon as the net proceeds of said railroad shall amount to seven per cent. on its cost the said corporation shall pay to the state a tax of one half of one per cent. on the cost of said road; provided, that no other tax or impost shall be levied or assessed on said company. *Held*, that the exemption under the word "provided" was a positive enactment exempting the company from all other tax, and not a condition on which the tax of one half of one per cent. was payable; that the company was exempted from all other tax, as well before the tax of one half per cent. was payable as afterwards; that this provision, though a power of alteration and repeal was reserved in the charter, was not affected by a subsequent general tax act, declaring all lands liable to taxation, and repealing all acts, and parts of acts, inconsistent with its provisions. The provisions of a charter cannot be altered or repealed, except by express words. *State* (*Morris & E. R. Co., Pros.*) *v. Minton*, 23 *N. J. L.* 529. —RECONCILED IN State (Morris & E. R. Co., Pros.) *v.* Com'rs of R. Taxation, 38 N. J. L. 472. REVIEWED IN State Treasurer *v.* Somerville & E. R. Co., 28 N. J. L. 21.

Section 3 of the New Jersey supplement to the charter of the company, approved March 23, 1865, enacting that the tax of one half of one per cent. provided by its original act of incorporation to be paid to the

state whenever the net earnings of the company amounted to seven per cent. upon the cost of the road should be in lieu and satisfaction of all other taxation or imposition whatsoever, and the acceptance of it by the company, constituted a contract on the subject of taxation which could not be impaired by any subsequent legislation. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826.

N. J. Act of 1865, by which a contract was made with the company that the state would accept from it a percentage on the cost of the road in lieu and satisfaction of all other taxation, applies as well to franchises and property acquired after the act as to those previously granted, and the operation of that act is not controlled or qualified by the fact that the supplements to the charter after the date of that act are repealable. *State Board of Assessors* v. *Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *Atl. Rep.* 826. — NOT FOLLOWING State (Morris & E. R. Co., Pros.) *v.* Com'r of R. Taxation, 37 N. J. L. 228.

212. Nashville & Decatur R. Co. —Tenn. Act of April 19, 1866, § 6, declaring that the company "shall for its government be entitled to all the rights and privileges, and subject to all the restrictions and liabilities, conferred and imposed upon the Nashville and Chattanooga railroad company," confers upon the former company the privilege of exemption from taxation, as to its capital stock and property, enjoyed by the latter company, under the provisions of its charter, and the Act of March 1, 1869, taxing the shares of stock owned by individual shareholders, in the company, impairs the obligation of the contract and is void. *Tennessee* v. *Whitworth*, 17 *Am. & Eng. R. Cas.* 417, 22 *Fed. Rep.* 81, 117 *U. S.* 139, 6 *Sup. Ct. Rep.* 649. — FOLLOWING Tennessee *v.* Whitworth, 22 Fed. Rep. 75.

213. Nashville, C. & St. L. R. Co. —The company having succeeded to all the rights and franchises of the Nashville and Chattanooga railway company and the Nashville and Northwestern railway company, the shareholders of the new company are entitled to exemption from taxation under the provisions in the new charters of the old companies that "the capital stock * * * shall be forever exempt from taxation"; and Tenn. Act of March 1, 1869, taxing such shares, violates the obligation of a contract and is void. *Tennessee* v. *Whitworth*, 17 *Am. & Eng. R. Cas.* 411, 22 *Fed. Rep.* 75; *affirmed in* 117 *U. S.* 129, 6 *Sup. Ct. Rep.* 645.

214. Natchez, J. & C. R. Co. — By Miss. Acts of Aug. 8, 1870 (Laws, p. 327), and March 5, 1878 (Laws, p. 233), the immunity from taxation conferred was extended to and confirmed in the above company; and while it was revoked by the Code of 1880, it was restored by the Act of March 12, 1884 (Laws, p. 29), and by the Revenue Act of 1890 (Laws, p. 6) this exemption was again recognized. *Natchez, J. & C. R. Co.* v. *Lambert*, 70 *Miss.* 779, 13 *So. Rep.* 33.

215. New Haven & Northampton Co. — A canal company was chartered in 1822, with a provision exempting the stock and income of the company forever from taxation. In 1836 the above company was incorporated and empowered to take a conveyance of the property of the canal company, with all its "franchises, rights, powers, privileges, and immunities," and to "hold and enjoy the same in as full and ample a manner, to all intents and purposes, as the same had been held and enjoyed by said corporation." In 1846 the charter of the company was amended so as to empower it to construct and operate a railroad along the line of the canal, and to add to its capital stock, which was accepted by the company, additional capital raised, and the railroad built. In 1864 the legislature passed a general statute providing for the taxation of corporations. *Held*, that the tax laid by the statute was a tax upon the property, and not upon the franchises, of railroad companies; and the above company, in taking all the rights and immunities of the canal company, took the same exemption of its capital from taxation which the canal company enjoyed. *Nichols* v. *New Haven & N. Co.*, 42 *Conn.* 103. — CRITICISING Coite *v.* Society for Savings, 32 Conn. 173; Coite *v.* Connecticut Mut. L. Ins. Co., 36 Conn. 512. DISAPPROVING Minot *v.* Philadelphia, W. & B. R. Co., 18 Wall. (U. S.) 206. QUOTING People ex rel. *v.* Com'rs of Taxes, 23 N. Y. 220; Bank Tax Case, 2 Wall. (U. S.) 200. REVIEWING People *v.* Com'rs of Taxes, 2 Black (U. S.) 620.

When the capital stock of the company was increased the whole capital did not become taxable by virtue of a provision in the amendment that "the capital stock hereby created shall be assessed and taxed." Only the increased capital was liable to taxa-

tion. *Nichols* v. *New Haven & N. Co.*, 42 *Conn.* 103.

The Act of 1864, which was a part of a general statute relating to taxation, in express terms exempted "the stock and property of all incorporated companies which by their charters are expressly exempt from taxation." *Held*, that this was not to be regarded as repealing the exemption of the original stock of the canal company; neither did the change from a canal to a railroad company affect the exemption. *Nichols* v. *New Haven & N. Co.*, 42 *Conn.* 103.

216. New Jersey R. & T. Co.—The exempting clause in the charter of the company does not relieve from taxation every species of property which the company lawfully may hold, irrespective of its location and character, and the purposes to which it is appropriated, but is limited to such acquisitions as are incident to the existence of the railroad, to its objects and its uses, and are expedient and necessary for the full enjoyment of its franchise. *State* (*New Jersey R. & T. Co., Pros.*) v. *Collectors*, 26 *N. J. L.* 519; *affirming* 25 *N. J. L.* 315.—FOLLOWED IN State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537. QUOTED IN Illinois C. R. Co. *v.* Irvin, 72 Ill. 452.

By the charter of the city of Newark, the common council is authorized to cause a just and equitable assessment of the damages and expenses incident to the opening and widening of streets in said city, to be made among the owners and occupants of all the houses and lots intended to be benefited thereby, in proportion to the advantages each shall be deemed to acquire. An assessment made, under this provision of the city charter, upon houses and lots owned by the above company is not a tax or imposition upon the company within the meaning of the exemption from taxation contained in section 18 of its act of incorporation. *State* (*New Jersey R. & T. Co., Pros.*) v. *Mayor, etc., of Newark*, 27 *N. J. L.* 185.—DISTINGUISHED IN North Beach & M. R. Co.'s Appeal, 32 Cal. 499. FOLLOWED IN State (New Jersey R. & T. Co., Pros.) *v.* Elizabeth, 37 N. J. L. 330.

A tax levied by a city on the boats of the company, used for the transportation and ferriage of passengers and merchandise from the terminus of the railroad on the Hudson river to and from the city of New York, and used as a part of a through railroad route between New York and Pennsylvania, and being part of the property of the company represented by its capital stock, is in violation of the chartered rights of the company, and must be set aside. *State* (*New Jersey R. & T. Co., Pros.*) v. *Haight*, 34 *N. J. L.* 319.

The words in the charter of the company "that no other or further tax or imposition shall be levied or imposed upon the said company" refer exclusively to taxation for general purposes, and are not applicable to assessments for local improvements. *State* (*New Jersey R. & T. Co., Pros.*) v. *Elizabeth*, 37 *N. J. L.* 330.—FOLLOWING State (New Jersey R. & T. Co., Pros.) *v.* Mayor, etc., of Newark, 27 N. J. L. 185. RECONCILING State (Protestant Foster Home Soc., Pros.) *v.* Mayor, etc., of Newark, 36 N. J. L. 478.—FOLLOWED IN State (Paterson & H. R. R. Co., Pros.) *v.* Passaic, 54 N. J. L. 340.

217. New Orleans, O. & G. W. R. Co.—The charter of the company contained a stipulation that its capital stock and other property "shall be exempt from taxation for ten years after the completion of said road within the limits of this state." The consideration of this grant was, of course, the promise of the corporation to prosecute to completion the building of the railroad. Over twenty years passed, and nothing of the kind had been done, and there was no visible prospect of the road's completion. *Held*, that the exemption had ceased. *State* v. *Morgan*, 28 *La. Ann.* 482.

Assuming that by the purchase of all the shares of stock or otherwise the plaintiff stood before the court representing the company, he could not claim the exemption from taxation mentioned in the charter, in view of the fact that the railroad had not been completed within the limits of the state, although more than twenty years had elapsed since the charter was granted. *State* v. *Morgan*, 28 *La. Ann.* 482.

The charge that the state, in assessing the taxes sought to be collected, had violated the obligation of her contract with the company cannot be maintained. The state never agreed to exempt from taxation forever the property of that corporation. *State* v. *Morgan*, 28 *La. Ann.* 482.

218. New York & Long Branch R. Co.—The shares of capital stock of the company, in the hands of a stockholder, are

exempt from taxation, both by the charter of the company and by New Jersey Act of April 11, 1866, § 15, exempting stockholders from assessment. *State* (*Longstreet, Pros.*) v. *Jones*, 38 *N. J. L.* 83.

219. New York & Oswego M. R. Co. — By New York Act of April 5, 1866 (Laws of 1866, ch. 398), it was provided that the property of the company, a corporation formed under the General Railroad Law of New York, should be exempt from taxation until a certain event should happen, but for a term of not exceeding ten years. On April 29, 1874, and, as was alleged, before such event had happened, the legislature passed an act (Laws of 1874, ch. 296) subjecting the property of the corporation to taxation for the future. *Held:* (1) that the other provisions found in the act of 1866 constituted amendments of the charter of the corporation; (2) that the provisions of that act, taken together, including the provision for exemption from taxation, constituted a contract, and one and the same contract; (3) that the provision for exemption from taxation could not, as against the corporation and its stockholders, be abrogated by the state, without impairing the obligation of the contract, unless the right so to do was reserved by the state, as a part of the same contract; (4) that, by reservations in the Constitution and statutes of the state, the legislature had the right to amend the charter of the corporation, by repealing such exemption from taxation. *Hewitt* v. *New York & O. M. R. Co.*, 12 *Blatchf.* (*U. S.*) 452.—REVIEWING Wilmington & M. R. Co. *v.* Reid, 13 Wall. (U. S.) 264; Tomlinson *v.* Jessup, 15 Wall. 454; Miller *v.* State, 15 Wall. 478; Humphrey *v.* Pegues, 16 Wall. 244; Pacific R. Co. *v.* Maguire, 20 Wall. 36.

220. North Carolina R. Co.—Under a provision of the charter of the above company exempting from taxation its right of way, station places, etc., until the company's dividends should exceed six per cent. per annum, county authorities have no power to tax the same until the dividends reach the prescribed amount. *Richmond & D. R. Co.* v. *Orange County Com'rs*, 74 *N. Car.* 506. —APPROVING Wilmington, C. & A. R. Co. *v.* Brunswick County Com'rs, 72 N. Car. 10. —FOLLOWED IN Richmond & D. R. Co. *v.* Brogden, 74 N. Car. 707. REVIEWED IN North Carolina R. Co. *v.* Alamance Com'rs, 82 N. Car. 259.

A dividend of fifteen or twenty per cent. paid in Confederate money is not such a dividend as was contemplated in the charter of the company, in exempting the real estate of the company from taxation, until the dividends or profits of said company should exceed six per cent.; nor is the six per cent. rent received from the Richmond and Danville railroad company such a dividend or profits. *Richmond & D. R. Co.* v. *Brogden*, 74 *N. Car.* 707, 13 *Am. Ry. Rep.* 114.

Extent of exemption of the company from taxation explained. *North Carolina R. Co.* v. *Alamance Com'rs*, 77 *N. Car.* 4.

Shares in the capital stock of the company are not exempt from taxation by a legislative enactment that "all real estate held by said company for right of way, for station places of whatever kind, and for workshop location, shall be exempt from taxation until the dividends or profits of said company shall exceed six *per centum* per annum." *Belo* v. *Forsyth County Com'rs*, 82 *N. Car.* 415.—QUOTING Richmond & D. R. Co. *v.* Alamance Com'rs, 76 N. Car. 212.

Under the charter of the company, all real estate held by it for right of way, for station places, and workshop location, the machinery, tools, and implements employed in the manufacture and repair of cars and engines, and office lots necessary for the use of its officers, are exempt from taxation until the dividends of profits shall exceed six per cent. per annum. *Richmond & D. R. Co.* v. *Alamance Com'rs*, 7 *Am. & Eng. R. Cas.* 339, 84 *N. Car.* 504.—QUOTING Richmond & D. R. Co. *v.* Alamance Com'rs, 76 N. Car. 212.

The company is liable to be taxed upon money on hand and on deposit; and is not entitled to the credit of three fourths of the taxes paid between 1869 and 1874; and is also liable upon shares of stock held by it for the years 1875 and 1876. *Richmond & D. R. Co.* v. *Alamance Com'rs*, 7 *Am. & Eng. R. Cas.* 339, 84 *N. Car.* 504.

The act of assembly relating to the taxation of the property of this company, and the method of assessment thereof by the state board, and the adjustment of the claims of the respective parties to this proceeding, discussed and pointed out. *Richmond & D. R. Co.* v. *Alamance Com'rs*, 7 *Am. & Eng. R. Cas.* 339, 84 *N. Car.* 504.

221. Northern Pacific R. Co.—Under the act of congress chartering the company, its right of way through the public lands of Montana was an easement

therein; and all the personal property of said road attached to the soil within the boundaries of such right of way was a part of such land and therefore exempt from taxation under the provisions of said act. *Northern Pac. R. Co.* v. *Carland*, 17 *Am. & Eng. R. Cas.* 364, 5 *Mont.* 146, 3 *Pac. Rep.* 134.—QUOTING Appeal of North Beach & M. R. Co., 32 Cal. 506.

222. Pacific R. Co.—Whether the exemption from taxation granted to the southwestern branch of the road by the act of Dec. 25, 1852, § 12, continues in favor of the Atlantic and Pacific railroad company, *quære*. *Bailey* v. *Atlantic & P. R. Co.*, 3 *Dill.* (*U. S.*) 22. See also *Parmley* v. *St. Louis, I. M. & S. R. Co.*, 3 *Dill.* (*U. S.*) 25.

Mo. Act of Dec. 25, 1852, § 12, and its acceptance by the Pacific railroad, were a contract between the state and that company binding the state, and for two years after its completion exempted that road from taxation, no dividend being declared in the meantime; and the same principle governs as to taxation of what is denominated the South West Branch railroad. *South Pac. R. Co.* v. *Laclede County*, 57 *Mo.* 147.—APPROVING Pacific R. Co. *v.* Maguire, 20 Wall. (U. S.) 36.—FOLLOWED IN Lawrence County *v.* Atlantic & P. R. Co., 57 Mo. 149; Barry County *v.* Atlantic & P. R. Co., 57 Mo. 149.

223. Paterson & Hudson R. Co.—The charter of the company provides for the payment of certain taxes to the state, and then enacts that "no further or other tax or impost shall be levied or assessed upon said company." *Held*, not only to exempt the franchises and privileges of the company, but the company generally and its property, from taxes for county, township, and all other purposes than those stated in the charter. *State* v. *Berry*, 17 *N. J. L.* 80.

The tax paid under the above provision of the charter was a commutation for all taxes on such property as might necessarily be held for purposes reasonably incident to the enjoyment of the franchise, and the charter exempts the company and its property held for such purposes from all other taxes, whether assessed for state, or for city or township purposes. *Gardner* v. *State*, 21 *N. J. L.* 557.—FOLLOWED IN State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537.

224. Petersburg R. Co.—Section 17 of the charter of the company, which exempted its property from taxation, has been repealed by Va. Act of April 2, 1853, which united it with the Greenesville and Roanoke railroad company, which act was accepted by the company, and the property of the said company is now subject to taxation. *Petersburg* v. *Petersburg R. Co.*, 29 *Gratt.* (*Va.*) 773.

225. Philadelphia, W. & B. R. Co.—The legislature, by Md. Act of 1831, ch. 296, § 19, which exempts the stock of the company, reserves the right to tax its fixed and permanent works, the tax on the property thus excepted being proper on the ground of selection. *Tax Cases*, 12 *Gill & J.* (*Md.*) 117.

226. Poughkeepsie & Eastern R. Co.—Under N. Y. Act of 1866, ch. 546, § 33, chartering the above company, and providing that "the real and personal property of said corporation and the capital stock of the same shall be exempt from taxation for state, county, town, or municipal purposes until a single track of said road shall be completed, for a term, however, not exceeding ten years," it was the intention to exempt the road from taxation until a single track was completed, though in no case should the exemption continue beyond ten years. *Poughkeepsie, H. & B. R. Co.* v. *Simpson*, 23 *Hun* (*N. Y.*) 43; *affirmed in* 89 *N. Y.* 636, *mem.*

227. Rome R. Co.—The property of the company within the city of Rome which is necessary to the business of the company is a part of its capital stock, and not liable to taxation as property by that city. *Rome R. Co.* v. *Mayor, etc., of Macon*, 14 *Ga.* 275.—APPROVED IN Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310. DISTINGUISHED IN People ex rel. *v.* Com'rs of Taxes, 2 Am. & Eng. R. Cas. 343, 82 N. Y. 459.

The correct mode of taxing the company is to estimate the whole property at its true value; upon so much of this value as equals the amount of capital stock actually paid in, assess at the charter limit (31½ cents on every $100); and upon the balance of such value, if any, assess at the general rate. *Goldsmith* v. *Rome R. Co.*, 62 *Ga.* 473.—FOLLOWED IN Goldsmith *v.* Augusta & S. R. Co., 62 Ga. 468; Goldsmith *v.* Central R. Co., 62 Ga. 509.

In no case can the assessment exceed the rate *ad valorem* imposed upon property generally; this general rate, when exceeded by the charter rate, must be levied upon the

whole value. *Goldsmith* v. *Rome R. Co.*, 62 *Ga.* 473.

228. St. John Bridge & R. E. Co. — The company's right to be exempt from taxation is not affected by the union of the cities of Portland and St. John, the agreement of the city of Portland being binding upon the united city. *Ex parte St. John B & R. E. Co.*, 30 *New Brun.* 551.

By 44 Vict. c. 44, § 41, incorporating the company, the bridge to be erected was made forever exempt from taxation; and the town council of Portland was by the same section authorized to exempt from all or any rates or taxes the railway and other works of the company. A resolution of the common council of the city was passed in 1888, exempting the company's railway from future taxation. *Held*, that the act 33 Vict. c. 46 had no application to the company, and that the latter could not be assessed on its income derived from the bridge and railway. *Ex parte St. John B. & R. E. Co.*, 30 *New Brun.* 551.

229. St. John City R. Co. — The company is a railway company within the meaning of 33 Vict. c. 46, and is exempt from taxation under the provisions of that act. *Ex parte Zebley*, 30 *New Brun.* 130.

230. St. Joseph & Iowa R. Co. — Although the charter of the company exempted its property from taxation, a branch road built by it under Mo. Act of 1868 (Laws, p. 90) would be subject to taxation in its hands. *State ex rel.* v. *Chicago, B. & K. C. R. Co.*, 89 *Mo.* 523, 14 *S. W. Rep.* 522.

231. St. Paul & Pacific R. Co. — Minn. Act of March 2, 1865 (Special Laws 1865, ch. 6), entitled "An act to aid and facilitate the completion of the St. Paul and Pacific railroad and branches," applies to all the lines of railroad authorized to be built under the charter originally granted to the Minnesota and Pacific railroad company by the Act of May 22, 1857. *Chicago, M. & St. P. R. Co.* v. *Pfaender*, 23 *Minn.* 217, 17 *Am. Ry. Rep.* 44.

The act of 1865 having been passed, as appears upon its face, on the assumption and belief that the company then owned and held those lines of road and the franchises thereto belonging, an acceptance of its provisions and benefits by the company estops it, and every company subsequently acquiring title through it to any portion of such lines, from disputing the correctness of such assumption. *Chicago, M. & St. P. R. Co.* v. *Pfaender*, 23 *Minn.* 217, 17 *Am. Ry. Rep.* 44.

The exemption from all taxation and assessment therein contained was not simply a personal privilege conferred upon the company, but was in the nature of a conditional grant, appurtenant to its several lines of railroad, and charged with the perpetual burden of an annual payment of the specified sum therein provided, dating from the time when any portion of such lines equal in extent to thirty miles should be completed and in operation. *Chicago, M. & St. P. R. Co.* v. *Pfaender*, 23 *Minn.* 217, 17 *Am. Ry. Rep.* 44.—FOLLOWED IN Stevens County *v.* St. Paul, M. & M. R. Co., 29 Am. & Eng. R. Cas. 225, 36 Minn. 467, 31 N. W. Rep. 942.

In case of a severance and division of such lines of road and the franchises thereto appertaining among different companies, reference must be had to the time when such first thirty miles of completed road were built and put in operation, in ascertaining and fixing the rate per cent. and amount of gross earnings each company is to pay during any given year as to its line of road. *Chicago, M. & St. P. R. Co.* v. *Pfaender*, 23 *Minn.* 217, 17 *Am. Ry. Rep.* 44. — APPROVED IN State *v.* Northern Pac. R. Co., 29 Am. & Eng. R. Cas. 219, 36 Minn. 207, 30 N. W. Rep. 663.

In ascertaining the amount due to the state from the company on account of the earnings of its road during any period embraced in its annual report, under Minn. Act of March 2, 1865, reference must be had to the date of the passage of that act as the time when, for such purpose, the first thirty-mile section of completed road is deemed to have been completed and put into operation. *Chicago, M. & St. P. R. Co.* v. *Pfaender*, 23 *Minn.* 217, 17 *Am. Ry. Rep.* 44.

The above company having succeeded to the ownership of the lands formerly granted to the Minnesota and Pacific railroad company, with the exemption of such company from ordinary taxation until its lands were sold, a mere executory contract for the sale of the lands does not deprive it of the protection accorded by Minnesota Act of March 4, 1865, relating to sales for taxes. *Stevens County* v. *St. Paul, M. & M. R. Co.*, 29 *Am. & Eng. R. Cas.* 225, 36 *Minn.* 467, 31 *N. W. Rep.* 942.

232. St. Paul, M. & M. R. Co. — Under the charter of the above company,

§ 18, the exemption from taxation extends only to such property as may be fairly said to be held and presently used for railroad purposes; and property not so used, although held with the purpose of devoting it, at some future time, to such use, is not within the exemption. But this does not mean that the exemption will not, under any circumstances, apply to property needed for it not actually used, as the word is ordinarily applied, as some time must necessarily elapse between the date of the acquisition of property and the date at which it can be prepared and put into actual use for railroad purposes. Hence, where lands are purchased in good faith for the purpose of using them as soon as present plans are fully executed, and processes of appropriating them to such uses are proceeding without unreasonable delay, they will be brought within the exemption, although not yet put to actual use. *St. Paul* v. *St. Paul, M. & M. R. Co.*, 39 *Minn.* 112, 38 *N. W. Rep.* 925. — FOLLOWING Ramsey County *v.* Chicago, M. & St. P. R. Co., 33 Minn. 537; Todd County *v.* St. Paul, M. & M. R. Co., 38 Minn. 163.

233. St. Paul, S. & T. F. R. Co. — The percentage required to be paid to the state by a railroad corporation accepting the provisions of Minn. Sp. Laws 1873, ch. 111, pursuant to section 2 of said act, in lieu of taxation, is to be graduated with reference to the time of completion of thirty miles of its own line, and not with reference to the fixed date named in the act with respect to the St. Paul, Stillwater, and Taylor's Falls railroad company. *State* v. *Northern Pac. R. Co.*, 29 *Am. & Eng. R. Cas.* 219, 36 *Minn.* 207, 30 *N. W. Rep.* 663.

234. Savannah & C. R. Co. — The company was chartered with an exemption from taxation, and bonds were issued having a first statutory lien on the property of the corporation. Subsequently the general assembly passed an act undertaking to postpone the first lien in favor of a second issue of bonds by that act authorized, upon condition that the corporation would release its exemption from taxation, which was done. The postponement of the lien being unconstitutional — *held*, that as to bondholders under the first lien who did not assent to the terms of the second act the property of the corporation in the hands of the original company and also in the hands of its successor, a new company, was exempt from taxation. *Hand* v. *Savannah & C. R. Co.*, 17 *So. Car.* 219.

235. Southern Pacific R. Co. — Where railroad companies are created under state laws, the fact that congress has granted lands in aid thereof and reserved the right to use them for postal and military purposes will not exempt them from taxation, in the absence of an express provision by congress to that effect. *Santa Clara County* v. *Southern Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 182, 18 *Fed. Rep.* 385, 9 *Sawy.* (*U. S.*) 165.

236. Southwestern Air Line E. R. Co. — By Miss. Act of Feb. 27, 1854, § 15, incorporating the company, it is enacted "that the fixtures and property of said company shall be exempt from taxation, for and during the full period of twenty years from the passage of this act; and that the privileges and benefits of this provision shall be extended to all railroad charters heretofore granted by the legislature of this state, as well as those hereafter to be granted, unless specially excepted; and the same shall be a part of said charters." *Held*, that this provision exempts all the property of companies from municipal as well as state and county taxation, and the exemption is secured to companies then chartered, for the period of twenty years from the passage of the act, and to companies thereafter chartered for twenty years from the date of their charters. *Southern R. Co.* v. *Mayor, etc., of Jackson*, 38 *Miss.* 334.

237. Southwestern R. Co. — That portion of the new Southwestern railroad known formerly as the Muscogee railroad, from Columbus to Butler, is not liable to be taxed beyond the limitation fixed in the charter, it being covered by the decision of the supreme court of the United States (Central R. & B. Co. *v.* Georgia, 92 U. S. 665). The road from Fort Valley to Butler is not liable to be taxed further than provided in the charter. The main line from Macon to Fort Gaines is exempt from taxation, except as limited in the charter. The line from Cuthbert to Eufaula is subject to the *ad valorem* tax, less the amount already paid. The line from Albany to Arlington is liable to the *ad valorem* tax, deducting the income tax paid, it being made expressly liable for "such additional tax as the legislature may hereafter impose." The court held that the act of 1874 imposed the *ad valorem* tax. *Southwestern R. Co.* v. *Wright*, 68 *Ga.* 311.

238. Union Pacific R. Co.—No state has a right to tax the means, agencies, or instrumentalities rightfully employed within the states by the general government for the execution of its powers; but the interest of the general government in the above company will not make it such an agency as to exempt it from state taxation. *Union Pac. R. Co.* v. *Lincoln County*, 1 *Dill.* (*U. S.*) 314.—QUALIFYING M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316; Osborn *v.* Bank of United States, 9 Wheat. 738. QUOTING Adams *v.* Boston, H. & E. R. Co., 1 Holmes (U. S.) 30; Hall *v.* Sullivan R. Co., Brun. Col. Cas. (U. S.) 613.

239. United New Jersey R. & C. Co.—The company, having an irrepealable charter and contract therein with the state on the subject of taxation, is not taxable under N. J. General Railroad Tax Law of 1873, § 1 (Acts 1873, p. 112), and not having surrendered its former contract and accepted the provisions of that act in lieu thereof, has not subjected itself to taxation, as provided by section 10. *State* (*United R. & C. Co., Pros.*) v. *Com'rs of R. Taxation*, 37 *N. J. L.* 240.

The lands of the company acquired and held under N. J. Act of March 20, 1868 (Pamph. L. p. 551), to increase its depot and terminal facilities at Jersey City, cannot be assessed for taxes to pay the principal and interest on the certificates of indebtedness denominated "Jersey City Water Scrip." *State* (*United N. J. R. & Canal Co., Pros.*) v. *Mayor, etc., of Jersey City*, 41 *N. J. L.* 471.

240. Vermont Central R. Co.—The provision in the charter of the above company, § 17, exempting its property and effects from taxation, is limited to such real estate as the company is authorized to take by proceedings *in invitum*. *Vermont C. R. Co.* v. *Burlington*, 28 *Vt.* 193. — QUOTING State (Camden & A. R. & T. Co., Pros.) *v.* Mansfield Com'rs, 23 N. J. L. 510; Worcester *v.* Western R. Corp., 4 Metc. (Mass.) 564. REVIEWING Reading R. Co. *v.* Berks County, 6 Pa. St. 70. — APPROVED IN Memphis & C. R. Co. *v.* Gaines, 3 Tenn. Ch. 604. REFERRED TO IN Todd County *v.* St. Paul, M. & M. R. Co., 31 Am. & Eng. R. Cas. 482, 38 Minn. 163, 36 N. W. Rep. 105. REVIEWED IN Eldridge *v.* Smith, 34 Vt. 484.

But where the company has paid to a town, under protest, taxes on its property which is exempt, it can only recover such amount as was collected for the benefit of the town, and not state, county, and state school taxes. *Vermont C. R. Co.* v. *Burlington*, 28 *Vt.* 193.

241. Western R. Corp.—The corporation is not liable to be taxed for the land, not exceeding five rods in width, over which it is authorized to lay out its road, nor for buildings and structures thereon erected, if such buildings and structures are reasonably incident to the support of the road or to its proper and convenient use for the carriage of passengers and property, such as houses for the reception of passengers, engine houses, car houses, and depots for the convenient reception, preservation, and delivery of merchandise carried on the road. *Worcester* v. *Western R. Corp.*, 4 *Metc.* (*Mass.*) 564. — APPLIED IN Brainard *v.* Clapp, 10 Cush. (Mass.) 6. DISTINGUISHED IN Portland, S. & P. R. Co. *v.* Saco, 60 Me. 196; Boston, C. & M. R. Co. *v.* Gilmore, 37 N. H. 410. QUOTED IN Railroad Com'rs *v.* Portland & O. C. R. Co., 63 Me. 269; Vermont C. R. Co. *v.* Burlington, 28 Vt. 193. REFERRED TO IN Todd County *v.* St. Paul, M. & M. R. Co., 31 Am. & Eng. R. Cas. 482, 38 Minn. 163, 36 N. W. Rep. 105. REVIEWED IN State (Camden & A. R. & T. Co., Pros.) *v.* Mansfield Com'rs, 23 N. J. L. 510.

242. Wilmington & Weldon R. Co.—The privilege of exemption from taxation granted to the company by North Carolina Act of Jan. 3, 1834, is limited to its main line, and does not extend to a branch road which it acquires, or is authorized to construct. *Wilmington & W. R. Co.* v. *Alsbrook*, 53 *Am. & Eng. R. Cas.* 687, 146 *U. S.* 279, 13 *Sup. Ct. Rep.* 72.

That portion of the road which lies between Halifax and Weldon, having been constructed by another company, is not exempt from taxation. *Wilmington & W. R. Co.* v. *Alsbrook*, 53 *Am. & Eng. R. Cas.* 687, 146 *U. S.* 279, 13 *Sup. Ct. Rep.* 72.

The acquisition of the Halifax and Weldon railroad by the Wilmington and Raleigh railroad company, now the Wilmington and Weldon railroad company, under N. Car. Act of 1835-36, did not merge the first-named road in the main line of the latter, and hence the property thereby acquired is not entitled to claim the exemption from taxation alleged to have been granted in the charter of the Wilmington and Weldon

railroad company. *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 137, 14 *S. E. Rep.* 652. *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 437, 14 *S. E. Rep.* 1007.

The exemption from taxation claimed to have been granted by Laws 1833-34, ch. 78, incorporating the Wilmington and Raleigh railroad company (now the Wilmington and Weldon railroad company), if valid at all, is confined to the "main line"—from Wilmington to Halifax—and does not extend to or embrace any "branch roads" which that company was authorized by its charter to construct or acquire. *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 137, 14 *S. E. Rep.* 652. *Wilmington & W. R. Co.* v. *Alsbrook*, 110 *N. Car.* 437, 14 *S. E. Rep.* 1007.

243. Winona & St. Peter R. Co.—The company, having succeeded to "the rights, benefits, privileges, property, franchises, and interest" of the Transit R. Co., is entitled to hold the lands granted to the latter company, by Minn. Territorial Act of May 22, 1857, exempt from taxation, as provided in said act, subch. 2, § 4. *State* v. *Winona & St. P. R. Co.*, 21 *Minn.* 315, 18 *Am. Ry. Rep.* 440.—FOLLOWING First Div. St. P. & P. R. Co. *v.* Parcher, 14 Minn. 297.

The requirement of the state Constitution, that "laws shall be passed taxing * * * all real and personal property at its true value in money," considered; and *held*, not to prohibit or render void the transfer of this immunity from taxation, by the state to the company, by a law passed after the adoption of the Constitution. *State* v. *Winona & St. P. R. Co.*, 21 *Minn.* 315, 18 *Am. Ry. Rep.* 440.—APPROVED IN Winona & St. P. R. Co. *v.* Deuel County, 7 Am. & Eng. R. Cas. 348, 3 Dak. 1. FOLLOWED IN Stevens County *v.* St. Paul, M. & M. R. Co., 29 Am. & Eng. R. Cas. 225, 36 Minn. 467, 31 N. W. Rep. 942; State *v.* Southern Minn. R. Co., 21 Minn. 344.

244. Yazoo & M. V. R. Co.*—The provisions of the charter of the company, that its property shall be exempted from taxation for a term of twenty years from the completion of its railway to the Mississippi river, "but not to extend beyond twenty-five years from the date of the approval of this act," takes effect only upon the completion of the railroad to the Mississippi river, and so long as it remains uncompleted it is subject to taxes imposed by a later statute. *Yazoo & M. V. R. Co.* v. *Thomas*, 41 *Am. & Eng. R. Cas.* 599, 132 *U. S.* 174, 10 *Sup. Ct. Rep.* 68; *affirming* 37 *Am. & Eng. R. Cas.* 392, 65 *Miss.* 553, 5 *So. Rep.* 108.—FOLLOWING Vicksburg, S. & P. R. Co. *v.* Dennis, 116 U. S. 665.

After consolidation of the Louisville, N. O. & T. R. Co. with the Yazoo & M. V. R. Co., the latter succeeded to the immunity from taxation on that part of its lines which formerly comprised the Natchez, J. & C. R. Co. *Natchez, J. & C. R. Co.* v. *Lambert*, 70 *Miss.* 779, 13 *So. Rep.* 33.

Said exemption from taxation is not affected by Miss. Const. of 1890, § 181, declaring that the property of all corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, for that section expressly provides that exemptions from taxation then existing should remain in force for the time fixed by charter or the general laws, unless sooner repealed by the legislature. *Natchez, J. & C. R. Co.* v. *Lambert*, 70 *Miss.* 779, 13 *So. Rep.* 33.

VII. ASSESSMENT AND LEVY.

245. Federal courts.—The fact that a state has prescribed a particular mode of assessing the property of a company, as upon a report made by certain officers, does not constitute such a contract as to prevent the legislature from prescribing a different mode; but until a different mode is prescribed the method fixed must be followed. *Bailey* v. *Magwire*, 22 *Wall.* (*U. S.*) 215, 11 *Am. Ry. Rep.* 470.

The capital stock, franchises, and all the real and personal property of corporations are justly liable to taxation; and a rule is fair which ascertains the value of all this by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment. Deducting from this the assessed value of all the tangible real and personal property, which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect. *Taylor* v. *Secor*, 92 *U. S.* 575.—DISTINGUISHED IN Singer Mfg. Co. *v.* Wright, 33 Fed. Rep.

* Yazoo and Mississippi Valley railroad company's charter construed, see 37 AM. & ENG. R. CAS. 394, *abstr.*

191. QUOTED IN Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 54 Am. & Eng. R. Cas. 227, 133 Ind. 625, 33 N. E. Rep. 432.

Where a state Constitution requires all general laws to be uniform in their operation, and all laws for the assessment and collection of taxes to be general and of uniform operation throughout the state, and that the property of all corporations shall be subject to taxation the same as that of individuals, *quære* whether it is competent for the legislature to tax railway corporations on their earnings while the bulk of the other property in the state is taxed upon its value. *Muscatine* v. *Mississippi & M. R. Co.*, 1 *Dill.* (*U. S.*) 536.—DISTINGUISHING Gilman *v.* Sheboygan, 2 Black (U. S.) 510.

The land and improvements thereon must be assessed separately like other real estate, and an assessment not made in the mode and on the principles stated is void. *Huntington* v. *Central Pac. R. Co.*, 2 *Sawy.* (*U. S.*) 503.

The cost of the construction of a railroad is not a safe criterion to follow in estimating its value for taxation. One road may cost two or three times as much as another, and yet not be as valuable. The net earnings of the road, cost of maintenance and operation, and many other things, should be taken into consideration. *Cincinnati Southern R. Co.* v. *Gunether*, 19 *Fed. Rep.* 395.

246. Alabama.*—Under the Revenue Act of 1868, two distinct systems of assessments are provided: one of general subjects of taxation, which is required to be made by the assessor; the other of railroads and their rolling stock, which duty was cast on the auditor. There has been no law since before December 31, 1868, which authorized the tax assessor or collector to assess railroads or their rolling stock. *Perry County* v. *Selma, M. & M. R. Co.*, 58 *Ala.* 546, 20 *Am. Ry. Rep.* 372.

Under the above act there is no such thing as an assessment of property for county taxes; the assessment is for state taxation alone; but after equalization of the assessment by the county board, the court of county commissioners levies a tax on the state assessments to provide for county expenses. State taxes are assessed, county taxes are only levied. *Perry County* v. *Selma, M. & M. R. Co.*, 58 *Ala.* 546, 20 *Am. Ry. Rep.* 372.

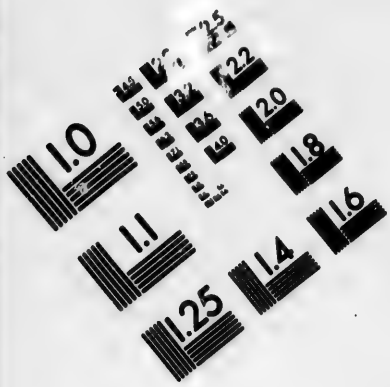
In the Acts of 1868 and 1875, "to establish revenue laws for the state of Alabama," are clauses which empower the assessor and collector, in certain conditions, to assess property which had escaped assessment during previous years; but those clauses give no authority to such officers in the cases under discussion, because (1) this is not property which has escaped assessment, these railroads having been assessed each year for state taxes; (2) the assessor had no authority to assess railroads or their rolling stock, and hence it cannot be affirmed that they have escaped the assessor—the auditor was the assessor, and they had not escaped him; (3) as there is no authority to assess any property for county taxes, and the railroads were assessed for state taxes, they did not escape any assessment which the law authorized to be made. *Perry County* v. *Selma, M. & M. R. Co.* 58 *Ala.* 546, 20 *Am. Ry. Rep.* 370.—REVIEWED IN Winter *v.* Montgomery City Council, 79 Ala. 481.

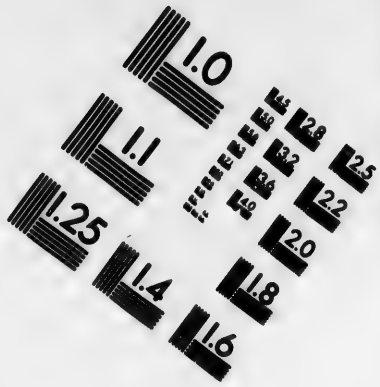
Ala. Code of 1876, § 383, establishes a rule for the estimation of the value of railroad property for the purpose of taxation which is not authorized by the Constitution; and, therefore, the assessment of taxes made in obedience to it is invalid, and is properly vacated by a court. *Assessment Board* v. *Alabama C. R. Co.*, 59 *Ala.* 551.

Under the Revenue Law of 1868, which, so far as regards the assessment of the property of railroad corporations, continued in force up to and during the year 1874, the provision contained in section 26, that the auditor of the state shall not apportion the values among the several counties through which the railroad runs until the equalization shall have been made by the board appointed for that purpose, is mandatory, and any apportionment made prior to such equalization is null and void. *State Auditor* v. *Jackson County*, 7 *Am. & Eng. R. Cas.* 273, 65 *Ala.* 142.

The provision contained in said section 26, requiring the board of equalization to meet at the office of the auditor on the third Wednesday in May annually, for the purpose of transacting its official business, is merely directory as to the day of meeting. The statute contemplates *ex parte*

* State boards of equalization, see notes, 13 AM. & ENG. R. CAS. 255; 2 L. R. A. 188.
Constitutionality of statutes requiring assessment of railroad property by state boards, see 54 AM. & ENG. R. CAS. 251, *abstr.*





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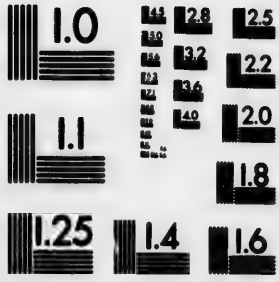

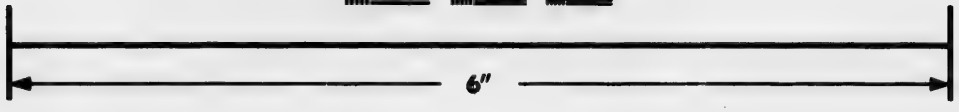

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proceedings by the board, making no provision for contests before it by the parties interested, and is not unconstitutional on that account. (Somerville, J., dissenting.) *State Auditor* v. *Jackson County*, 7 *Am. & Eng. R. Cas.* 273, 65 *Ala.* 142.

The provision also contained in said section 26 requiring the board of equalization to "keep a record of their proceedings" is mandatory, and such record is a condition precedent to a valid assessment and apportionment; but, to constitute a record, it is not necessary that the proceedings should be kept in a book; a writing, or written memorandum, is sufficient; and upon proof of its loss or destruction secondary evidence of its contents may be received and acted on. *State Auditor* v. *Jackson County*, 7 *Am. & Eng. R. Cas.* 273, 65 *Ala.* 142.

The provision contained in the same section that the record of the proceedings of the board "shall be signed by all the members present" is mandatory; but when the minutes show that all the members of the board were present when they commenced business, and yet the record is signed by only two of them, the courts will indulge the presumption that the third had retired before the business was finished, the remaining members being a quorum. *State Auditor* v. *Jackson County*, 7 *Am. & Eng. R. Cas.* 273, 65 *Ala.* 142.

Section 24 of the statute requires the president and secretary of each company to report annually to the auditor, under oath, the total length of their road, and its total length in this state, with the value thereof, including right of way, roadbed, side-track, and main track, and also the total length and value thereof in each county, together with the number and value of all engines, cars, and other rolling-stock. The object of this provision was to obtain a basis for the apportionment of the railroad property between this state and any other state into which the road might run, and also for the apportionment of that part liable to taxation here among the several counties through which it runs. But the report of those officers is not conclusive on the auditor, nor is it a condition precedent to a valid assessment and apportionment by him. *State Auditor* v. *Jackson County*, 7 *Am. & Eng. R. Cas.* 273, 65 *Ala.* 142.

Under the provisions of the statute, the auditor is the assessor of the property of railroads, and there can be no valid apportionment until he has made the assessment. He has no authority to assess back taxes, or the omitted taxes of former years; but he may at any time certify to the county assessor the ascertained value of the railroad track in the county, and the proportionate value of the rolling stock, when the facts have been so ascertained and shown by legal evidence that he can determine this proportionate value by a clerical calculation, which is a mere ministerial act and has nothing judicial in it. *State Auditor* v. *Jackson County*, 7 *Am. & Eng. R. Cas.* 273, 65 *Ala.* 142. *Perry County* v. *Selma, M. & M. R. Co.*, 7 *Am. & Eng. R. Cas.* 298, 65 *Ala.* 391.

While the present Constitution requires, as did the Constitution of 1868, that the income of corporations shall be taxed at the same rate that is imposed on the income of natural persons, and the legislature, when the power is asserted, cannot tax the one at a higher and the other at a lower rate, yet, the first step in taxation being the levy by the legislature, until that is done there can be no assessment or collection of taxes on either. *State* v. *Board of Revenue*, 73 *Ala.* 65.

247. Arizona. — Under the provisions of Arizona Revenue Law, § 2649, that railroad property shall be assessed by the board of equalization, and that railroad companies may appear and show why such assessment should be lowered or changed, the board is authorized to make alterations in the assessment. *Atlantic & P. R. Co.* v. *Yavapai County*, (*Ariz.*) 39 *Am. & Eng. R. Cas.* 543, 21 *Pac. Rep.* 768.

Under a statute which provides that "assessments shall be made upon the entire railway * * * and shall include the franchise, right of way, bridges, culverts," etc., "and all other property, real and personal, exclusively used in the operation of such railway," it is not necessary that each item by which the conclusion is reached shall appear in the assessment roll. *Atlantic & P. R. Co.* v. *Yavapai County*, (*Ariz.*) 39 *Am. & Eng. R. Cas.* 543, 21 *Pac. Rep.* 768.

248. Arkansas. — A statute is not invalid because it authorises the assessment of railroad tracks, which are treated as real estate, annually, whereas other real estate is only assessed biennially. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254. — FOLLOWING on different grounds Little

Rock & Ft. S. R. Co. v. Worthen, 46 Ark. 312; Huntington v. Worthen, 120 U. S. 97.

The provisions of the Revenue Act of 1883 (Mansf. Dig. §§ 5647–5659) are not unconstitutional on the ground that they require the tracks and "rolling stock" of railways to be assessed by a state board of commissioners, while the act provides for the valuation of all other property by county assessors. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254.

Nor is said statute unconstitutional because it fails to provide for an appeal from the valuation of railroad property fixed by the state board. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254.—QUOTING Kentucky Railroad Tax Cases, 115 U. S. 321.

That notice of the meeting of a board of commissioners for the purpose of assessing railroad property for taxation is not given to the railroad company will not render the assessment void as a taking of property without due process of law, where the time and place for the meeting of the board are fixed by statute. The notice contained in the statute is all that can be required. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254.

Where a bridge corporation, owning a railway toll-bridge, grants the use thereof for the period of its corporate existence to a railway company, reserving its corporate franchise and the right to contract with other parties for the use of the bridge, the bridge should be assessed by the county assessor as the property of the bridge company, and not by the state board of railway commissioners as the property of the railway company. *St. Louis & S. F. R. Co.* v. *Williams*, 53 *Ark.* 58, 13 *S. W. Rep.* 796.

249. California.—(1) *Federal decisions.*—Under the Constitution and laws of California relating to taxation, fences erected upon the line between the roadway of a railroad and the land of coterminous proprietors are not part of "the roadway," to be included by the state board in its valuation of the property of the corporation, but are "improvements" assessable by the local authorities of the proper county. *Santa Clara County* v. *Southern Pac. R. Co.*, 24 *Am. & Eng. R. Cas.* 523, 118 *U. S.* 394, 6 *Sup. Ct. Rep.* 1132.—FOLLOWED IN California v. Central Pac. R. Co., 33 Am. & Eng. R. Cas. 451, 127 U. S. 1.

In assessing a railroad for the purposes of taxation, the value of fences between the right of way and adjoining owners was improperly included. *Held*, that a tax based on this valuation as a unit was invalid as a whole. The court could not eliminate the part that was based on the value of the fence, and give judgment for the remainder. *Santa Clara County* v. *Southern Pac. R. Co.*, 24 *Am. & Eng. R. Cas.* 523, 118 *U. S.* 394, 6 *Sup. Ct. Rep.* 1132.—FOLLOWED IN San Bernardino County *v.* Southern Pac. R. Co., 118 U. S. 417. QUOTED IN Alexandria C., R. & B. Co. *v.* District of Columbia, 5 Mackey (D. C.) 376.

Under the state statute a railroad must be taxed as real estate, and the portion situate in each county must be assessed in said county as so much land, like the adjoining lands, without reference to its connections, or the uses to which it is put, and must be assessed at its "cash value," which is "the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor." *Huntington* v. *Central Pac. R. Co.*, 2 *Sawy.* (*U. S.*) 503.

Neither the Constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owner or an opportunity for him to be heard at any stage of the proceeding. In this respect both conflict with the guaranty that no one shall be deprived of property without due process of law. *San Mateo County* v. *Southern Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 1, 13 *Fed. Rep.* 145, 7 *Sawy.* (*U. S.*) 517. *San Mateo County* v. *Southern Pac. R. Co.*, 8 *Sawy.* (*U. S.*) 238, 13 *Fed. Rep.* 722; *appeal dismissed in* 116 *U. S.* 138, 6 *Sup. Ct. Rep.* 317.—QUOTED IN Smith *v.* Louisville & N. R. Co., 21 Am. & Eng. R. Cas. 157, 75 Ala. 449.

By Cal. Const., art. 13, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured" is treated, for the purposes of assessment and taxation, as an interest in the property affected thereby, and, "except as to railroad and other *quasi*-public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. (Sec. 4.) But by the same article "the franchise, roadway, roadbed, rails, and rolling stock of all rail-

roads operated in more than one county" are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property. *Held*, that in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity. *San Mateo County* v. *Southern Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 1, 13 *Fed. Rep.* 145, 7 *Sawy.* (*U. S.*) 517. *San Mateo County* v. *Southern Pac. R. Co.*, 8 *Sawy.* (*U. S.*) 238, 13 *Fed. Rep.* 722; *appeal dismissed in* 116 *U. S.* 138, 6 *Sup. Ct. Rep.* 317.—DISTINGUISHED IN Manhattan R. Co. *v.* Mayor, etc., of N. Y., 13 Am. & Eng. R. Cas. 261, 18 Fed. Rep. 195; Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121. FOLLOWED IN San Francisco & N. P. R. Co. *v.* Dinwiddie, 8 Sawy. 312, 13 Fed. Rep. 789; Santa Clara County *v.* Southern Pac. R. Co., 13 Am. & Eng. R. Cas. 182, 18 Fed. Rep. 385, 9 Sawy. 165.

An assessment made in strict accordance with the provisions of the Constitution of the state relating to the assessment of the property of "railroad and other *quasi*-public corporations" violates the provisions of the fourteenth amendment to the Constitution of the United States by taking private property without due process of law. *San Francisco & N. P. R. Co.* v. *Dinwiddie*, 8 *Sawy.* (*U. S.*) 312, 13 *Fed. Rep.* 789.—FOLLOWING San Mateo County *v.* Southern Pac. R. Co., 8 Sawy. 238.

Such assessment is void. A payment under it is not a payment under duress, but is voluntary and cannot be recovered. *San Francisco & N. P. R. Co.* v. *Dinwiddie*, 8 *Sawy.* (*U. S.*) 312, 13 *Fed. Rep.* 789.

(2) *State decisions.*—Under Cal. Const. art. 9, § 13, providing for the election of collectors and assessors by the qualified electors of the district in which the property taxed is situated, the assessor has no power to assess property situated beyond the limits of his own district. *People* v. *Placerville & S. V. R. Co.*, 34 *Cal.* 656.

Boards of supervisors of the several counties through which run railroads operated in more than one county have no jurisdiction to raise or lower the assessments placed upon the property of such roads by the state board of equalization. *People* v. *Sacramento County Sup'rs*, 59 *Cal.* 321.

The provision of the California Constitution that the assessment of railroads operated in more than one county is to be made by the state board of equalization is self-executing, and the aid of a statute is not necessary to enable the board to act. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

Cal. Const. art. 13, § 9, so far as it relates to the state board, has reference to the equalization of assessments between counties. The Political Code, § 3692, subdiv. 9, refers to the equalization between counties; and §§ 3692–93, if they attempt to provide for the equalization of individual assessments, are void. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

Assuming section 3664 of the Political Code to be valid, where no "sworn statement" is filed, the corporation is cut off from its right to appeal to the board, within five days, to have its first assessment corrected. And since it is only where a statement has been presented that the application can be made to have the assessment corrected, the assessment made by the board after the statement is furnished is the one which may be corrected. It was not the purpose of the statute to allow the corporation to complain of—and have corrected—its own sworn statement. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

A reconsideration of the assessment (or equalization) of railroad property can only be made by the state board in case a petition shall be filed by a party interested, within five days after the assessment is made and entered. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

The annual valuation by the state board of equalization, which precedes the fixing of the rate of taxation, applies to the rate which for state purposes is fixed for two years, and for county, city, etc., purposes, perhaps for a single year. The order of assessment made on or before the first Monday in March need not declare the particular fiscal year or years to which it is applicable. It is made applicable, by fair construction of the Constitution and statutes, to the orders fixing the rate of taxation

which next succeed it. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

The question whether it is obligatory on the board to specify the several items of railroad property, not decided, as the order of assessment in question did assess separately the franchise, roadway, roadbed, rails, and rolling stock. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

The Constitution does not in terms require that the assessed value of each item of railroad property should be separately apportioned to the several counties by the board, nor does the Political Code, § 3650, so require. The Constitution does not require that the apportionment to counties and to cities, etc., shall be one act. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

The description of the road—*held*, sufficient. The *termini*, courses, and distances being given, the law fixes the width. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

Petitioner contends that the property had been assessed thrice — i. e., the roadway, roadbed, and rails were the same. *Held*, not tenable. The roadbed is the foundation on which the superstructure of a railroad rests. The roadway is the right of way—property liable to taxation. The rails in place constitute the superstructure resting upon the roadbed. *San Francisco & N. P. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 248, 60 *Cal.* 12.

The provision of Cal. Constitution that the property of railroad and other *quasi*-public corporations is subject to assessment and taxation, without deduction of the amount of any mortgage or like lien thereon, does not conflict with the provision of the United States Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws." A corporation is not a person within the meaning of the Constitution. *Central Pac. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 256, 60 *Cal.* 35.

Cal. Const. art. 1, § 9, relating to the equalization of county assessment rolls, has no relation to the assessment of the property of railroad corporations operated in more than one county. *Central Pac. R. Co.* v. *State Board of Equalization*, 13 *Am. & Eng. R. Cas.* 256, 60 *Cal.* 35.

Steamers used by a company in transferring freight across a bay between different parts of its road are not included in the property defined by Cal. Const. art. 13, § 10, as "franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county," which must be assessed by a state board of equalization. Such steamers should be assessed by the local assessors. *San Francisco* v. *Central Pac. R. Co.*, 63 *Cal.* 467, 49 *Am. Rep.* 91. — FOLLOWED IN California v. Central Pac. R. Co., 33 Am. & Eng. R. Cas. 451, 127 U. S. 1.

250. Colorado.— The phrase "exclusively used" in Colo. Laws of 1885, p. 322, § 2 does not limit the action of the state board to such rolling stock as always remains upon the company's lines and under its immediate control. The authority of the board includes cars which in performing their regular journeys pass out of the state and become temporarily useful in operating other railroads. *Denver & R. G. R. Co.* v. *Church*, 48 *Am. & Eng. R. Cas.* 627, 17 *Colo* 1, 28 *Pac. Rep.* 468.

251. Connecticut.—The valuation of the property of a company for the purpose of taxation constitutes an "assessment" of the property, as that term is used in the statutes. *State* v. *New York, N. H. & H. R. Co.*, 60 *Conn.* 326, 22 *Atl. Rep.* 765.

By "cash on hand," in the statute relative to deductions from taxable valuation of railroad property, is intended ready money, or that which in ordinary business usage is the same thing, as banknotes, checks, drafts, bills of exchange, certificates of deposit, and other like instruments which pass with or without indorsement from hand to hand as money or are immediately convertible into money. *State* v. *New York, N. H. & H. R. Co.*, 60 *Conn.* 326, 22 *Atl. Rep.* 765.

252. Delaware.— A law of the state provided that the Philadelphia, Wilmington and Baltimore railroad company, owning 23$\frac{46}{100}$ miles of track in the state, should pay in lieu of all other taxes the sum of $40,000 annually. Subsequently the company added two branches aggregating 11$\frac{49}{100}$ miles. In 1881 an act of the legislature provided that if the Delaware and Western railroad company became part of a trunk line, it should pay a tax bearing the same proportion to $40,000 that its line bore to the length of the Philadelphia, Wilmington and Baltimore

road. *Held*, that, in forming the proportion for the computation of the tax, the two branches added to the first-mentioned road should not be considered. *Herbert* v. *Baltimore & P. R. Co.*, (*Del.*) 13 *Atl. Rep.* 902.

253. District of Columbia. — The mere cost of the planks of a bridge is not the only element to be taken into consideration in making an assessment; the use permitted to be made of the property under the franchise may enter as a constituent into the valuation. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217.

Where there is an appeal board authorized and required to sit and hear all complaints as to overvaluation or impropriety of assessments and to revise the same, and its action is declared to be complete and final, persons who wilfully neglect to avail themselves of the opportunity so amply afforded them cannot expect a court of equity, after long delay, to relieve them from the consequences of their own laches. Especially will the court not substitute its own judgment for that of the tribunal expressly created for that purpose. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217.

A bridge which lies partly in the District and partly in the state of Virginia cannot be assessed by the District upon its entire length; only that portion within the District can be assessed, otherwise the assessment is illegal, and a bill to enjoin a sale of the property by the District authorities for non-payment of the tax will be sustained. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey* (*D. C.*) 217.

Where a tax is assessed upon different kinds of property as a unit, and a part of the property is not legally taxable, the whole tax will be void if the court cannot, from anything in the record, separate the invalid portion from that which is valid. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 5 *Mackey* (*D. C.*) 376. — QUOTING Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394.

The board of equalization has no power to decide any question going to the invalidity of a tax; it can only increase or decrease the tax; it is therefore no objection to granting relief by the courts against an invalid tax that no appeal was made to this board. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 5 *Mackey* (*D. C.*) 376.

254. Florida. — There is no statute authorizing the county commissioners to raise or lower the valuation of railroad property assessed by the state comptroller, as prescribed by statute. *Pensacola* v. *Louisville & N. R. Co.*, 21 *Fla.* 492.

Fla. Laws, ch. 3219, § 46, and ch. 3413, § 46, charge the state comptroller with the duty of assessing the total number of miles and value of any railroad in the state the line of which runs through two or more counties or through a county and incorporated city or town, and apportioning the value of the road in each county, incorporated city, or town, and the proportionate value of the locomotives, engines, passenger, freight, platform, construction, and other cars and appurtenances, and withdraws from the local assessors of towns and cities through which the road runs the power to assess the same under the general power granted to municipal corporations to assess and tax all real and personal property within their limits. *Pensacola* v. *Louisville & N. R. Co.*, 21 *Fla.* 492.

All other property of a railroad company, within the limits of an incorporated city or town, not required, by section 46 of each of said acts, to be assessed by the comptroller, can be lawfully assessed by the tax assessor of said city or town in the manner prescribed in Fla. Laws, ch. 3477. *Pensacola* v. *Louisville & N. R. Co.*, 21 *Fla.* 492.

255. Georgia.—Under the guaranties of Ga. Act of October 24, 1870, §§ 1, 11, authorizing the lease of the Western and Atlantic railroad, the company, though made a corporation by said act, by virtue of the contract of lease when accepted by the governor and recorded, is not liable to a tax greater than one half of one per cent. on the net income of the company. By section 11 of said act it is taxable to that extent. *Western & A. R. Co.* v. *State*, 54 *Ga.* 428. — DISTINGUISHING Central R. & B. Co. *v.* State, 54 Ga. 401; Union Branch R. Co. *v.* East Tenn. & G. R. Co., 14 Ga. 328; West End & A. St. R. Co. *v.* Atlanta St. R. Co., 49 Ga. 158.—FOLLOWED IN Atlantic & G. R. Co. *v.* State, 55 Ga. 312; Savannah, G. & N. A. R. Co. *v.* State, 55 Ga. 557.

When the charter of a company declares "that said railroad and the property of said company shall not be subject to be taxed higher than one half of one *per centum* on

its annual income," in measuring a tax imposed on the property of said company the *per centum* is to be counted on the gross and not on the net income. The lease of the road to another company by authority of the legislature does not affect the basis of taxation. The income contemplated by the charter is not the annual rental, but the earnings of the road. The act authorizing the lease not having any provision in regard to taxation, the limit in the charter was not lost or changed by the lease. *Goldsmith* v. *Augusta & S. R. Co.*, 62 *Ga.* 468.

The limit on the taxing power extends to all the capital of said company, except so much thereof as was issued under the amendment of 1868 authorizing the Clayton branch (54 Ga. 423). The correct mode of taxing the company's property under existing laws is to estimate all its property at its true value, just as if it belonged to a natural person, and upon so much of this value as equals the amount of the whole capital stock other than that issued for the Clayton branch, assess at the charter rate (that is, at such percentage as will yield a revenue to the state equal to one half of one per cent. on the net annual proceeds of all the company's investments); and upon the balance of such value, if any, assess at the general rate. If, however, the charter rate thus arrived at should exceed the general rate, then assess at the latter upon the whole value, as in no case is the general rate, that is, the rate *ad valorem* imposed upon property generally, to be exceeded. *Goldsmith* v. *Georgia R. Co.*, 62 *Ga.* 485.

Bonds, notes, or other mere evidences of debt, unless they form part of the income of a road, are subject to the ordinary rates of taxation. So, also, water craft belonging to the company in 1876 and 1877. *Wright* v. *Southwestern R. Co.*, 64 *Ga.* 783.

That portion of the Southwestern railroad extending from Macon to Fort Gains, known as the main line, and that portion from Fort Valley to Columbus, are subject to a tax of one half of one per cent. on its net annual income, and not to an *ad valorem* tax imposed upon property of citizens of the state under general laws. That portion of the road which lies between Americus and Albany, and which became a part of the road by purchase, under Georgia Act of 1859; that portion known as the Arlington branch, extending from Albany to Blakely; and that portion known as the Cuthbert branch, extending from Cuthbert Junction to Eufaula, are subject to an *ad valorem* tax. *State* v. *Southwestern R. Co.*, 70 *Ga.* 11.

The mere receipt by the comptroller-general for a certain sum of money from the attorney-general as taxes on the road, with a return of the company of a valuation of the section subject to taxation—*held*, no evidence that the comptroller-general knew of a settlement of the taxes on a certain basis between the attorney-general and the attorney of the company, so that he could have ratified the assessment. *State* v. *Southwestern R. Co.*, 70 *Ga.* 11.

A defendant in an execution for taxes having been relieved as to two-thirds of its property from an *ad valorem* tax, and having neglected to make a new return—*held*, that the comptroller-general was authorized to assess the portion subject to the tax from the best information he could obtain. *State* v. *Southwestern R. Co.*, 70 *Ga.* 11.

Ga. Act of 1874 is exhaustive as to the method of collecting state taxes on railroad property and of having the same returned with a view to the laying of taxes by the comptroller-general. Hence the return should specify the several sorts of property, so that the kind appurtenant and necessary to the company for railroad purposes should bear only the rate of taxation fixed by the charter, and other property, not so appurtenant and necessary, should be taxed as that of all other persons; the entire state tax being levied by the comptroller-general. *Savannah, F. & W. R. Co.* v. *Morton*, 71 *Ga.* 24.—FOLLOWED IN Atlanta *v.* Georgia Pac. R. Co., 74 Ga. 16.

As respects railroad companies having no exemption, a statute is not unconstitutional which provides for taxing railroad property for county purposes at the regular rate *ad valorem* which is levied by the county authorities on other property, each county through which a road runs being allowed to tax at that rate all the company's property, real and personal, located in that county, and, in addition thereto, its due proportion of the rolling stock and other floating or unlocated property of the company—that is, a proportion corresponding to the ratio between the company's property, real and personal, located in the given county, and the aggregate of its located property in all the counties through which the road runs. *Columbus Southern R. Co.* v. *Wright*, 54 *Am. & Eng. R. Cas.* 255, 89 *Ga.* 574, 15

S. E. Rep. 293.—REVIEWING Atlanta & F. R. Co. *v.* Wright, 87 Ga. 487.—FOLLOWED IN Georgia Midland & G. R. Co. *v.* State, 89 Ga. 597, 15 S. E. Rep. 301.

Ga. Act of Oct. 16, 1889, relating to taxing railroads, neither imposes a state tax for county purposes nor attempts to levy county taxes directly by the state. It provides for taxing railroads for county purposes by and through the action of the county authorities, the rate in each county being fixed by such authorities, and being the same for all kinds of property. That different counties fix different rates is of no consequence, one and the same rate only being applied to property located in a given county. *Columbus Southern R. Co.* v. *Wright*, 54 *Am. & Eng. R. Cas.* 255, 89 *Ga.* 574, 15 *S. E. Rep.* 293.—FOLLOWED IN Georgia Midland & G. R. Co. *v.* State, 89 Ga. 597, 15 S. E. Rep. 301.

256. Idaho.—Where machine and repair shops are situate upon lands other than the right of way, but are connected with the main line by a side track, under Idaho Rev. St. § 1463 they should be assessed by the local assessor rather than by the territorial board of equalization. *Oregon Short Line R. Co.* v. *Yeates*, 33 *Am. & Eng. R. Cas.* 481, 2 *Idaho* 365, 17 *Pac. Rep.* 457.

257. Illinois.—(1) *Constitutional requisite as to equal taxation.*—The constitutional provision requiring equality of taxation applies to special assessments for public improvements, so the assessments must be distributed in the ratio of benefits. *Chicago* v. *Baer*, 41 *Ill.* 306.—DISTINGUISHED IN Chicago *v.* Sheldon, 9 Wall. (U. S.) 50.

If the law is not strictly observed in the case of individuals, and their property is not assessed at its actual value, the property of a corporation situate in the same county should not be assessed at a greater proportional value than that of individuals, even though the enhanced assessment is not the actual cash value of the property of such corporation. But one county does not furnish a rule for another, in regard to the proportion of the value of property which shall be taken as the basis for assessment. *Chicago & N. W. R. Co.* v. *Boone County Sup'rs*, 44 *Ill.* 240.—FOLLOWING Bureau County Sup'rs *v.* Chicago, B. & Q. R. Co., 44 Ill. 229.—DISTINGUISHED IN Illinois & St. L. R. & C. Co. *v.* Stookey, 31 Am. & Eng. R. Cas. 479, 122 Ill. 358, 13 N. E. Rep. 516, 11 West. Rep. 614.

Where the property belonging to individuals in a county has been assessed at less than its actual value, the constitutional rule of uniformity forbids that the property of a railroad in such county should be assessed upon any greater per cent. of its value than that of individuals. *Bureau County Sup'rs* v. *Chicago, B. & Q. R. Co.*, 44 *Ill.* 229.—DISTINGUISHED IN Illinois & St. L. R. & C. Co. *v.* Stookey, 31 Am. & Eng. R. Cas. 479, 122 Ill. 358, 13 N. E. Rep. 516, 11 West. Rep. 614. FOLLOWED IN Chicago & N. W. R. Co. *v.* Boone County Sup'rs, 44 Ill. 240.

Under the constitutional provision requiring that taxes shall be uniform, where the property belonging to individuals in a county has been assessed at less than its actual value, railroad property in the same county must not be assessed at any greater per cent. of its value. *Chicago & A. R. Co.* v. *Livingston County Sup'rs*, 68 *Ill.* 458.

The state board of equalization having made an assessment of railroad property at about its cash value, the local officer extended the tax upon the basis of such valuation. The other property in the same locality was assessed for the same year, by the local assessor, at only about one third of its cash value. The company sought to enjoin the collection of so much of the tax as resulted from the excess in valuation of its property over that of individuals. The contention of the company was that by reason of the unequal valuation it would be required to pay a tax largely in excess, in comparing actual values, of individuals in the same locality, and this in violation of the rule of uniformity prescribed in the Constitution. But the relief sought was denied. *Illinois & St. L. R. & C. Co.* v. *Stookey*, 31 *Am. & Eng. R. Cas.* 479, 122 *Ill.* 358, 13 *N. E. Rep.* 516, 11 *West. Rep.* 614. —DISTINGUISHING Bureau County Sup'rs *v.* Chicago, B. & Q. R. Co., 44 Ill. 229; Chicago & N. W. R. Co. *v.* Boone County Sup'rs, 44 Ill. 240.

The property of the individuals was assessed by the local assessor, and that of the company by the state board of equalization, each acting under a statute not in conflict with the Constitution, and which required that all property should be assessed at its fair cash value. *Held*, that the mere fact that the local assessor did not comply with the law in that regard could not operate to invalidate the assessment of the state board,

which was in compliance with the law. *Illinois & St. L. R. & C. Co.* v. *Stookey*, 31 *Am. & Eng. R. Cas.* 479, 122 *Ill.* 358, 13 *N. E. Rep.* 516, 11 *West. Rep.* 614.

(2) *Assessments by state board of equalization, generally.*—It is neither in conflict with the Constitution of Illinois nor inequitable that the entire taxable property of a company should be ascertained by a state board of equalization, and that the state, county, and city taxes should be collected within each municipality on this assessment, in the proportion which the length of the road within such municipality bears to the whole length of the road within the state. And the action of the board of equalization, in increasing the assessed value of the property of a railroad company or an individual, above the return made to the board, does not require a notice to the party to make it valid; and the courts cannot substitute their judgment as to such valuation for that of the board. *Taylor* v. *Secor*, 92 *U. S.* 575.—FOLLOWED IN St. Louis, V. & T. H. R. Co. *v.* Surrell, 88 Ill. 535. QUOTED IN Alexandria C., R. & B. Co. *v.* District of Columbia, 7 Am. & Eng. R. Cas. 325, 1 Mackey (D. C.) 217; Franklin County *v.* Nashville, C. & St. L. R. Co., 17 Am. & Eng. R. Cas. 445, 12 Lea (Tenn.) 521; Hannibal & St. J. R. Co. *v.* State Board of Equalization, 64 Mo. 294. REVIEWED IN Huntington *v.* Palmer, 7 Sawy. (U. S.) 355, 8 Fed. Rep. 449.

Under Ill. Act of 1872, providing for the assessment of property, and for the collection of taxes, an assessment by the state board of equalization upon the capital stock and franchises of a railroad of that state, though leased and managed by a company in an adjoining state, assigning to each county on the line of the road such proportion of the assessments as the length of line in such county bears to the entire length of the road—*held*, valid. *Indianapolis & St. L. R. Co.* v. *Vance*, 96 *U. S.* 450.

Ill. Consolidated Revenue Act of 1872, § 3, requiring that the capital stock of all companies and associations then or thereafter created under the laws of the state shall be so valued by the state board of equalization as to ascertain and determine respectively the fair cash value of such stock, including the franchise, over and above the assessed value of the tangible property of such company or association, is valid. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.—QUOTED IN Cleveland, C., C. & St. L. R. Co. *v.* Backus, 133 Ind. 513; Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 133 Ind. 625.

The power given to the state board of equalization to "adopt such rules and principles for ascertaining the fair cash value of the capital stock of corporations as to it may seem equitable and just" is not a delegation of legislative power, and does not therefore render the act unconstitutional. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.—FOLLOWED IN St. Louis, V. & T. H. R. Co. *v.* Surrell, 88 Ill. 535.

A company returned its capital stock as of no value, and sent to the state board of equalization an attorney who made a statement to that effect. The board promised the attorney that if it should not be satisfied with his statement, it would notify him, but failed to do so, and assessed the capital stock at $5000, but upon what evidence, if any, did not appear. *Held*, that the bad faith of the board in not keeping its promise did not render the assessment fraudulent. In the absence of proof to the contrary it will be presumed that the board acted upon sufficient evidence to justify its action. *La Salle & P. H. & D. R. Co.* v. *Donoghue*, 127 *Ill.* 27, 18 *N. E. Rep.* 827.

The provisions of Ill. Revenue Act, §§ 42, 43, 44, and 109, are intended to control and direct the state board of equalization in making the assessment of railroad tracks and rolling stock, and the county clerk in distributing the amount assessed on railroad property in his county, among the various municipalities and taxing districts therein. *Wabash, St. L. & P. R. Co.* v. *People ex rel.*, 137 *Ill.* 181, 27 *N. E. Rep.* 456.

In the absence of anything showing the contrary, it will be presumed that these officers discharged their duties; that in making an assessment the board properly described the railroad track, as required by section 42 of the act; and that the county clerk certified to the several road districts their proportionate and distributive share of the assessed value of such railroad track and rolling stock as subject to taxation therein. *Wabash, St. L. & P. R. Co.* v. *People ex rel.*, 137 *Ill.* 181, 27 *N. E. Rep.* 456.

(3) *What property is to be assessed by the board.*—Land constituting the right of way of a railroad, with the ties, rails, etc., in place on the track, and turnouts, depot grounds, and buildings on the same, are

real estate; but rolling stock is made by statute, for the purposes of taxation, personal property. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.

Under the Constitution, art. 9, § 1, an assessment for taxation must be made by the person or persons to be elected or appointed in the manner in which the general assembly shall direct, and not otherwise. Therefore an assessment made by a person or persons not authorized by law is void, and no judgment can be rendered for the taxes levied on such assessment. *Chicago & A. R. Co.* v. *People ex rel.*, 5 *Am. & Eng. R. Cas.* 94, 98 *Ill.* 350.

Under the Revenue Law the exclusive power to assess railroad tracks and rolling stock is conferred upon the state board of equalization, and therefore an assessment of property used as railroad track, by the local township assessor, is void. *Chicago & A. R. Co.* v. *People ex rel.*, 5 *Am. & Eng. R. Cas.* 94, 98 *Ill.* 350.

Land held and in actual use by a company for side tracks, switches, and turnouts must be regarded, within the meaning of the Revenue Law, as a part of the right of way of the company, notwithstanding it may have machine shops, depots, roundhouses, and other superstructures thereon, necessary for the successful use of the road. *Chicago & A. R. Co.* v. *People ex rel.*, 5 *Am. & Eng. R. Cas.* 94, 98 *Ill.* 350.—DISTINGUISHED IN Indianapolis & St. L. R. Co. *v.* People, 41 Am. & Eng. R. Cas. 634, 130 Ill. 62, 22 N. E. Rep. 854.

Two lots of a company contained about 32 acres after deducting a strip 100 feet wide running through them occupied as the main track. The 32 acres were covered by tracks used all the time for the purpose of running cars and engines over them, and for switching cars, making up trains, loading and unloading cars, and for various other purposes in the transaction of the company's business. The ground was also used for car shops, machine shops, blacksmith shops, foundry, roundhouses, freight depot, stock yards, paint shops, etc. *Held*, that the whole of the lots constituted a part of the company's right of way, and its railroad track, and as such could not legally be assessed by the local township assessors. But land cannot be regarded as right of way merely because one or even two side tracks may be constructed upon it. The land must be, in fact, appropriated for the purpose of the right of way. *Chicago & A. R. Co.* v. *People ex rel.*, 5 *Am. & Eng. R. Cas.* 94, 98 *Ill.* 350.—DISTINGUISHED IN Chicago, B. & Q. R. Co. *v.* People ex rel., 136 Ill. 660. FOLLOWED IN Chicago & A. R. Co. *v.* People ex rel., 99 Ill. 464. QUOTED IN Pfaff *v.* Terre Haute & I. R. Co., 29 Am. & Eng. R. Cas. 181, 108 Ind. 144; Chicago & A. R. Co. *v.* People ex rel., 41 Am. & Eng. R. Cas. 629, 129 Ill. 571, 22 N. E. Rep. 864, 25 N. E. Rep. 5.

Rolling stock and railway track, as well as capital stock of railway companies, are to be assessed by the state board of equalization; but other railway property is to be assessed by the local assessors. *People ex rel.* v. *Chicago & W. I. R. Co.*, 24 *Am. & Eng. R. Cas.* 612, 116 *Ill.* 181, 4 *N. E. Rep.* 480.—DISTINGUISHED IN Indianapolis & St. L. R. Co. *v.* People, 41 Am. & Eng. R. Cas. 634, 130 Ill. 62, 22 N. E. Rep. 854.

Fixed and stationary machinery attached to railroad shops on the company's right of way are part of the real estate or railroad track, and as such are assessable only by the state board. But a steam engine and boiler not permanently attached to the realty are personal property, and are properly assessed for taxation by the local assessor. *Peoria, D. & E. R. Co.* v. *Goar*, 29 *Am. & Eng. R. Cas.* 189, 118 *Ill.* 134, 8 *N. E. Rep.* 682.

Land held by a company for right of way is required by law to be assessed for taxation by the state board, and not by the local assessor. This rule is not limited to the right of way of the main track, but embraces the right of way of all the side tracks, switches, and turnouts as well. An assessment of such property by the local assessor is void. *Chicago & A. R. Co.* v. *People ex rel.*, 41 *Am. & Eng. R. Cas.* 629, 129 *Ill.* 571, 22 *N. E. Rep.* 864, 25 *N. E. Rep.* 5.

(4) *Railroad track.*—Town lots used by a company as right of way, and assessed under the denomination of "railroad track," are only liable for taxes as right of way, and cannot be taxed both as right of way and as town or city lots; and where a tax is levied on such property both as railroad track and as town and city lots, the collection of the tax levied as upon town and city lots should be enjoined. *Chicago & N. W. R. Co.* v. *Miller*, 72 *Ill.* 144.—DISTINGUISHED IN Chicago, B. & Q. R. Co. *v.* People ex rel., 136 Ill. 660; Indianapolis & St. L. R. Co. *v.* People, 41 Am. & Eng. R. Cas. 634, 130 Ill. 62, 22 N. E. Rep. 854. QUOTED IN Chicago &

A. R. Co. *v.* People ex rel., 41 Am. & Eng. R. Cas. 629, 129 Ill. 571, 22 N. E. Rep. 864, 25 N. E. Rep. 5.

Railroad track must be assessed for taxation by the state board of equalization, but all other real estate of railroad companies, including the stations and other buildings and structures thereon, must be assessed by the local assessors. *Chicago, B. & Q. R. Co. v. Paddock*, 75 *Ill.* 616.

Lands held by a company for a right of way, when the road is located and is in process of construction, are required to be returned as "railroad track"; and this is so though the lands are at the time occupied by tenants. Actual use for railroad purposes is not essential to the classification of lands as "railroad track." *People ex rel. v. Chicago & W. I. R. Co.*, 24 *Am. & Eng. R. Cas.* 612, 116 *Ill.* 181, 4 *N. E. Rep.* 480.—DISTINGUISHED IN Chicago, B. & Q. R. Co. *v.* People ex rel., 136 Ill. 660.

A bridge across a navigable stream forming the boundary between Illinois and another state, constructed and used exclusively by a company as a part of its continuous line of railroad, for the purposes of taxation comes within the denomination of "railroad track," and as such is to be assessed only by the state board. Its assessment by the local assessor is without warrant of law, and taxes extended thereon may be enjoined. *Anderson v. Chicago, B. & Q. R. Co.*, 25 *Am. & Eng. R. Cas.* 522, 117 *Ill.* 26, 7 *N. E. Rep.* 129.—REVIEWED IN Cass County *v.* Chicago, B. & Q. R. Co., 25 Neb. 348, 2 L. R. A. 188, 41 N. W. Rep. 246.

Ill. Act of 1873, providing that "all bridge structures across any navigable stream forming the boundary line between the state of Illinois and any other state shall be assessed by the township or other assessor in the county where the same is located, as real estate," was not intended to change the method of taxing railroad property or the mode of assessing it, but to apply to bridges not constituting a railroad track exclusively, and to make such structures real estate, for the purpose of collecting taxes thereon. *Anderson v. Chicago, B. & Q. R. Co.*, 25 *Am. & Eng. R. Cas.* 522, 117 *Ill.* 26, 7 *N. E. Rep.* 129.

On the question of the proper authority to assess for taxation a bridge built by a company, the question whether the company exceeded its chartered powers in building the bridge is wholly immaterial. *Anderson v. Chicago, B. & Q. R. Co.*, 25 *Am. & Eng. R. Cas.* 522, 117 *Ill.* 26, 7 *N. E. Rep.* 129.

Under Illinois Revenue Law, the exclusive power to assess "railroad track," which includes right of way, with the superstructures of main, side, or second track and turnouts, and the station and improvements thereon, is conferred upon the state board of equalization, and therefore an assessment of the property used as railroad track, by a local or township assessor, is void. *Peoria, D. & E. R. Co. v. Goar*, 29 *Am. & Eng. R. Cas.* 189, 118 *Ill.* 134, 8 *N. E. Rep.* 682.—DISTINGUISHED IN Indianapolis & St. L. R. Co. *v.* People, 41 Am. & Eng. R. Cas. 634, 130 Ill. 62, 22 N. E. Rep. 854. QUOTED IN Chicago & A. R. Co. *v.* People ex rel., 41 Am. & Eng. R. Cas. 629, 129 Ill. 571, 22 N. E. Rep. 864, 25 N. E. Rep. 5.

A side track leading from the main track to a stone quarry, and used for the purpose of procuring stone for ballasting the road, for the purposes of taxation must be regarded as "railroad track." (Schofield and McGruder, JJ., dissenting.) *Chicago & A. R. Co. v. People ex rel.*, 41 *Am. & Eng. R. Cas.* 629, 129 *Ill.* 571, 22 *N. E. Rep.* 864, 25 *N. E. Rep.* 5.—QUOTING Chicago & A. R. Co. *v.* People ex rel., 98 Ill. 354; Chicago & N. W. R. Co. *v.* Miller, 72 Ill. 144; Chicago & A. R. Co. *v.* People ex rel. 99 Ill. 466; Peoria, D. & E. R. Co. *v.* Goar, 118 Ill. 136.—DISTINGUISHED IN Chicago, B. & Q. R. Co. *v.* People ex rel., 136 Ill. 660.

A company returned various schedules of its property for taxation. Schedule "A," showing the property designated as "railroad track," failed to include eighteen acres assessed by the assessor, and taxes were levied thereon. There was nothing to show that the track so omitted was not included in "D," the schedule of all real estate other than railroad track. *Held*, that it must be presumed that such land was returned as real estate other than railroad track. *Indianapolis & St. L. R. Co.* v. *People*, 41 *Am. & Eng. R. Cas.* 634, 130 *Ill.* 62, 22 *N. E. Rep.* 854.

A company having failed to return a strip of its land as "railroad track," the land was assessed as real estate other than railroad track, and not otherwise. On application for judgment for the taxes, the company was estopped to prove that in fact it was a part of the track. *Indianapolis & St. L. R. Co.* v. *People*, 41 *Am. & Eng. R.*

Cas. 634, 130 *Ill.* 62, 22 *N. E. Rep.* 854.—DISTINGUISHING Chicago & N. W. R. Co. *v.* Miller, 72 Ill. 147; Chicago & A. R. Co. *v.* People ex rel., 98 Ill. 351; People ex rel. *v.* Chicago & W. I. R. Co., 116 Ill. 181; Peoria, D. & E. R. Co. *v.* Goar, 118 Ill. 134.

Lots and parts of lots bought by a company near its right of way, and intended to be used for tracks in the future, if a purchase of the other parts of the lots could be made, and which are rented to tenants and used for other than railroad purposes, are not in any sense a part of such company's track, as defined by section 42 of the Revenue Law. *Chicago, B. & Q. R. Co.* v. *People ex rel.*, 136 *Ill.* 660, 27 *N. E. Rep.* 200.—DISTINGUISHING Chicago & N. W. R. Co. *v.* Miller, 72 Ill. 144; Chicago & A. R. Co. *v.* People ex rel., 98 Ill. 350; People ex rel. *v.* Chicago & W. I. R. Co., 116 Ill. 181; Chicago & A. R. Co. *v.* People ex rel., 129 Ill. 571.

Where stations and other improvements are erected on the right of way of a company, they may be regarded as a part of the track, within the meaning of section 42 of the Revenue Act; but a station erected on land which is not a part of the right of way is not necessarily a part of the railroad track. The construction by a railway company of its passenger station on land adjoining its right of way will not, *ipso facto*, have the effect of constituting such land a part of the right of way. *Chicago, B. & Q. R. Co.* v. *People ex rel.*, 136 *Ill.* 660, 27 *N. E. Rep.* 200.

If a company erroneously schedules lots as part of its track, when in fact they have never been appropriated for such use, and they are assessed by the state board as a part of the track, this will not interfere with the duty of the local assessor to assess the same, or of the proper officers to extend the taxes on such local assessment. *Chicago, B. & Q. R. Co.* v. *People*, 136 *Ill.* 660, 27 *N. E. Rep.* 200.

Illinois statute of 1872, relating to the taxation of railroads, provides that in assessing a right of way for taxation it shall include not only the main and side tracks and turnouts, but all stations and improvements thereon. Plaintiff company occupied a strip of land 500 feet wide and about half a mile long, with the main track running through it, and the remainder used for side tracks, turnouts, machine shops, and repair shops. *Held*, that this was properly included in the assessment. *Chicago, R. I. & P. R. Co.* v. *People ex rel.*, 4 *Ill. App.* 468.

The statute divides the real property of railroads into two classes, "railroad track" and "all real estate other than that denominated railroad track." With the first of these the town assessor has nothing to do. The latter should be assessed by him as other property. The strip of land mentioned above, with its buildings and improvements, belonged to appellant's right of way, was properly assessed as "railroad track" and the assessment of the same by the town assessor under the provisions of section 46 was unauthorized and void. *Chicago, R. I. & P. R. Co.* v. *People ex rel.*, 4 *Ill. App.* 468.

Ill. Revenue Law, § 43, providing for the listing and taxation of "railroad track" in the several counties, towns, cities, etc., in proportion to the length of the main track therein, has no reference to the ascertainment of the value of such property, but merely furnishes the principle upon which the value when ascertained may be distributed to the various municipalities entitled to the benefit of the same, and controls the action of the auditor and county clerk in their duties under section 109. *Chicago, R. I. & P. R. Co.* v. *People ex rel.*, 4 *Ill. App.* 468.

(5) *Making up the assessment.*—In assessing the value of a railroad, for purposes of taxation, the inquiry should be, What is the property worth, to be used for the purposes for which it was designed, and not for any other purpose to which it might be applied? In such a case, if the property is devoted to the use for which it was designed, and in a condition to produce its maximum income, one very important element for ascertaining its present value is the amount of the net profits. This, however, should not be the absolute standard of value. There should be taken in connection with it the inquiry, What would a prudent man give for the property as a permanent investment, with a view to present and future income? *State* v. *Illinois C. R. Co.*, 27 *Ill.* 64.—EXPLAINED IN Chicago & N. W. R. Co. *v.* Boone County Sup'rs, 44 Ill. 240. REVIEWED IN Louisville & N. R. Co. *v.* State, 8 Heisk. (Tenn.) 663.

Under Ill. Law of 1855, improvements made upon real estate belonging to a railroad, occupied and fitted for use as a roadway, must be taken into account in fixing its value for the purposes of taxation. *Chicago & N. W. R. Co.* v. *Lee County Sup'rs*, 44 *Ill.* 248.

Ill. Act of 1855, which required railroads to return a schedule setting forth "the actual value of each lot or parcel of land, including the improvements thereon, except track or superstructure of said road," did not require the value of the improvements to be set forth separately from the land, but the value of the land including the improvements. *Chicago & A. R. Co.* v. *Livingston County Sup'rs*, 68 *Ill.* 458.

The valuation of railroad property required by the statute to be furnished is only evidence of value, and is not necessarily conclusive on the state board of equalization in making its assessment of the property for taxation. *Chicago, B. & Q. R. Co.* v. *Paddock*, 75 *Ill.* 616.

It was urged, on bill to enjoin the collection of a railway tax, that the board of equalization had included in the assessment of the capital stock, including the franchise, debts which the company owed. The evidence of this was the resolution of the board, declaring that the market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt, excluding indebtedness for current expenses, should be added together, and the aggregate should be taken as the value of the capital stock, including the franchise. *Held*, that the resolution did not show that the company was assessed with the amount of its debts, but that it was a mode by which to approximate the value of the capital stock, including the franchise. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.

It was objected to an assessment of the property of a railway that the valuation was determined by a committee of the state board of equalization. *Held*, that as the report of the committee was acted upon and adopted by the board, it was to be regarded as having been made by the board. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.

The levy of corporate taxes for the years 1864 to 1869, inclusive, cannot be extended upon the valuation for the year 1870, but must be extended upon the assessment for the several years for which the levies were made. The curative act of 1853 does not apply in such a case. *Lebanon* v. *Ohio & M. R. Co.*, 77 *Ill.* 539.

What may be the relative value of lands in the several counties over which a railroad is laid is not a pertinent inquiry in assessing the track, as such, for taxation. The track as a whole is a single property, and it should not be assessed upon any higher valuation per mile in one county than in another, even if its construction has cost more in some localities than in others. *Law* v. *People ex rel.*, 87 *Ill.* 385. — FOLLOWED IN Hopkins *v.* Taylor, 87 Ill. 436.

The fact that the board finds the equalized value of the capital stock of some companies not to exceed the equalized value of their tangible property, thus leaving nothing but the latter upon which to extend taxes, when such assessment is honestly made, and with no fraudulent intent, affords no ground for enjoining the collection of taxes upon another railroad which is assessed for its capital stock in excess of the value of its tangible property. *Chicago, B. & Q. R. Co.* v. *Siders*, 88 *Ill.* 320, 21 *Am. Ry. Rep.* 304.

Whether the valuation of railroad property is represented solely in the valuation of its tangible property, or in the valuation of its tangible property and that of its capital stock, cannot be regarded as, *per se*, evidence of an unjust and fraudulent discrimination. *Chicago, B. & Q. R. Co.* v. *Siders*, 88 *Ill.* 320, 21 *Am. Ry. Rep.* 304.

A company cannot be heard to object to the payment of taxes on the ground that the board of equalization has failed to assess the value of the roadbeds under the rails, including embankments, bridges, culverts, etc., of all companies in the state, as tangible property. *Chicago, B. & Q. R. Co.* v. *Siders*, 88 *Ill.* 320, 21 *Am. Ry. Rep.* 304.

The board has the power to increase the valuation of railroad property returned by its officers without first hearing evidence impeaching the return. Such return is not conclusive. *St. Louis, V. & T. H. R. Co.* v. *Surrell*, 88 *Ill.* 535, 21 *Am. Ry. Rep.* 356. —FOLLOWING Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 564; State R. Tax Cases, 92 U. S. 575.

It is not essential that township and other assessors shall hear evidence in fixing the taxable value of railroad property; they may act upon their own knowledge and judgment, and the same rule is applicable to the state board. *St. Louis, V. & T. H. R. Co.* v. *Surrell*, 88 *Ill.* 535, 21 *Am. Ry. Rep.* 356.

The state board found the value of the capital stock and rolling stock of a corporation, operating its road in this and other states by a continuous line, by taking the value of the entire capital stock and all the

rolling stock everywhere, and setting apart so much of the entire value of each, for taxation in this state, as the proportion of the length in this state of its main line bore to the length of the entire line of the road. *Held*, in the absence of proof to the contrary, that the mode adopted was fair and reasonable, and that this was not an assessment of any part of its property in the other states. *Ohio & M. R. Co.* v. *Weber*, 5 *Am. & Eng. R. Cas.* 101, 96 *Ill.* 443.—FOLLOWED IN Wilson *v.* Weber, 96 Ill. 454.

A rule adopted by the board, for the assessment of the capital stock of corporations, was that the value of all shares of stock, and the value of all debts, excluding current expenses, should be added to ascertain the fair cash value of the capital stock, or entire property, including franchises, and that from this sum should be deducted the value of all tangible property, and that the remainder should be taken as the fair cash value to be assessed for taxation. On an application to enjoin the collection of a tax, when equalized, by the board, with other property, the rule was sustained. *Ohio & M. R. Co.* v. *Weber*, 5 *Am. & Eng. R. Cas.* 101, 96 *Ill.* 443.

Where a company fails to make a return of its property to the auditor, as required by law, and the state board has before it a return made to the county clerk by an agent of the contractors who built the road, which return is not shown to be untrue, the company cannot defeat the collection of a tax levied upon such a basis on the charge that the board did not ascertain the necessary facts upon which to fix the proper valuation. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.

The taxation of a road only twelve miles long, connecting St. Louis and East St. Louis by bridge, at a rate five times as high as any other road running into St. Louis was held not to show fraud where it appeared that the road, including a relay depot and network of tracks surrounding it, was all within the limits of East St. Louis, and that it did all the railroad traffic between East St. Louis and St. Louis, being merely a terminal railroad. *St. Louis B. & T. R. Co.* v. *People ex rel.*, 39 *Am. & Eng. R. Cas.* 562, 127 *Ill.* 627, 21 *N. E. Rep.* 348.

(6) *Assessing leased road.*—Where a company is operating leased roads as a part of its line, it is proper not only to assess the value of the tangible property of such leased roads against the lessee road, but, in distributing the value of the capital stock for taxation among the different counties, the leased roads are to be considered as parts of the main line. *Huck* v. *Chicago & A. R. Co.*, 86 *Ill.* 352, 17 *Am. Ry. Rep.* 419.

(7) *Special assessments.*—Commissioners appointed to make a special assessment assessed a block of land belonging to a company, except the part occupied and used for its right of way. Two parcels, one on each side of the right of way, were assessed separately. The court, on the hearing of the application to confirm the assessment, modified the roll so as to spread the aggregate of the two assessments over the whole block. *Held*, that this was not an assessment of any part of the right of way, and that the company had no substantial cause of complaint of the action of the court. *Chicago, R. I. & P. R. Co.* v. *Chicago*, 139 *Ill.* 573, 28 *N. E. Rep.* 1108.

In such case it did not appear that the block was assessed any more than its share of the entire assessment, in proportion to its frontage, excluding the right of way, nor that if the block had been assessed as a whole the assessment would have been any less than it was, nor was it shown that the block was not used for business purposes in such a way as to justify the separate assessments made by the commissioners. *Held*, without passing on the correctness of the court's action, that the company was not thereby injured and had no just cause of complaint. *Chicago, R. I. & P. R. Co.* v. *Chicago*, 139 *Ill.* 573, 28 *N. E. Rep.* 1108.

(8) *Appeals.*—There is no provision of law authorizing a company to appeal to the circuit court from an assessment of taxes made by a board of supervisors. The provision of the Constitution relating to appeals is not self-executed. It seems that an aggrieved company might have a remedy by *certiorari*. *Ohio & M. R. Co.* v. *Lawrence County*, 27 *Ill.* 50.

It is not required that a corporation whose property is assessed for taxation by the state board shall be notified of the assessment or of the rules adopted whereby to determine the value of the property, and no right of appeal is given from the assessment. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.

Under the statute, the valuation for taxation of main and side tracks is committed to the state board, and no appeal lies from

its decision to the county court when acting on application for judgment for taxes, or at any other time. *East St. Louis Connecting R. Co.* v. *People ex rel.*, 119 *Ill.* 182, 10 *N. E. Rep.* 397.

The decision of the state board of equalization in fixing the valuation of railroad property for the purpose of taxation is judicial in its nature, and can only be assailed for fraud or want of jurisdiction. *East St. Louis Connecting R. Co.* v. *People ex rel.*, 119 *Ill.* 182, 10 *N. E. Rep.* 397.

The board, in the assessment of railroads, is not bound by the valuation fixed upon its road, etc., by the company, and a slight error in judgment on the part of the board in valuation of such property, there being no fraud or corruption shown, affords no ground for enjoining any part of the taxes levied on such valuation. *Illinois & St. L. R. & C. Co.* v. *Stookey*, 31 *Am. & Eng. R. Cas.* 479, 122 *Ill.* 358, 13 *N. E. Rep.* 516, 11 *West. Rep.* 614.

An assessment of railroad property for taxation by the state board is conclusive, except where fraud has intervened. *Illinois & St. L. R. & C. Co.* v. *Stookey*, 31 *Am. & Eng. R. Cas.* 479, 122 *Ill.* 358, 13 *N. E. Rep.* 516, 11 *West. Rep.* 614.

Or for want of jurisdiction. *St. Louis B. & T. R. Co.* v. *People ex rel.*, 39 *Am. & Eng. R. Cas.* 562, 127 *Ill.* 627, 21 *N. E. Rep.* 348.

The action of the assessors of taxes is final, unless it can be shown that the assessment was fraudulently made, or that the property assessed was not liable to taxation, or that the legislature has, in authorizing the tax, disregarded or transcended the principles of equality, or unless the tax has been levied when not authorized by law. *La Salle & P. H. & D. R. Co.* v. *Donoghue*, 127 *Ill.* 27, 18 *N. E. Rep.* 827.

(9) *Local assessments and taxes.*—Under Ill. Rev. St. ch. 86, § 8, giving to county commissioners "power to levy a tax in their respective counties," the valuation and assessment of a railroad should not be the valuation of an undivided part, but of the portion confined to the county, and the valuation and assessment for city purposes are governed by the same rules. *Sangamon & M. R. Co.* v. *Morgan County*, 14 *Ill.* 163. —QUOTED IN Coe *v.* Columbus, P. & I. R. Co., 10 Ohio St. 372; State *v.* Central Pac. R. Co., 10 Nev. 47.

The board of supervisors of a county has the power under the statute to correct the lists of real and personal property for taxation furnished by railway companies, and also to correct the valuation returned. The reconsideration of an order of the board of supervisors increasing the value of railroad property, at a subsequent meeting when the result is not changed, will not affect the former action. *Chicago & R. I. R. Co.* v. *Bureau County Sup'rs*, 25 *Ill.* 580.

Where a lot is returned by a company in its list as being used for tracks, side tracks, and buildings in connection with the road and for railroad purposes, and the board of equalization assesses the same, and the taxes upon it are levied and paid, an assessment by the local assessor of the same lot will be a double assessment, and the tax extended upon the latter assessment will be illegal. *Chicago & A. R. Co.* v. *People ex rel.*, 99 *Ill.* 464.—FOLLOWING Chicago & A. R. Co. *v.* People ex rel., 98 Ill. 350.—QUOTED IN Chicago & A. R. Co. *v.* People ex rel., 41 Am. & Eng. R. Cas. 629, 129 Ill. 571, 22 N. E. Rep. 864, 25 N. E. Rep. 5.

Where a company returns and files with the county clerk a sworn list of all its taxable property in such county except its personal property in one town, which is omitted, it is made the duty of the town assessor to list and assess such omitted property, and if he lists it upon his general assessment roll instead of upon the county clerk's copy of the railroad schedules furnished him, it is but an informality not affecting the substantial justice of the tax levied thereon, and furnishes no ground whereon to enjoin the collection of the taxes extended on such assessment. *Wabash, St. L. & P. R. Co.* v. *Johnson*, 17 *Am. & Eng. R. Cas.* 487, 108 *Ill.* 11.

Certain commissioners of highways, from 1875 to 1883 inclusive, levied the necessary road taxes annually upon all the taxable property in their town except the property of a company, which was overlooked. In 1886 the omission was discovered, and the commissioners then made out lists for the several districts, of property of the company, for each year from 1875 to 1883, both inclusive, and ordered that the road taxes for those years be levied against the property of the company, the taxes being extended accordingly. *Held*, that the taxes for such years were illegally levied and could not be collected by law. *Ohio & M. R. Co.* v. *People ex rel.*, 123 *Ill.* 648, 15 *N. E. Rep.* 277.

The commissioners of highways, in levying a road tax on railroad property, must take the value of property in their particular districts as fixed by the state board and certified by the county clerk. The commissioners are required annually to make lists describing each tract of land in the district, with the names of the owners, including railroad property returned to them, and to extend the road tax thereon in a separate column. *Wabash, St. L. & P. R. Co.* v. *People ex rel.*, 137 *Ill.* 181, 27 *N. E. Rep.* 456.

A description of railroad property, in the lists made by the commissioners of highways, as "railroad track," and as "proportion of rolling stock," or as "rolling stock, main line," and as "main track," is not void for uncertainty. The property thus described will embrace all the main track, right of way, and improvements assessable by the state board, lying within the road district, and its proportionate share of the rolling stock assessed. *Wabash, St. L. & P. R. Co.* v. *People ex rel.*, 137 *Ill.* 181, 27 *N. E. Rep.* 456.

A board of town auditors made out and signed a statement that at a meeting held by them, they did "determine that twenty-five per cent. of tax shall be levied on the real estate and personal property of said town, including railroad track and rolling stock, for town purposes, and for the payment of outstanding orders drawn by them on their treasurer." The town clerk certified that the same was a true and correct copy of transcript from the original book of the records of the town. This transcript and certificate were filed with the county clerk, who extended the town tax on it, without any certificate by the town clerk of the amount to be raised by taxation. *Held*, that the tax was extended without authority of law and was therefore unjust and void. *Peoria, D. & E. R. Co.* v. *People ex rel.*, 141 *Ill.* 483, 31 *N. E. Rep.* 113.

258. Indiana. — (1) *Statute of* 1852.— The list of "stock" for taxation required by Ind. Rev. St. 1852 (1 Rev. St. 1852, pp. 113, 114, 115) to be furnished by the president, secretary, agent, or other accounting officer of every railroad, plank road, turnpike road, slack-water navigation, telegraph, and bridge company in this state, to the auditor of the county where the principal office is situated is not a list of the subscriptions of stock, but of the actual, tangible property of such company. *State* v. *Hamilton*, 5 *Ind.* 310.

If the company does not furnish such list by the first of June in any year its right to furnish the list ceases, and it is incumbent upon such auditor to make it. *State* v. *Hamilton*, 5 *Ind.* 310.

For the purpose of compelling the auditor, by writ of mandamus, to make out such list, upon the failure of any such company to furnish the same within the period prescribed by the statute, any citizen may be a relator. The auditor of state, however, being more specially charged with the management of the finances of the state, is a peculiarly appropriate relator. *State* v. *Hamilton*, 5 *Ind.* 310.

The act of 1852 remains in force as to the assessment of personal property, and under its provisions a list of all the stock of a railroad company, which includes all personal property, should be furnished to the auditor of the proper county between January 1 and June 1. *Louisville & N. A. R. Co.* v. *State*, 25 *Ind.* 177.

If the proper officer of the company fails to make such return before the 1st of July, it becomes the duty of the auditor to make it, under section 37 of the act of 1852. The company has no longer a right, and cannot be required, to make such statement. *Louisville & N. A. R. Co.* v. *State*, 25 *Ind.* 177.

The Constitution does not require a uniform method of valuation of property for taxation, but only such regulations as shall secure a just valuation. In determining how this end shall be secured the legislature must exercise a discretion, and unless the method adopted is clearly inadequate to secure the result, the courts cannot interfere. *Louisville & N. A. R. Co.* v. *State*, 25 *Ind.* 177. — DISTINGUISHED IN Indianapolis & C. R. Co. *v.* State ex rel., 37 Ind. 489; State ex rel. *v.* New Orleans & C. R. Co., 37 La. Ann. 589. QUOTED IN Wisconsin C. R. Co. *v.* Taylor County, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37.

(2) *Statutes of* 1858 *and* 1859.—The acts of 1858 and 1859 relate only to the assessment of real property. *Louisville & N. A. R. Co.* v. *State*, 25 *Ind.* 177.

The Act of March 4, 1859, § 6 (Acts of 1859, p. 5), which provides that the appraisers, in estimating the value of the road, shall take into consideration the location of the road for business, the competition of other roads, its earnings, etc., is constitutional. *Louisville & N. A. R. Co.* v. *State*, 25 *Ind.* 177.

The Ind. Act of Dec. 21, 1858 (1 G. & H. 85), as it stood at the time for the assessment of taxes for the year 1868, contemplated taxing each railroad, including all property used in running and operating the same, as an entirety or unit, the road to be appraised by the appraisers of all the counties through which it might run, at a meeting to be held for that purpose on the line of the road, the appraisers to appraise the value of the road per mile through their respective counties, taking into consideration the location of such road for business, the competition of other roads, its earnings above current expenses and repairs, and its condition for present and future business, so as to enable them to arrive at the actual present value of such road, independently of what it cost or the amount of its indebtedness. *Indianapolis, C. & L. R. Co.* v. *Kilner*, 1 *Am. & Eng. R. Cas.* 413, 69 *Ind.* 71.

There was no provision in this statute which authorized a county auditor to enter the part of the road running through his county upon the duplicate for taxation as omitted property. *Indianapolis, C. & L. R. Co.* v. *Kilner*, 1 *Am. & Eng. R. Cas.* 413, 69 *Ind.* 71

(3) *Statute of* 1865.—The act of 1865 (3 Ind. St. 418) in reference to the valuation and taxation of railroad property does not provide for any action by the district board of equalization upon the assessment made by the appraisers, and the only appeal authorized is an appeal from the action of the appraisers to the state board of equalization. *Jeffersonville, M. & I. R. Co.* v. *McQueen*, 49 *Ind.* 64.—FOLLOWED IN Montgomery *v.* Jeffersonville, M. & I. R. Co., 49 Ind. 204.

Such appeal does not vacate the valuation and assessment made by the county assessors, or suspend proceedings thereon. *Jeffersonville, M. & I. R. Co.* v. *McQueen*, 49 *Ind.* 64.

(4) *Statute of* 1891. —Section 129 of Ind. Act of 1891, relating to taxation, conferring upon the state board of tax commissioners the same powers possessed by the county boards of review, gives to railway companies the right to be heard by the state board in regard to the assessment and valuation of their "railroad track" and "rolling stock," made by said board, and gives to the state board the right to correct any valuation and assessment made in relation to such property. *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 513, 33 *N. E. Rep.* 421. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 54 *Am. & Eng. R. Cas.* 227, 133 *Ind.* 625, 33 *N. E. Rep.* 432.

The act of 1891 provides a general system for the assessment and valuation of property; the method of ascertaining the valuation and assessing each class and kind of property applies alike to all persons holding and owning the same class of property; it applies alike to all persons under like circumstances and conditions; it does not deny to railway companies the equal protection of the law, and is not in conflict with the Constitution of the United States. *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 513, 33 *N. E. Rep.* 421.

The statute does not authorize the importation of values from other states, nor does the method of assessment of rolling stock, valued in accordance with the rule of rating the road as a unit, and taking such a portion of its value as the length of the road lying within the state bears to the whole road, operate to import values upon which assessments for taxation are made; nor does such method of assessment tax interstate commerce. *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 513, 33 *N. E. Rep.* 421. *Indianapolis & V. R. Co.* v. *Backus*, 133 *Ind.* 609, 33 *N. E. Rep.* 443. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 54 *Am. & Eng. R. Cas.* 227, 133 *Ind.* 625, 33 *N. E. Rep.* 432.

The state board of tax commissioners, in fixing a valuation on "railroad track" and "rolling stock," is not confined to the schedules and rates made by the railway companies, but such commissioners have the right to seek other information to enable them to arrive at a just valuation. *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 513, 33 *N. E. Rep.* 421. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 54 *Am. & Eng. R. Cas.* 227, 133 *Ind.* 625, 33 *N. E. Rep.* 432.

The law having required the owners of "railroad track" and "rolling stock" to file with the auditor of state a schedule of the same, and the value thereof, and having made it the duty of the auditor of state to present such schedule to the state board of tax commissioners, and having fixed a time for the meeting of such board, the owners of such railway property are bound to take notice of the time of the meeting of such board, and are entitled to no other notice; and the owners of such property,

through their written schedules and statements of values, are heard by such board, and to be further heard they must take notice of and be present at the sitting of such board. *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 513, 33 *N. E. Rep.* 421. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 54 *Am. & Eng. R. Cas.* 227, 133 *Ind.* 625, 33 *N. E. Rep.* 432.—REVIEWING Hannibal & St. J. R. Co. *v.* State Board of Equalization, 64 Mo. 294.

The statute is a valid enactment, and does not deny to property owners "due process of law" or "the equal protection of the law" in the assessment of their property. *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 513, 33 *N. E. Rep.* 421.—QUOTING Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 561.

The provision of the state Constitution providing "for a uniform and equal rate of assessment and taxation" is complied with when the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the district subject to taxation; and the provision of the state Constitution requiring that the legislature "shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," is complied with when the legislature provides that "railroad track" and "rolling stock" of railway companies shall be assessed by the state board of tax commissioners, while all other property shall be assessed by local boards and officers. *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 133 *Ind.* 513, 33 *N. E. Rep.* 421. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 54 *Am. & Eng. R. Cas.* 227, 133 *Ind.* 625, 33 *N. E. Rep.* 432.

Under the statute, the only real difference in the assessment of "railroad track" and "rolling stock" and other property is that other property is valued and assessed by assessors and county boards of review, with a right of hearing on the part of the owners of such property, before the county board of review, which is vested with power to correct errors, and a right of appeal is given from such board to the state board; while property denominated "railroad track" and "rolling stock" is valued and assessed in the first instance by the state board, with a right of hearing before such board, to the owners of such property, with power vested in such board to correct errors. The difference in the mode of assessment is not such as denies to owners of such railroad property the "equal protection of the law," nor does it deny them "due process of law." *Indianapolis & V. R. Co.* v. *Backus*, 133 *Ind.* 609, 33 *N. E. Rep.* 443.

259. Iowa.—Under Code of 1851, § 462, and Laws of 1852, ch. 152, § 7, the property of railroad companies was only taxable for state and county purposes through the shares of the stockholders. *Iowa Homestead Co.* v. *Webster County*, 21 *Iowa* 221.—REVIEWING Tallman *v.* Butler County Treasurer, 12 Iowa 531; Faxton *v.* McCosh, 12 Iowa 527; Davenport *v.* Mississippi & M. R. Co., 12 Iowa 539; Davenport *v.* Mississippi & M. R. Co., 16 Iowa 348.—DISTINGUISHED IN Cedar Rapids & M. R. R. Co. *v.* Woodbury County, 29 Iowa 247; Dickerson *v.* Yetzer, 53 Iowa 681. FOLLOWED IN Iowa R. Land Co. *v.* Fitchpatrick, 52 Iowa 244.

Revision of 1860, ch. 45, was general, treating all property of all persons alike, whether belonging to railway companies or private persons, and whether lands, money, or goods; and this act governed the levy of taxes for the year 1861. *Iowa Homestead Co.* v. *Webster County*, 21 *Iowa* 221.

Revision of 1860, ch. 45, changed and repealed Laws of 1858, ch. 152, and under said chapter 45 the property of railroad companies was taxable in the same manner as that of any other company or individual. *Dubuque & P. R. Co.* v. *Webster County*, 21 *Iowa* 235.

Iowa Laws 1872, ch. 26, providing for the taxation of railway property, directed that the assessment for 1872 should be made in July. *Held*, that the road tax upon such property for that year was collectible, notwithstanding the date of the assessment rendered impossible a compliance with the formal requirements of the statute, respecting the manner in which the tax should be extended upon the tax list. *Milwaukee & St. P. R. Co.* v. *Kossuth County*, 41 *Iowa* 57.

Where the assessor or other proper officer fails to assess certain lands, and the county treasurer, under the provisions of the statute, discharges the duty within two years, but fails to note the fact that the assessment was made by himself, the omission does not affect the legality of the assessment, and the fact that and time at which it was made may be shown by parol. *Cedar Rapids & M. R. R. Co.* v. *Carroll County*, 41 *Iowa* 153.

A road tax against a company is not defeated by the fact that the assessment of the property is not placed upon the assessment book of the township. The order of the board of supervisors, declaring the length of the main track and assessed value of the road lying within the township, transmitted to the trustees, forms the basis for the levy of taxes upon railroad property. *Sioux City & St. P. R. Co.* v. *Osceola County*, 45 *Iowa* 168.

A railroad, with its right of way, rails, switches, depots, engine houses, and machine shops, is an entirety; and a system of taxation, therefore, leaving the assessment to the officers of each taxing district, would result in a great inequality of burden. *Dubuque* v. *Chicago, D. & M. R. Co.*, 47 *Iowa* 196.

The levy of local municipal taxes upon a company is a denial of the right of the legislature to provide the measure of valuation of property, and the right to locate it for the purpose of taxation. (Beck and Adams, JJ., dissenting.) *Dubuque* v. *Chicago, D. & M. R. Co.*, 47 *Iowa* 196.

The statute providing for the assessment of railroad property in March of each year (Code, § 1317) is not in conflict with the statute (Code, § 812) providing for assessment of real estate in January of each alternate year. *Central Iowa R. Co.* v. *Wright County Sup'rs*, 22 *Am. & Eng. R. Cas.* 223, 67 *Iowa* 199, 25 *N. W. Rep.* 128.

The order of the board of supervisors determining the number of miles of track within cities, incorporated towns, and taxing districts is not in any sense an assessment or valuation of those portions of the property; and the provisions of the statute exempting agricultural and horticultural lands from taxation for city purposes has no application to property of this character. *Illinois C. R. Co.* v. *Hamilton County*, 73 *Iowa* 313, 35 *N. W. Rep.* 238.

A city has no power to levy a special road tax on railroad property within its limits, such property being taxable for general city purposes. *Illinois C. R. Co.* v. *Hamilton County*, 73 *Iowa* 313, 35 *N. W. Rep.* 238.

Under the Code, §§ 808, 1319, all railroad bridges are to be assessed for taxation by the executive council, except those over the Mississippi and Missouri rivers, and they are to be assessed by the assessors of the local districts in which they are situated; and such construction does not render section 808 unconstitutional. *Missouri Valley & B. R. & B. Co.* v. *Harrison County*, 74 *Iowa* 283, 37 *N. W. Rep.* 372.

260. Kansas.—Laws of 1869, ch. 124, § 11, giving to the supreme court jurisdiction to hear appeals from the board of county clerks, in the appraisal of the property of railroads for taxation, is giving to the court power not judicial in its character, and is therefore not authorized by the Constitution. *Auditor* v. *Atchison, T. & S. F. R. Co.*, 6 *Kan.* 500.

Under Gen. St. 1868, ch. 25, § 41, which provides that a deputy county clerk may, in the absence of the county clerk, perform all the duties of such county clerk, a deputy county clerk may, in such absence, act as one of the "board of appraisers and assessors" to assess railroad property, as provided by Laws of 1869, ch. 124. *Amrine* v. *Kansas Pac. R. Co.*, 7 *Kan.* 178.—FOLLOWED IN Missouri River, Ft. S. & G. R. Co. *v.* Morris, 7 Kan. 210.—*Missouri River, Ft. S. & G. R. Co.* v. *Morris*, 7 *Kan.* 210, 1 *Am. Ry. Rep.* 353.—FOLLOWING Amrine *v.* Kansas Pac. R. Co., 7 Kan. 178.

Where the county clerk mingles real estate and personalty in his assessment of railroad property, before the county commissioners can raise such valuation they must take all the steps necessary to give them jurisdiction in regard to both real and personal estate. *Kansas Pac. R. Co.* v. *Russell*, 8 *Kan.* 558, 5 *Am. Ry. Rep.* 232.

Irregularities in the assessment made by the county clerk acting as a board for assessing railroad property, or acting separately under other statutes, will not render void the taxes founded upon such assessment. *Missouri River, Ft. S. & G. R. Co.* v. *Blake*, 9 *Kan.* 489.—FOLLOWING Missouri River, Ft. S. & G. R. Co. *v.* Morris, 7 Kan. 210.

Under the General Tax Law of 1868, the value to be placed upon personal property for taxation was in the first instance fixed by the party returning and listing the same, while the state had the right under section 65 of that law, after notice to the party and inquiry before the county clerk or the commissioners, to have any errors in such valuation corrected. The Railroad Tax Law of 1874 established the same rule in respect to the valuation of railroad property; and the value placed on its personal property by the owner was to be accepted, unless corrected by proceedings under section 65. *Kansas*

Pac. R. Co. v. *Wyandotte County Com'rs*, 16 *Kan.* 587.

Under the General Tax Law, the valuation of real estate is fixed in the first place by the assessor, and not by the owner, and may thereafter be changed by the board of equalization at a regular meeting of which legal and public notice is given; and by the law of 1874 the assessment and valuation of railroad property was to be the same as that of other property. *St. Joseph & D. C. R. Co.* v. *Smith*, 19 *Kan.* 225.

Proceedings of a board of equalization of taxes, to revise, and if necessary to increase, a valuation and assessment of property for taxes, are not of a judicial nature, even though evidence is received, but are an exercise of the legislative power. *Kansas Pac. R. Co.* v. *Ellis County Com'rs*, 19 *Kan.* 584.

Under the Railroad Tax Law of 1874, as amended in 1875, the action of the state board of equalization in raising the assessment of railroad property prescribed in the statute as "railroad track" is not impeached by proof that the board acted only on the information furnished by the schedules and statements returned by the various companies to the state auditor, and from personal knowledge of the value and business of the several roads, if in doing so it has only equalized values, and has not increased the aggregate assessment; and such action is conclusive as to the proper valuation of the property, notwithstanding errors in prior proceedings of assessors and commissioners. *Kansas Pac. R. Co.* v. *Riley County Com'rs*, 20 *Kan.* 141.

The omission of the official title of the assessor after his signature to the oath to his official return of the valuation of real estate, and the absence of the official seal of the county clerk on the jurats to the oath of the assessor attached to such return, and upon the affidavits of the publication of the tax levy and tax sale, are mere irregularities, and will not invalidate the tax proceedings based thereon. *Shoup* v. *Central Branch U. P. R. Co.*, 5 *Am. & Eng. R. Cas.* 125 24 *Kan.* 547.

After the list of the rolling stock is returned to the auditor of state, the board of railroad assessors are the officials to assess such property, and the property is to pay taxes to the various counties through which the railroad is located and operated. *Shawnee County Com'rs* v. *Topeka Equipment Co.*, 26 *Kan.* 363.

It is the duty of the board of railroad assessors, not of the local assessors, to assess rolling stock of a company operating its road within the state; and there is nothing in the statutes directing otherwise. *Shawnee County Com'rs* v. *Topeka Equipment Co.*, 26 *Kan.* 363.

The county board of equalization is authorized at its meetings held in the month of June of the odd years, when proper notice has been given, to correct and equalize the assessment made in those years, under the Tax Law, § 69, of real property that has become taxable since the regular assessment of such property in the even years, and therefore at such time the owners of such property have an opportunity for a hearing at which to contest the legality and justice of the assessment. *Atchison, T. & S. F. R. Co.* v. *Wilson*, 24 *Am. & Eng. R. Cas.* 623, 35 *Kan.* 175, 10 *Pac. Rep.* 459.

261. Kentucky.—Appellant company was subject to assessment and taxation, according to the value of its corporate estate, ever since it owned such estate, until the specific tax at the rate of $20,000 per mile of road was substituted by the Act of February 20, 1864. *Louisville & N. R. Co.* v. *Com.*, 1 *Bush* (*Ky.*) 250.—DISTINGUISHED IN Louisville & E. Mail Co. *v.* Barbour, 88 Ky. 73.

The railroads of the state are not listed with the assessor of any county, nor do they enter into the assessed property of any county, even for revenue purposes. *Louisville & N. R. Co.* v. *Warren County Court*, 5 *Bush* (*Ky.*) 243.

The mode of assessing and collecting taxes is not in the nature of a judicial proceeding. Revisory boards may be established and appeals allowed, but they are matters of expediency, and cannot be demanded as a matter of constitutional right. *Cincinnati, N. O. & T. P. R. Co.* v. *Com.*, 13 *Am. & Eng. R. Cas.* 270, 81 *Ky.* 492.—QUOTING Kelly *v.* Pittsburgh, 104 U. S. 78.

A system of assessing railroad property by a state board of equalization at the same rate as real estate generally, which assesses it as a unit, and is designed to do away with fragmentary assessments in counties, and which provides for a hearing, is constitutional. *Cincinnati, N. O. & T. P. R. Co.* v. *Com.*, 13 *Am. & Eng. R. Cas.* 270, 81 *Ky.* 492. — QUOTING Preston *v.* Roberts, 12 Bush (Ky.) 570; St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.) 423.

Where there has been a failure to list property for taxation because of the decision of the court of last resort in the state that such property was not subject to taxation, the fact that the court subsequently decides that the law was misinterpreted will not authorize the collection of taxes on the property for the period during which the law as announced and understood did not require such property to be listed. *Franklin County Court* v. *Louisville & N. R. Co.*, 25 *Am. & Eng. R. Cas.* 535, 84 *Ky.* 59.

The provisions of Ky. Gen. St. art. 5, ch. 92, as to proceedings against taxpayers who have failed to list their property with the assessor, are applicable to railroads. *Louisville & N. R. Co.* v. *Com.*, 85 *Ky.* 198, 3 *S. W. Rep.* 139.

While the Act of April 3, 1878, prescribing the mode of taxing the property of railroad companies, expressly repealed all existing laws as to the assessment and taxation of such property, it did not take away the existing mode of procedure as to unassessed taxes of a prior date, but to that extent left the existing statute in force. *Louisville & N. R. Co.* v. *Com.*, 85 *Ky.* 198, 3 *S. W. Rep.* 139.

A summons based upon Ky. Gen. St. ch. 92, art. 5, § 25, need not charge anything more than a mere failure to list, for which it prescribes a penalty. *Louisville & N. R. Co.* v. *Com.*, 85 *Ky.* 198, 3 *S. W. Rep.* 139.

If the default to render a list of taxable property is not wilful, or if for any reason the penalty cannot be imposed, although the default be wilful, or if barred by limitation, the court should direct the clerk to take the list. *Louisville & N. R. Co.* v. *Com.*; 85 *Ky.* 198, 3 *S. W. Rep.* 139.

County taxes on a railroad are sufficiently levied where the valuation upon the property is fixed by the board of equalization, and the rate of taxation is fixed by the county levy court; but after the valuation is made by the board the auditor must give notice to the railroad company and the county clerk before the county can proceed to collect the taxes. *Kentucky C. R. Co.* v. *Pendleton County*, (*Ky.*) 2 *S. W. Rep.* 176.

Where railroad property has, since it was purchased by a new company, been increased in value by the addition or renovation of cross ties, rolling stock, and other appendages, and by having been made part of a system doing increased business, instead of an isolated road, as was the case when purchased, it is liable to taxation in any county where it may be situated, as other property therein. And in imposing the taxation the lower court ought to have deducted the value of the property at the time it was purchased from the value as it now exists in the counties seeking to tax it. *Louisville & N. R. Co.* v. *Hopkins County*, 37 *Am. & Eng. R. Cas.* 400, 87 *Ky.* 605, 9 *S. W. Rep.* 497.

A provision in the charter of a company regulating the mode of assessing its property, and thus exempting it from the general law applicable to other companies, confers a mere personal privilege not transferable by sale or succession. And where a company whose charter confers such a privilege sells to another company its property and franchises, an act of the legislature investing the purchasing corporation "with all the powers, privileges, rights, immunities, and franchises" of its vendor does not confer upon it the privilege possessed by its vendor as to the assessment of its property. *Kentucky C. R. Co.* v. *Com.*, 87 *Ky.* 661, 10 *S. W. Rep.* 269.

Under Gen. Stat. (old ed.), ch. 22, stockholders were required to list and pay taxes on their stock in every case in which the corporation itself was not expressly required to report and pay tax; and where the stockholders are required to list and pay tax on their stock, the corporation is not liable for tax on its property. It is immaterial whether the stockholders had or had not listed their stock for taxation, as required by the statute. *Louisville & E. Mail Co.* v. *Barbour*, 88 *Ky.* 73, 9 *S. W. Rep.* 516.—DISTINGUISHING Louisville & N. R. Co. *v.* Com., 1 Bush (Ky.) 250.

If a tax be levied for a specific purpose, as the payment of bonds issued in aid of a railroad, the order for the levy must show that it was levied for that purpose. *Louisville & N. R. Co.* v. *Com.*, 41 *Am. & Eng. R. Cas.* 595, 89 *Ky.* 531, 12 *S. W. Rep.* 1064.

Although the county court of claims cannot levy an *ad valorem* tax to meet the general indebtedness of the county, unless authorized to do so by the legislature, yet, as it has jurisdiction of the subject of the general indebtedness of the county, if it makes a levy in excess of its authority in the particular case the act is a mere irregularity and not a want of jurisdiction, and hence may be validated by the legislature. *Louisville & N. R. Co.* v. *Bullitt County*, 92

Ky. 280, 17 *S. W. Rep.* 632.—DISTINGUISHING Slaughter *v.* Louisville, 89 Ky. 112. FOLLOWING Marion County *v.* Louisville & N. R. Co., 91 Ky. 388.

262. Louisiana. — An assessment of the capital stock of a corporation at its par value, when the evidence shows that it has a higher market value, is a valid assessment. *St. Charles St. R. Co. v. Board of Assessors*, 31 *La. Ann.* 852.

The taxable value of that portion of the capital of a corporation represented by the shares of its stock is the market value of those shares. *New Orleans & C. R. Co.* v. *Board of Assessors*, 32 *La. Ann.* 19.

The assessment of "the capital" of a corporation need not particularize every element of value entering therein. It need only be made in general terms. *New Orleans & C. R. Co.* v. *Board of Assessors*, 32 *La. Ann.* 19.

The law authorized the assessments under the head of "capital" of all capital of corporations "not invested in real estate," and such assessment is not void for defective description because not setting out the particular items and objects in which the capital is invested. *New Orleans* v. *New Orleans, St. L. & C. R. Co.*, 37 *La. Ann.* 45.

The actual cash value of property is the constitutional basis of its taxation. *Morgan's L. & T. R. & S. Co.* v. *Board of Reviewers*, 33 *Am. & Eng. R. Cas.* 438, 41 *La. Ann.* 1156, 3 *So. Rep.* 507.

The market value of its stocks or bonds is one of the truest *criteria* of the value of a road; yet it does not hold when the corporation becomes insolvent. *Morgan's L. & T. R. & S. Co.* v. *Board of Reviewers*, 33 *Am. & Eng. R. Cas.* 438, 41 *La. Ann.* 1156, 3 *So. Rep.* 507.

Neither the price of investment in, nor the net revenues or profits earned by, a railroad, is the fixed criterion of value in assessment matters. *Morgan's L. & T. R. & S. Co.* v. *Board of Reviewers*, 33 *Am. & Eng. R. Cas.* 438, 41 *La. Ann.* 1156, 3 *So. Rep.* 507.

There exists no rigid rule for the valuation of property, which is affected by a multitude of circumstances which no rule can provide for. The assessor must consider all these circumstances and elements of value, and must exercise a prudent discretion in reaching a conclusion. This maxim applies with equal force to the board of reviewers. *Morgan's L. & T. R. & S. Co.* v. *Board of Reviewers*, 33 *Am. & Eng. R. Cas.* 438, 41 *La. Ann.* 1156, 3 *So. Rep.* 507.

The earning capacity of a company forms a basis of estimating the values for the purposes of taxation. *New Orleans City & L. R. Co.* v. *New Orleans*, 44 *La. Ann.* 1053, 11 *So. Rep.* 687.

The earning capacity of the franchises of a city railroad corporation is the true and statutory basis of their assessment for taxation. *New Orleans City & L. R. Co.* v. *New Orleans*, 54 *Am. & Eng. R. Cas.* 297, 44 *La. Ann.* 1055, 11 *So. Rep.* 820.

The assessment of the value of a franchise measured chiefly by the earning capacity of the corporation is a proper assessment. *Crescent City R. Co.* v. *New Orleans*, 44 *La. Ann.* 1057, 11 *So. Rep.* 681.

263. Maine. — An act incorporating a company among other things authorized it to "procure, purchase, and hold in fee simple, improve and use for all purposes of business, to be transacted on or by means of said railroad, lands or other real estate, and to manage and dispose thereof as they may see fit"; and provided that "the capital stock of said company may consist of $300,000, and shall be divided into shares of $100 each, to be holden and considered as personal estate." *Held*, that the real estate owned and used by the company, either as a railroad or as a depot, was not subject to taxation, otherwise than as personal estate, unless the legislature should specifically prescribe differently. *Bangor & P. R. Co.* v. *Harris*, 21 *Me.* 533.—APPLIED IN Tallman *v.* Butler County Treasurer, 12 Iowa 531. DISTINGUISHED IN Cumberland Marine R. Co. *v.* Portland, 37 Me. 444; People ex rel. *v.* Com'rs of Taxes, 2 Am. & Eng. R. Cas. 343, 82 N. Y. 459.

A provision in a railroad charter to the effect that the whole property shall be divided into shares which shall be considered in all respects as personal estate is only intended to define the interest of stockholders, and does not prevent the taxation of real estate belonging to the company. *Cumberland Marine R. Co.* v. *Portland*, 37 *Me.* 444.—DISTINGUISHING Bangor & P. R. Co. *v.* Harris, 21 Me. 533.

264. Maryland.—The proper principle of valuation to be adopted in taxing the property of a railroad is to tax the buildings, steamboats, and rails, as of the value they bear, irrespective of their being portions of a railroad, and to tax the land as

land, and not as of increased value by reason of its being used as a railroad. *Tax Cases*, 12 *Gill & J.* (*Md.*) 117.

A city leased certain lots to a company for ninety-nine years, renewable forever, which lots the company improved for depot and shop purposes. *Held*, that the lots should be assessed only with the value of the leasehold estate, subject to the rent reserved in the lease, the interest of the city in the premises being exempt from taxation. *Philadelphia, W. & B. R. Co.* v. *Appeal Tax Court*, 50 *Md.* 397.

In such case the improvements placed upon the lots by the company are subject to separate assessments, and are properly assessed to the company at their full assessable value. *Philadelphia, W. & B. R. Co.* v. *Appeal Tax Court*, 50 *Md.* 397.

Where a company occupies real estate in a city under an ordinance providing for a formal lease to the company for ninety-nine years, renewable forever, the company must be regarded as the substantial owner of the leasehold interest in the property, and is liable to be assessed for the value of the leasehold interest, subject to the rental fixed by the ordinance. *Appeal Tax Court* v. *Western Md. R. Co.*, 50 *Md.* 274.

An easement in the bed of a public street, enjoyed by a company for the purpose of its track, may be assessed and taxed as real estate; so may a tunnel under a street. *Appeal Tax Court* v. *Western Md. R. Co.*, 50 *Md.* 274.

Md. Act of 1878, ch. 178, imposed upon the tax commission the same duties as to the assessment of railroad property that formerly belonged to the comptroller by the act of 1874, ch. 483; therefore the tax commission had power to assess the property of a company for municipal taxation for the years 1879 and 1880. *Mayor, etc., of Baltimore* v. *Baltimore City Pass. R. Co.*, 7 *Am. & Eng. R. Cas.* 362, 57 *Md.* 31.

Where a portion of the line of a street railroad extends beyond the city limits, and the company has kept no account of the passengers traveling upon such portion, the gross earnings of the company within the city, upon which the percentage payable to the city for the use of its streets in terms of the charter is chargeable, will be computed in the proportion that the number of miles traveled by the cars inside of the city limits bears to the total mileage traveled by said cars. *Baltimore Union Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 41 *Am. & Eng. R. Cas.* 646, 71 *Md.* 405, 18 *Atl. Rep.* 917.—QUOTING State *v.* Philadelphia, W. & B. R. Co., 45 Md. 384.

265. Massachusetts. — A company gave in a tax list as follows: "To the assessors of the city of C. The F. R. Co. submit and bring in the following list of all the estate of said company, in said C., subject to taxation, being all the real estate of said company in said C. except that embraced and contained in the location of said company's railroad, made and filed according to law, that is to say, three hundred and forty-eight thousand and three hundred and ten square feet of land and wharf with the buildings thereon—the same lying between Prison Point, so called, and Warren avenue, valued at $350,000. F. R. Co., by M. D. B., Treasurer. Then personally appeared M. D. B., Treasurer, and made oath that the above statement by him subscribed was true. T. G., Assessor." *Held*, sufficient under Mass. St. 1853, ch. 319, § 3. *Charlestown* v. *Middlesex County Com'rs*, 1 *Allen* (*Mass.*) 199.

A corporation, having reserved profits to an amount exceeding twenty per cent. of its capital, and having authority to create additional stock, declared a dividend of twenty per cent. on its existing shares, payable in six years to their then holders, either in money or stock at the option of the corporation, interest thereon to be paid meanwhile on a certain day in each year to the holders on that day. After declaring this dividend, it created new stock of the same par value; but the market value of the old shares, to which the privilege of the dividend was thus attached, was twenty per cent. more than that of the new shares, and the difference was owing wholly to this privilege. *Held*, that in computing the true value of the corporate franchise for the purposes of taxation, under Mass. St. of 1865, ch. 283, § 4—requiring the commissioner's report of resources, etc., upon the treasurer's sworn return—the tax commissioner was not in error in estimating the fair cash valuation of all the shares of the capital stock by adding the actual market value of the old shares to that of the new shares, without making any deduction on account of the dividend. *Boston & L. R. Co.* v. *Com.*, 100 *Mass.* 399.

Under Mass. Pub. St. ch. 13, §§ 38, 40, which provide that in taxing a railroad corporation the aggregate value of the shares

in the capital stock is to be taken as a basis of assessment, the commonwealth cannot include, in estimating such value, proposed and unissued new shares in the capital stock. *Boston & A. R. Co.* v. *Com.*, 157 *Mass.* 68, 31 *N. E. Rep.* 696.

266. Michigan. — Proceedings under the statute (Laws 1872, p. 89), on an appeal to the circuit court from an assessment of taxes made by the auditor-general, are not judicial, in the proper sense of that term, and cannot be reviewed on writ of error. *Auditor-General* v. *Pullman Palace Car Co.*, 34 *Mich.* 59.

Where a statute requires a corporation to be taxed at a certain rate upon its capital and on loans employed in the state, and the auditor-general merely computes the amount of the tax on the basis of reports made to him by the company, but without passing judgment upon their correctness, the state is not precluded from enforcing payment of the correct amount. *Lake Shore & M. S. R. Co.* v. *People*, 46 *Mich.* 193, 9 *N. W. Rep.* 249.

A company is taxed, not for the face of bonds upon which it negotiates a loan, but for the amount of the loan. *Lake Shore & M. S. R. Co.* v. *People*, 46 *Mich.* 193, 9 *N. W. Rep.* 249.

Stock dividends and issues of stock proportioned to that previously held by shareholders must stand on the same footing with original stock, and should be taxed as far as it is considered paid in. *Lake Shore & M. S. R. Co.* v. *People*, 46 *Mich.* 193, 9 *N. W. Rep.* 249.

A company was established in Michigan under a special charter which defined the basis on which it was to be taxed. The state afterwards authorized it to consolidate with an Indiana company, with no change in the basis of taxation, and a general railroad law was passed at about the same time. This law, and various similar acts afterwards passed, provided that companies within the state might consolidate with companies in other states, and that every corporation formed under the law should be taxed at a certain rate. The consolidated company meanwhile became part of the Lake Shore & Michigan Southern Ry. Co. A writ of mandamus sought for by the state treasurer to compel the auditor-general to assess the company under the general law was denied; it is not a corporation formed under that law, and taxes are properly assessed upon the basis fixed by the original special charter. *State Treasurer* v. *Auditor-General*, 13 *Am. & Eng. R. Cas.* 296, 46 *Mich.* 224, 9 *N. W. Rep.* 258.

267. Minnesota. — Under Gen. St. 1878, ch. 4, § 1, providing that in the construction of a statute the words "real estate" shall include lands, tenements, hereditaments, and all rights thereto and interests therein "unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the same statute," the track of a street railway is not assessable as real estate for local improvements. *State ex rel.* v. *Ramsey County Dist. Court*, 13 *Am. & Eng. R. Cas.* 419, 31 *Minn.* 354, 17 *N. W. Rep.* 954.

A company organized for and doing the business of an ordinary railroad, transporting passengers and freight, is subject to taxation only in accordance with Gen. Laws 1887, ch. 11—that is, by the rule of percentage on its gross earnings—although the road is only three miles in extent, the cars being operated by a steam locomotive over two miles of the road, and by cable up a steep ascent of one mile. *State ex rel.* v. *District Court*, 54 *Minn.* 34, 55 *N. W. Rep.* 816.

268. Mississippi.—Under section 3 of the charter of Vicksburg (Laws 1884, p. 422), the action of the mayor and aldermen in raising an assessment of property based on the valuation rendered by the owner will be void, unless there has been notice to the owner, and the assessor has complied with section 30 of the charter by reporting to the board the undervaluation with his "statement of what he believes to be the reasonable taxable value of said property." *Alabama & V. R. Co.* v. *Brennan*, 69 *Miss.* 103, 10 *So. Rep.* 451.

The above requirements cannot be dispensed with by the board. They are not abrogated or affected by section 33 of said charter, which declares that the assessment is to conform to such time and method as may be prescribed therefor by ordinance. *Alabama & V. R. Co.* v. *Brennan*, 69 *Miss.* 103, 10 *So. Rep.* 451.

269. Missouri. — (1) *In general.*—An assessment of stock of a railroad company in the name of the shareholders, instead of that of the corporation, is irregular. But the action of the assessor in such case is judicial, and where it appears from the tax list that he had jurisdiction over the prop-

erty, i. e., that it was liable to taxation in some form or other, the collector will not be liable to the taxpayer for the amount collected under such assessment, notwithstanding its irregularity. In the case supposed the tax bill certified to the collector is a sufficient warrant, and will justify him in the proceeding. *North Mo. R. Co.* v. *Maguire*, 49 *Mo.* 482, 1 *Am. Ry. Rep.* 43.—FOLLOWING St. Louis Mut. L. Ins. Co. *v.* Charles, 47 Mo. 462.

The assessor of a county for 1869 made no assessment of the property of a railroad, and his assessment book, when returned, contained no entry in relation to said road. Subsequently, the county board of equalization verbally ordered an entry to be made on the book of an assessment of taxes against the road for the year 1869, made by themselves. This order and entry were made without notice to the railroad. No taxes were charged against it on the tax book for 1869, or on the delinquent book for that year, until Dec., 1871, when an entry was made by order of the county court of that date, without notice to the company, ordering that the assessment made by the board of equalization and the taxes thereon be placed on a copy to be made by the clerk for the use of the collector. *Held*, that such assessment was clearly without authority of law and void: (1) because no notice was given as required by the act of 1868; (2) because the board had no authority to make an assessment. It had power to increase or diminish the valuation made by the assessor, but had no power to make an assessment of its own. *Pacific R. Co.* v. *Cass County*, 53 *Mo.* 17, 12 *Am. Ry. Rep.* 336.

An entry correcting the books of a county assessor is not objectionable merely because the entry is made by a deputy instead of the county clerk; nor because the order of the county board of equalization directing the assessment to be placed on the books is entered on the journal of proceedings after the adjournment and dissolution of the board; nor because the assessment, having been omitted by mistake, is entered the year subsequent, without notice of the time of the entry. *Pacific R. Co.* v. *County Clerk*, 57 *Mo.* 223.

Although it appears from an allegation in the petition that the board of equalization assessed the actual value of railroad property in a county, instead of a share in the aggregate valuation proportional to the number of miles of road within the county, as required by law, yet if from the general tenor of the petition it appears that the sum assessed was ascertained by the methods which the law prescribes, the pleading will be held sufficient. *Washington County* v. *St. Louis & I. M. R. Co.*, 58 *Mo.* 372.—QUOTED IN Re Railroad School Tax, 78 Mo. 596; Hannibal & St. J. R. Co. *v.* State Board of Equalization, 64 Mo. 294.

A railroad interest-fund tax and railroad sinking-fund tax, not being state taxes, or taxes necessary for paying the funded or bonded debt of the state, or for current county expenditures, or for schools (Rev. St. § 6798), cannot be levied by the county court without a compliance with Rev. St. § 6799. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 87 *Mo.* 236.—APPLIED IN State ex rel. *v.* Union Trust Co., 92 Mo. 157. REVIEWED IN State ex rel. *v.* Missouri Pac. R. Co., 92 Mo. 137.

The statement of a county clerk issued by virtue of Missouri Act of April 14, 1877, is not void because the tax is designated a delinquent tax of 1875 instead of 1876, it appearing that the proper tax has been levied for the proper period. *Morrison* v. *St. Louis, I. M. & S. R. Co.*, 96 *Mo.* 602, 9 *S. W. Rep.* 626, 10 *S. W. Rep.* 148.

An order issued by a circuit judge in 1882, under Rev. St. § 6799, gives to a county clerk no power to re-levy a railroad interest-fund tax for the year 1880. *State ex rel.* v *Wabash, St. L. & P. R. Co.*, 97 *Mo.* 296, 10 *S. W. Rep.* 434.

The failure of a county clerk to sign and seal the assessors' book, as required by Rev. St. § 6723, renders it of no official validity and affords to the collector no authority or protection for his acts in enforcing the taxes contained therein. In such case he must be regarded as a trespasser *ab initio*. *St. Louis & S. F. R. Co.* v. *Apperson*, 97 *Mo.* 300, 10 *S. W. Rep.* 478.—QUOTING Kansas City *v.* Hannibal & St. J. R. Co., 81 Mo. 285.

In levying a tax on the property of a company for the purpose of building a court house, there must, under Rev. St. §§ 6879, 6881, be an order of the county court levying the tax before the county clerk can extend the same on the tax books, and if the county clerk of his own head, without such order of the county court, extends such taxes, the same are void. *St.*

Louis & S. F. R. Co. v. *Apperson*, 97 *Mo.* 300, 10 *S. W. Rep.* 478.

An order of a county court which directs the clerk to extend the specified tax at a specified rate upon the tax books for the omitted years is a sufficient levy. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.

Where the county court opens a regular term and adjourns from day to day for a number of days, the adjournments are a part of the regular term within the meaning of Rev. St. 1879, § 6879, providing that taxes against a railroad company are to be levied "at a regular term of said court if in session at the time." *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.

A levy by the county court to pay a railroad township tax gives rise to the presumption, in the absence of evidence to the contrary, that the preliminary order required to be made by the circuit court, under the Act of March 8, 1879 (Rev. St. 1879, § 6799), has been complied with. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.

A railroad company's buildings are subject to taxation like other property at the local rates fixed in the district where situated, and not at the average rate throughout the county. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 110 *Mo.* 265, 19 *S. W. Rep.* 816.

Where the county clerk fixes the rate, not from the official returns of the local school boards, but from information obtained by him from consultation with the school officers of the county, the tax levy is invalid. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 110 *Mo.* 265, 19 *S. W. Rep.* 816.

(2) *Act of* 1871.—The Act of March 10, 1871, providing for a uniform system of assessing and taxing railroads, construed to mean that all railroad property in the state is to be assessed by the state board of equalization; that it is to ascertain the value of such property within the limits of any city and transmit that amount as the proper assessment in favor of the city; and that its action in this regard is exclusive of that of all other officers, state or municipal. It follows that the above act had the effect of repealing a provision in a city charter authorizing it to assess property within its limits. *State ex rel.* v. *Severance*, 55 *Mo.* 378.—QUOTED IN Re Railroad School Tax, 78 Mo. 596.

Under the Act of Sept. 20, 1852, § 3, it became the duty of the president of the Hannibal & St. Joseph R. Co. to furnish an annual statement under oath to the state auditor, showing the actual value of the railroad property, from which statement that officer shall assess the railroad state tax. *Held*, that this provision did not amount to a contract between the state and company which rendered invalid the Act of March 10, 1871, subjecting the road to assessment for taxation by a special board of equalization; and the latter act, so far as inconsistent with the former, repealed it. *State* v. *Hannibal & St. J. R. Co.*, 60 *Mo.* 143, 9 *Am. Ry. Rep.* 239.—DISTINGUISHING State *v.* Hannibal & St. J. R. Co., 37 Mo. 265; Hannibal & St. J. R. Co. *v.* Shacklett, 30 Mo. 550.

In fixing a valuation under the statute (Acts 1871, p. 58) upon the property of a railroad failing to make returns as provided by the act, the board of equalization is not confined to testimony which would be competent in a court of justice, and is not compelled to examine witnesses under oath. *State* v. *St. Louis, K. C. & N. R. Co.*, 8 *Mo. App.* 582, *app'x.*

(3) *Act of* 1873.—The Act of March 24, 1873 (Acts, p. 119), relating to taxation of railroads, does not authorize the clerk of the county court to certify the amount due from railroads for city taxes from the certificate of the rate of taxation levied by the city, received by him from the city clerk. The county clerk can make such certificate only from an order of the county court, spread upon its records; otherwise the collection of the tax cannot be enforced. *Kansas City* v. *Hannibal & St. J. R. Co.*, 22 *Am. & Eng. R. Cas.* 239, 81 *Mo.* 285.

The Act of March 24, 1873, § 12, provides that for the purpose of levying school taxes in counties on railroad property, the county courts shall ascertain from the returns in the office of the clerk of the county court the average rate levied for school purposes by the school boards, and shall charge to the railroad companies taxes at said rates on the proportionate value of their property, certified to the clerk by the state auditor. The Act of March 26, 1874, § 65, requires the district boards to ascertain and report to the county court the amount they will require for school purposes for the

ensuing year, and thereupon the county clerk shall assess the amount so returned on all taxable property in said districts, as shown by the last annual assessment. The defendants offered to prove, by the records of the county courts, that the rate for school purposes had been ascertained by taking the amount required by each school board and dividing it by the total property in the district, exclusive of railroad property, as shown by the last assessment, and that in extending this rate upon the taxable property, the valuation of the railroad property within the district was included. *Held*, inadmissible. *Ketchum* v. *Pacific. R. Co.*, 4 *Dill.* (*U. S.*) 41, *n.*

(4) *Act of* 1875.—Under the act of 1875 relating to the assessment and taxation of railroad property, railroad companies are liable to pay taxes for the year 1876 on property owned Aug. 1, 1876, at the same rates as were levied on all other property owned at that time, for the year 1877. *State ex rel.* v. *Union Trust Co.*, 68 *Mo.* 463.—APPLIED IN State ex rel. *v.* Union Trust Co., 92 Mo. 157. FOLLOWED IN State *v.* St. Louis, I. M. & S. R. Co., 71 Mo. 88.

The roadbed of a railroad is chiefly valuable as an entirety, and its subdivisions within the limits of a county or a school district are not to be treated as local property under the acts of 1875 for the assessment and distribution of railroad taxes. *In re Railroad School Tax*, 17 *Am. & Eng. R. Cas.* 491, 78 *Mo.* 596.

In levying taxes on railroad property under the Act of March 15, 1875, the same rate of taxation must be applied to it as to the general property of individuals. *State ex rel.* v. *Missouri Pac. R. Co.*, 92 *Mo.* 137, 6 *S. W. Rep.* 862.

(5) *Constitutional limitations.*—Under the new Constitution of Missouri, the board of equalization created by art. 10, § 18, became at once the only board for those purposes, and was clothed with all the powers of the previous board. *Ketchum* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 41, *n.*

After the adoption of the Constitution of 1875, and until the passage of the Act of March 24, 1877 (Sess. Acts 1877, p. 405), no authority existed for levying taxes for school purposes in districts, exceeding forty cents on the $100 valuation. Fifteen days' notice must be given of any election held under that act for the purpose of authorizing a tax exceeding forty cents on the $100 valuation. *State* v. *St. Louis, K. C. & N. R. Co.*, 10 *Am. & Eng. R. Cas.* 652, 75 *Mo.* 526.

The Constitution authorizes the limit of forty cents on the $100 valuation of railroad property for school purposes to be increased by a vote, and when it is so increased under the law authorizing an election to be held for that purpose, the increased rate becomes the constitutional limit the same as if inserted therein. *Chicago & A. R. Co.* v. *Lamkin*, 97 *Mo.* 496, 10 *S. W. Rep.* 200.

The limitation of the present Constitution as to the rate of levy for taxes applied only to years subsequent to its adoption; it did not affect levies made after its adoption for years prior thereto. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 263, 101 *Mo.* 120, 13 *S. W. Rep.* 406.

(6) *Board of equalization.*—Under a Mo. statute constituting a board of equalization of railroad property, which was required to meet once a year and adjust and equalize the aggregate valuation of each company and apportion it to the several counties, the result to be certified to the county courts, whose duty it was to make the levy on such valuation, an assessment by the county assessor, in the absence of action by the board of equalization, and a levy and execution thereunder, are void. *State ex rel.* v. *St. Louis, I. M. & S. R. Co.*, 82 *Mo.* 683.

Under the act of 1871 creating a state board of equalization to adjust and equalize the value of railroad property for purposes of taxation, it is the duty of the railroads to take notice of the time and place of the meeting of the board as fixed by law. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 263, 101 *Mo.* 120, 13 *S. W. Rep.* 406.

The law did not require that the evidence upon which the board based its valuation should be preserved, nor did it designate the evidence upon which such valuation should be made. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 263, 101 *Mo.* 120, 13 *S. W. Rep.* 406.

The fact that the board fixed the same valuation for the company's property for the preceding years that it did for the year 1872 does not raise such a presumption that it acted arbitrarily and without evidence as will overcome the legal presumption that it honestly discharged its duties. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 263, 101 *Mo.* 120, 13 *S. W. Rep.* 406.

Courts can grant relief against the mistake in judgment of the board only by direct proceeding in a manner provided by law. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 263, 101 *Mo.* 120, 13 *S. W. Rep.* 406.

Under the Missouri statute providing for the assessment of railroad property by a state board of equalization, and directing such board to proceed "to adjust and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation under the provisions of this act," the board is only authorized to equalize the aggregate valuation of the county boards, and is not empowered to make an assessment *de novo*. *Paul* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 35.

But if the board should transcend its power and make an assessment *de novo*, this would not vitiate the entire tax, but would leave the final valuation as fixed by the county board. *Paul* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 35.

The companies were required to pay taxes on the valuation fixed by the county boards, and the collecting officers were enjoined only in respect of the excess over such valuation. *Paul* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 35.

A mere error of judgment on the part of the assessing officers, as to the valuation of property, is not, in the absence of fraud, subject to judicial revision. The charge of fraud made against the state board of equalization was not sustained by the proofs. *Paul* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 35.

Property purchased by a company for future yard purposes, and in the possession of lessees and used for manufacturing purposes, with the right reserved to the lessees to remove their buildings therefrom at the end of the lease, does not fall within Mo. Rev. St. 1879, § 6876, providing for the assessment of tracks, etc., on a report made to the state auditor, but is within section 6866, and is assessable as local property. *State ex rel.* v. *St. Louis & S. F. R. Co.*, 117 *Mo.* 1, 22 *S. W. Rep.* 910.

270. Montana.—A taxpayer has the right to have his real and personal property separately listed and valued, and he has the right to be heard before the proper tribunal (the board of equalization) as to the correctness or propriety of his assessment, and a right to notice of the proceedings of such a tribunal in reference to the same. Such rights are constitutional. *Northern Pac. R. Co.* v. *Carland*, 17 *Am. & Eng. R. Cas.* 364, 5 *Mont.* 146, 174, 3 *Pac. Rep.* 134.

An assessment, in order to be valid, must be in substantial compliance with the revenue laws of the territory, under which real and personal property must be listed and valued separately, to enable county commissioners to act as boards of equalization thereon, and an assessor is required to demand a list of property under oath from the officer of a corporation authorized to furnish the same. *Northern Pac. R. Co.* v. *Carland*, 17 *Am. & Eng. R. Cas.* 364, 5 *Mont.* 146, 174, 3 *Pac. Rep.* 134.

271. Nebraska.—A county board of equalization of taxes has no power to meet and reassess property for taxation at any other time than that fixed by law, and it cannot increase the assessed valuation without notice to the person whose interests are affected. *Sioux City & P. R. Co.* v. *Washington County*, 3 *Neb.* 30.—QUOTED IN South Platte Land Co. *v.* Buffalo County Com'rs, 7 Neb. 253.

The word "rate," in connection with the provision of a statute prescribing a land tax in any rate "not exceeding four dollars to the quarter section," denotes that, 160 acres being taken as the unit of quantity, whatever may be the ratio between that and the tax, the same relative proportion must be observed as to any other given quantity of land, more or less, that falls within the apportionment. *Burlington & M. R. R. Co.* v. *Lancaster County*, 4 *Neb.* 293.—QUOTED IN State ex rel. *v.* Dodge County Com'rs, 8 Neb. 124.

It is the duty of the proper officers of a company, whose road is situated in more than one county, to list under oath, for assessment and taxation, the roadbed, superstructure, right of way, rolling stock, side tracks, telegraph lines, furniture and fixtures, and personal property belonging to such corporation, and to transmit the same to the state auditor, on or before the first day of March in each year. *Burlington & M. R. R. Co.* v. *Lancaster County Com'rs*, 7 *Neb.* 33.

All other property of a company is to be assessed by the assessor of the city, ward, or precinct in which it is situated, in the same manner as is provided for the assessment of real estate, but land used for necessary side tracks is not subject to such assessment. *Burlington & M. R. R. Co.* v. *Lancaster County Com'rs*, 7 *Neb.* 33.

In the year 1875 the commissioners of a county, of their own motion, and under the supposed authority conferred by the amendatory act of Feb. 25, 1875, levied the district school-bond tax complained of. *Held*, that under the law as it then stood, such taxes could be legally levied only in pursuance of direction from the district as to the amount required. *Burlington & M. R. R. Co.* v. *Saunders County Com'rs*, 9 *Neb.* 507, 4 *N. W. Rep.* 240.

Accidental omissions of property, in making assessments for taxation, do not invalidate the tax upon other property. *Burlington & M. R. R. Co.* v. *Seward County Com'rs*, 10 *Neb.* 211, 4 *N. W. Rep.* 1016.—REVIEWED IN Burlington & M. R. R. Co. *v.* Saline County Com'rs, 7 Am. & Eng. R. Cas. 347, 12 Neb. 396.

In 1879 school taxes for all purposes were restricted to a sum not exceeding twenty-five mills on the dollar valuation. *Union Pac. R. Co.* v. *Dawson County*, 12 *Neb.* 254, 11 *N. W. Rep.* 307.—FOLLOWING Burlington & M. R. R. Co. *v.* York County Com'rs, 7 Neb. 487.

Where in a levy of taxes for county revenue the several estimated objects of expenditure, and the rate for each, are set out in detail, instead of being grouped together under the single head of "general fund," as the statute contemplates, it is at most but a mere informality, in no way invalidating the tax, so long as the objects specified are those for which the commissioners are authorized to draw upon the general fund. *Burlington & M. R. R. Co.* v. *Lancaster County Com'rs*, 12 *Neb.* 324, 11 *N. W. Rep.* 332.

A certificate from the county superintendent of schools to the county clerk, of an amount found by him to be due as between school districts, upon a division thereof, is sufficient to authorize the levy of a tax upon the property of the district or districts from which the amount is found to be due. *Burlington & M. R. R. Co.* v. *Lancaster County Com'rs*, 12 *Neb.* 324, 11 *N. W. Rep.* 332.

The failure of assessors to return their assessment rolls to the county within the time required by the statute is a mere irregularity, and does not invalidate the tax. *Burlington & M. R. R. Co.* v. *Saline County Com'rs*, 7 *Am. & Eng R. Cas.* 347, 12 *Neb.* 396, 11 *N. W. Rep.* 854.

Under Comp. St ch. 77, § 30, it is the duty of the state auditor, in case any company whose property is situated in more than one county fails to list its property for taxation, as therein provided, by the 3d of March of each year, to proceed to obtain the facts and information necessary to such taxation, in any manner that may appear most likely to secure the same correctly. *Held*, that it will be presumed, in the absence of proof, that the property of such company lawfully taxable by the state board was for the year or years in question properly taxed. *Burlington & M. R. R. Co.* v. *Lancaster County Com'rs*, 15 *Neb.* 251, 18 *N. W. Rep.* 71.—FOLLOWED IN Red Willow County *v.* Chicago, B. & Q. R. Co., 39 Am. & Eng. R. Cas. 556, 26 Neb. 660.

The property of a company which should properly be assessed by the state board is not rendered assessable by the precinct assessor, nor taxable by the county board, by reason of the failure of the officers of the railroad company to list the same to the state auditor, or of the state board to assess the same. *Burlington & M. R. R. Co.* v. *Lancaster County Com'rs*, 15 *Neb.* 251, 18 *N. W. Rep.* 71.

Neb. Comp. St. ch. 77, § 39, requires railroad officers within the state to return to the auditor of public accounts, for assessment and taxation, the number of miles of railroad in each organized county, and the total number of miles in the state, including roadbed, etc.; but does not require a return of bridges across the Missouri river. Therefore the state board of equalization has no power to include such bridges within the line of a railroad for taxation, and can levy no tax thereon. The portion of such a bridge within a county is to be assessed and taxed by the local officers of the county. *Cass County* v. *Chicago, B. & Q. R. Co.*, 25 *Neb.* 348, 2 *L. R. A.* 188, 41 *N. W. Rep.* 246.—REVIEWING Anderson *v.* Chicago, B. & Q. R. Co., 117 Ill. 26, 7 N. E. Rep. 129.—FOLLOWED IN Chicago, B. & Q. R. Co. *v.* School Dist. No. 1, 25 Neb. 359.

Where real estate is in fact used for roadbed and right of way purposes at a railway station, and it is apparent that no more has been taken than seems necessary for the business and necessities of the corporation at present or in the near future, such land, under the statute, is to be assessed by the state board, although all of such real estate may not be covered with railway tracks. *Red Willow County* v. *Chicago, B. & Q. R. Co.*, 39 *Am. & Eng. R. Cas.* 556, 26 *Neb.*

660, 42 *N. W. Rep.* 879.—FOLLOWING Burlington & M. R. R. Co. *v.* Lancaster County Com'rs, 7 Neb. 33; Burlington & M. R. R. Co. *v.* Lancaster County Com'rs, 15 Neb. 251.

A roundhouse was assessed by the local assessor at $10,000, and the company claimed that it had listed the same with the state board, which had levied taxes thereon that it had paid, but the proof failed to show whether, or to what extent, the roundhouse was also used as a repair shop. *Held*, that, unless it was also used as a repair shop, so as to make it such shop as well as a roundhouse, the assessment should have been made by the state board, and not by the local assessor. *Red Willow County* v. *Chicago, B. & Q. R. Co.*, 39 *Am. & Eng. R. Cas.* 556, 26 *Neb.* 660, 42 *N. W. Rep.* 879.

All real estate and personal property of a company, outside of right of way and depot grounds, are to be listed by one of the principal officers or agents of such corporation, and assessed by the assessor of the precinct where the property is situated. *Red Willow County* v. *Chicago, B. & Q. R. Co.*, 39 *Am. & Eng. R. Cas.* 556, 26 *Neb.* 660, 42 *N. W. Rep.* 879.

An unimproved right of way, grading, culverts, etc., running through two or more counties, owned by the company for years but with no superstructure thereon, is subject to assessment by the local assessors, and a petition to enjoin taxes so levied will be dismissed for want of equity. *Republican Valley & W. R. Co.* v. *Chase County*, 48 *Am. & Eng. R. Cas.* 641, 33 *Neb.* 759, 51 *N. W. Rep.* 132.

Under Rev. St. ch. 46, § 50, a county clerk has authority, where lands in his county have not been assessed, to "enter the same upon the assessment roll, and assess the value." *Elkhorn L. & T. L. Co.* v. *Dixon County*, 35 *Neb.* 426, 53 *N. W. Rep.* 382.

272. Nevada.—Under the Revenue Act of 1866 (St. 1866, 1868, § 15) the board of equalization has no power to reduce an assessment when the company complaining has refused to give to the assessor a statement under oath of its property. *State* v. *Washoe County Com'rs*, 5 *Nev.* 317.

But under the Revenue Act of 1869 (St. 1869, 184), the sworn statement as to the property of railroads, to be given to the assessor for assessment purposes, must show affirmatively that the person making it is one of the persons named in the statute and it must be subscribed by him. *State* v. *Washoe County Com'rs*, 5 *Nev.* 317.

The punishment prescribed for failure of a company to make a sworn statement, as required by the Revenue Act of 1869, § 3, is in addition to the penalty of exclusion from the benefits of equalization. *State* v. *Washoe County Com'rs*, 5 *Nev.* 317.

A revenue act provided that a sworn statement of the property of a railroad should be furnished on demand of the assessor, otherwise it should be deprived of the benefits of equalization; and, no proper statement being made, it was claimed by the company that it did not appear that there had been any demand. *Held*, that the burden of proof was upon the company desiring equalization to show the fact of neglect to make the demand. *State* v. *Washoe County Com'rs*, 5 *Nev.* 317.

The Supplementary Revenue Act (St. 1867, 111) provided that in cases where the county assessor neglected to make an assessment, the county treasurer, as *ex officio* tax receiver, should specially assess and collect the taxes; and that if any person felt aggrieved by such subsequent assessment he might apply to have it equalized by the county commissioners, and that they should determine the matter. *Held*, that the county commissioners while sitting to equalize such assessment were not controlled by the restrictions imposed upon the board of equalization sitting under the General Revenue Act; and that they could not, like the board of equalization, refuse to equalize an assessment upon a railroad because a sworn statement had been refused on demand of the treasurer. *Virginia & T. R. Co.* v. *Ormsby County Com'rs*, 5 *Nev.* 341.—FOLLOWED IN State ex rel. *v.* Ormsby County Com'rs, 7 Nev. 392.

Under the provisions of the above supplemental act a company applied to the commissioners of a county to have the "subsequent assessment roll" for 1869, as to its property, equalized; and the commissioners thereupon ordered the entire subsequent assessment roll to be stricken out and remitted. *Held*, that they acted beyond their powers, and that their order was void. *State ex rel.* v. *Ormsby County Com'rs*, 6 *Nev.* 95.—FOLLOWED IN State *v.* Ormsby County Com'rs, 7 Nev. 392.

On application of a company to equalize as to its own property the subsequent assessment roll, as provided in the above act,

the commissioners ordered the entire subsequent assessment roll to be stricken out, and their proceedings were carried by *certiorari* to the supreme court, *Held*, that the question before the supreme court was solely as to whether the commissioners had the authority to make the order striking out the entire roll, and that the court could not consider the question as to the authority to equalize or discharge the assessment of the particular company making the application. *State ex rel.* v. *Ormsby County Com'rs*, 6 *Nev.* 95.

A company failed to furnish a proper statement of its taxable property within the time prescribed by law, and in default thereof the assessor placed a valuation thereon which the board of equalization afterwards reduced. *Held*, that the action of the board was unauthorized and should be annulled. *State ex rel.* v. *Board of Equalization*, 7 *Nev.* 83.

On *certiorari* to review the proceedings of the board of equalization in reference to the reduction of an assessment against a company, the clerk of the board was directed to certify whether it appeared before the board that the company served a statement of its taxable property within the time prescribed by law; and the clerk returned a certificate that it was proven before the board that such a statement had been furnished within time, but went on to show that his certificate was based upon the sworn statement of others, who composed the board at the time, and not upon his own recollection or the records of the board. *Held*, that such certificate was quite inadmissible; and on motion it was stricken out. *State ex rel.* v. *Board of Equalization*, 7 *Nev.* 83.—REVIEWING New Jersey R. & T. Co. *v.* Suydam, 17 N. J. L. 25.

The "legal excuse" mentioned in the Act of 1869, § 3, requiring railroads to furnish statements of their taxable property, is only to be considered in case of a criminal prosecution as provided for by the Act of 1866, § 6 (St. 1866, 168), and not in proceedings before the board of equalization (St. 1866, 169, § 15). *State ex rel.* v. *Board of Equalization*, 7 *Nev.* 83.

The fact that a company fails to make a statement as required by law does not authorize the assessor to impose a valuation which he knows to be exorbitant and unjust. *State* v. *Central Pac. R. Co.*, 7 *Nev.* 99.

As the law requires an honest and just estimate of value to be placed upon property for the purpose of taxation, an excessive valuation made by an assessor contrary to his official judgment, and with intent to injure, is a fraud against which the law will afford relief. *State* v. *Central Pac. R. Co.*, 7 *Nev.* 99.

An application was made to the commissioners to equalize a supplemental assessment against a company, which was denied; and afterwards an application was made to discharge the same assessment. *Held*, that the board had not exhausted its power in reference to the assessment by its action on the application to equalize. The discharge of a supplemental assessment is entirely different from an equalization of the same. *State* v. *Ormsby County Com'rs*, 7 *Nev.* 392.

Under the statute of 1867 action may be taken by the commissioners to modify, equalize, or discharge assessments against a railroad irrespective of the particular character of the session of the board; nor is there any limitation imposed by the statute as to the time of application. *State* v. *Ormsby County Com'rs*, 7 *Nev.* 392.

The cash value of a railroad is measured by the amount of cash required to procure it, provided its utility is commensurate with its cost; and the amount of cash required to procure a railroad is the necessary cost of its construction. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 47.—QUOTING Sangamon & M. R. Co. *v.* Morgan County, 14 Ill. 163. REVIEWING Albany & S. R. Co. *v.* Osborn, 12 Barb. (N. Y.) 225; Albany & W. S. R. Co. *v.* Canaan, 16 Barb. 244.

Where property is visible and open to inspection, the assessor should exercise his own judgment in the valuation, and not be governed by the opinion of the taxpayer. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 47.

The omission of the assessor to state the number of acres of land assessed to a railroad company where the number of miles of the road is stated, and it is not shown that the railroad company was injured by the failure to state the number of acres, does not make the assessment void. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 47.

The statute does not require a separate assessment or valuation of lands and improvements where both belong to the same owner; nor does it require the value per acre to be given. And where the land is described by its common designation or

name, it is not necessary to give the metes and bounds also. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 47.

The affidavit to a statement filed with the board of equalization was made in California, using the words "this state" in such a manner that if strictly considered they would relate to the state of California. *Held*, upon a statement of the facts, that the intention to verify the contents of the statement relating to property in the state of Nevada was so clear as to entitle them to be received as a proper statement of the company's property in Lander County, Nevada. *State* v. *Central Pac. R. Co.*, 17 *Nev.* 259, 30 *Pac. Rep.* 887.

The statement of a company's property filed with the board of equalization need not contain an itemized list of the various articles of personal property, and, where the company is not seeking a reduction upon the valuation of property of a general nature, it will be sufficient if it contains a list of property of the company, real and personal, pertaining to its road. *State* v. *Central Pac. R. Co.*, 17 *Nev.* 259, 30 *Pac. Rep.* 887.

If a written statement is not furnished by the company to the assessor of all the company's property within the county, as required by law (St. 1875, 105), the board of equalization has no power to reduce the assessment made by the county assessor. *State* v. *Central Pac. R. Co.*, 17 *Nev.* 259, 30 *Pac. Rep.* 887.

The board of county commissioners has the right to amend the record of its proceedings, when sitting as a board of equalization, so as to make it conform to the truth, and an amendment made by order of the board after it had ceased to sit as a board is admissible in evidence to show the facts upon which the board acted in reducing the assessment upon defendant's property. *State* v. *Central Pac. R. Co.*, 17 *Nev.* 259, 30 *Pac. Rep.* 887.

When a company claims that its taxes, as assessed by the county assessor, have been reduced, it must affirmatively show by the record of the board the jurisdictional fact that a complaint was made by it to the judicial board of equalization of the assessor's valuation of the property, the oral testimony of the members of the board being insufficient. *State* v. *Central Pac. R. Co.*, 17 *Nev.* 259, 30 *Pac. Rep.* 887.

Under the statute assessors are required to estimate the value of railroads with reference to their position, connections, and use, and "as an integral part of a complete, continuous, and operated line of railroad, and not as so much land covered by the right of way merely, nor as so many miles of track consisting of iron rails, ties, and couplings." *State* v. *Central Pac. R. Co.*, 21 *Nev.* 75, 25 *Pac. Rep.* 296.

273. New Hampshire.—Under N. H. Gen. Laws, ch. 62, the tax of a railroad there authorized is not a town tax, and is not assessable in proportion to the taxation of other property in the towns in which the railroad is located. *Boston, C. & M. R. Co.* v. *State*, 60 *N. H.* 87.

In the assessment of a railroad "as near as may be in proportion to the taxation of other property" in towns, the rate at which savings banks are taxed by the state is not considered. *Boston, C. & M. R. Co.* v. *State*, 62 *N. H.* 648.

When a railroad tax is reduced on appeal, the amount abated is allowed on a subsequent tax. *Boston, C. & M. R. Co.* v. *State* 64 *N. H.* 490, 13 *Atl. Rep.* 874.

274. New Jersey.—(1) *In general.*—The Act of February 6, 1866, § 9, consolidating two companies, provides that "whenever the net earnings of said consolidated company shall amount to six per cent. per annum over expenses and interest, the said company shall pay to the treasurer a tax of one half of one per cent. upon the cost of said road, to be paid annually, and such other state tax as may be assessed from time to time, by a general law, applicable to all railroads over which the legislature shall have power, for that purpose, at the time of the passage of such law or laws." The company was taxed upon its capital stock, amounting to $220,604, and upon its real estate, valued at $7000, there having been no such general law passed as contemplated in said section. *Held*, that the assessment was illegal. *Cook* v. *State* (*Camden & B. County R. Co., Pros.*), 33 *N. J. L.* 474.—QUOTING New York & E. R. Co. *v.* Sabin, 26 Pa. St. 242.—FOLLOWED IN State (New Jersey R. & T. Co., Pros.) *v.* Hancock, 35 N. J. L. 537.

A tax being affirmed by the commissioners of appeal was carried, on *certiorari*, into the supreme court and the court of errors, in both of which courts the proceedings were sustained. Before the argument in the supreme court, the statute authorizing the tax was repealed. *Held*, on a man-

damus directing the payment of such tax, that the question of the legality thereof arising from the repeal of such statute could not be raised, on the ground that the judgments on *certiorari* had conclusively settled that question. *Belvidere* v. *Warren R. Co.*, 34 *N. J. L.* 193.

In assessing depot grounds of a company having an exemption from taxation in its charter for benefits derived from local improvements, supposed benefits arising from the probable increase of business in consequence of increased facilities of access to its depot cannot be made the basis of assessment. An assessment on that principle would be a tax on the business of the company in violation of the exemption in the act of incorporation. *State* (*Morris & E. R. Co., Pros.*) v. *Jersey City*, 36 *N. J. L.* 56, 12 *Am. Ry. Rep.* 302.—FOLLOWED IN State (New Jersey R. & T. Co., Pros.) *v.* Elizabeth, 37 N. J. L. 330.

Lands acquired for a public use by a corporation under legislative authority, which are essential to the exercise of its corporate franchises, and are held in good faith for that purpose, must be regarded for purposes of taxation as devoted to that public use. In assessing lands so circumstanced for local improvements, the increase in their present market value is not the proper basis of assessment; if not benefited in their present use by such improvement, the assessment should be made on a valuation depending on the probability that they may thereafter be converted to other uses. *State* (*Morris & E. R. Co., Pros.*) v. *Jersey City*, 36 *N. J. L.* 56, 12 *Am. Ry. Rep.* 302.

A corporation having an irrepealable charter which provides for a special mode of taxation, and that "no other or further tax or imposition shall be levied or imposed upon the said company," may consent to other taxation, or a different mode of assessment from that specified in its charter, by the acceptance of subsequent legislative acts, without impairing the exemption from general taxation contained in its charter. In such event, the new taxation becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force. *State* (*United R. & C. Co., Pros.*) v. *Com'rs of R. Taxation*, 37 *N. J. L.* 240.

When railroad property is legally subject to assessment, and the proceedings of the commissioners are regular, the report is conclusive, in the absence of other proof, of the fact of benefit actually received, and of its amount and value. *State* (*New Jersey Midland R. Co., Pros.*) v. *Mayor, etc., of Jersey City*, 1 *Am. & Eng. R. Cas.* 406, 42 *N. J. L.* 97.

Writs of *certiorari* allowed in 1880, to bring up assessments made in 1873, 1874, and 1875, dismissed for laches. *State* (*United N. J. R. & C. Co., Pros.*) v. *Binninger*, 1 *Am. & Eng. R. Cas.* 410, 42 *N. J. L.* 528.

In estimating the value of lands lying upon tidewater, for the purpose of taxation, adjacency to the tidewater is a circumstance which should enter into their taxable valuation, and in so far as the market value of the land is enhanced by reason of its frontage on the water, and of the privileges arising from its location, it should be estimated at such enhanced valuation for the purposes of taxation. *State* (*New York, L. E. & W. R. Co., Pros.*) v. *Yard*, 11 *Am. & Eng. R. Cas.* 529, 43 *N. J. L.* 632; *affirming* 43 *N. J. L.* 121.

Where an assessment of taxes has been made in good faith on property which, by the prosecutor's charter, is exempt from taxation, costs will not be allowed to the prosecutor on setting aside the taxes on *certiorari* where application for relief has not been made to the local authorities, unless the defense in the *certiorari* suit has been conducted vexatiously. *State* (*Lehigh Valley R. Co., Pros.*) v. *Mayor, etc., of Newark*, 44 *N. J. L.* 323.

Under what is known as the Riparian Act of March 31, 1869, §§ 3, 4, the Hoboken Land and Improvement company and its assigns may secure from the state a conveyance in fee of the lands under water lying in front of the lands owned by such corporation or its assigns, on paying to the state fifty dollars per foot in front of the lands included in the conveyance; but the privilege of securing such conveyance must be regarded as enhancing the value of the land, to the ownership of which the privilege attaches, for the purpose of taxation. *New York, L. E. & W. R. Co.* v. *Hughes*, 46 *N. J. L.* 67.

(2) *The Act of* 1873.—Under the Act of April 2, 1873, providing for "just rules for the taxation of railroad corporations," it is required that the president of every such corporation shall return to the state comptroller the cost of the road, and the cost of

equipment and appendages of the road, specifying the items and locality thereof. *Held*, that no valid claim for a tax could be made by the state until such return was made. *Williamson* v. *New Jersey Southern R. Co.*, 28 *N. J. Eq.* 277, 14 *Am. Ry. Rep.* 34; *reversed in* 29 *N. J. Eq.* 311.

In laying a tax under the above statute for the benefit of counties, townships, and cities, the commissioner of railroad taxation performs the same duties as a township assessor under the General Tax Law, and the proceedings for review are the same as in cases of ordinary taxes, except that such taxes are not subject to review before the local commissioners of appeal in cases of taxation. The writ of *certiorari* to review such taxation should be directed to the collector of taxes for the township or city in whose hands the duplicate of taxes is placed for collection, and the proceedings under the writ, with respect to the review and correction of the assessment, will be the same as in ordinary cases. *State* (*New York, L. E. & W. R. Co., Pros.*) v. *Yard*, 11 *Am. & Eng. R. Cas.* 529, 43 *N. J. L.* 632; *affirming* 43 *N. J. L.* 121.

(3) *The Act of* 1876. — A road was sold under a mortgage, and the purchasers, in November, 1878, organized a new corporation under a different name. Taxes for 1878–79, laid upon the road and its equipment pursuant to the Railroad Taxation Act (N. J. Rev. 1876, p. 1168) being unpaid, judgment was entered therefor against the company. *Held*, upon application for judgment to issue thereon, that, though the tax for 1879 should have been assessed in the name of the new corporation, the assessment might be amended under the Act of March 25, 1881 (Pamph. L. p. 94), providing that no tax or assessment should be set aside for any defect or irregularity in assessing the same, if the person against whom or property on which such tax was levied was in fact liable, and giving to the court power to amend and correct irregularities in the form or manner of assessment, as that act should be liberally construed and its provisions applied to taxes assessed before it was passed. *State* v. *Montclair & G. L. R. Co.*, 13 *Am. & Eng. R. Cas.* 390, 43 *N. J. L.* 524.

(4) *The Act of* 1884.—It is proper, under this act, to appraise the land and improvements separately. *State* (*New York, L. E. & W. R. Co., Pros.*) v. *Yard*, 43 *N. J. L.* 121; *affirmed in* 43 *N. J. L.* 632.

The prosecutor owned ten acres of upland, and claimed to own a right of reclamation over more than twenty acres of land under water in the Hudson river, fronting the upland. *Held*, that a valuation of the whole as "thirty acres of land," at so much per acre, did not invalidate a tax based on such appraisement under the act, and that even though the claim of a right of reclamation were groundless, the tax would still be sustained, unless it were shown that the value of the ten acres, with the appurtenant riparian rights, was less than the appraisement. *State* (*New York, L. E. & W. R. Co., Pros.*) v. *Yard*, 43 *N. J. L.* 121; *affirmed in* 43 *N. J. L.* 632.

Section 6 of the act directs that whenever in any taxing district there are several branch roads belonging to or controlled by one company, the state board shall designate one of such lines as the main stem, and the others shall be valued as property used for railroad purposes, thereby subjecting such respective parts of the property thus separated to a different rate of taxation. *Held*, that although such distribution of property with a view to variant taxation was to be justified by force of the decision in these cases by the court of errors, still such system was invalid inasmuch as it left it to the unguided judgment of the state board to decide which of such branches should be subjected to the higher rate of taxation. *Central R. Co.* v. *State Board of Assessors*, 49 *N. J. L.* 1, 7 *Atl. Rep.* 306.

Section 4 of the act directs that in case the valuations of railroad and canal property by the state board shall be relatively higher than the value, as ascertained by the local assessors, of the property of other persons in any taxing district, the said board should accept the valuations of such local assessors as a correct standard of value. It was shown that the local assessors illegally took but a percentage of what they deemed the true value of the property appraised by them. *Held*, that the state board could not take such reduced valuations as its standard of value. *Central R. Co.* v. *State Board of Assessors*, 49 *N. J. L.* 1, 7 *Atl. Rep.* 306.

The Act of 1884, § 4, provides that "if the assessed value of the real estate of persons, other than railroad or canal corporations * * * is relatively lower than that which has been laid upon the land of the several companies in said taxing district, the said board [of state assessors] shall be required to ac-

cept said valuation of the assessors * * * as a correct standard of value, and to thereby correct or reduce the separate valuation provided for in the second subdivision of section three of this bill." *Held*, that this section is unconstitutional. The true value of railroad property is the sole basis of a constitutional assessment. *Williams* v. *Bettle*, 42 *Am. & Eng. R. Cas.* 271, 51 *N. J. L.* 512, 18 *Atl. Rep.* 750; *affirming* 50 *N. J. L.* 132, 11 *Atl. Rep.* 17.

Under section 12 of the above statute, in determining whether the tax assessed against a company is greater than such company would pay if it did not pay the state tax of one half of one per cent., but did pay full local rates on all its property and franchises mentioned in section 3 of the act, the local rate to be applied is "the local rate as fixed and assessed for county and municipal purposes upon other property in each taxing district," and not such rate as would have been sufficient to raise the same revenue, in case the valuation of the railroad property had been added to the valuation of the other property in each local assessment. *Williams* v. *Bettle*, 42 *Am. & Eng. R. Cas.* 271, 51 *N. J. L.* 512, 18 *Atl. Rep.* 750; *affirming* 50 *N. J. L.* 132, 11 *Atl. Rep.* 17.

The authorized right of way of a railroad company, duly acquired, over which the road has been constructed and is in good faith operated, is "used for railroad purposes" within the meaning of the N. J. Act of April 10, 1884, which provides that all property of any railroad company "used for railroad purposes" shall be assessed by a state board, and not by the local assessor —although it may not, for the time being, be wholly occupied by tracks or other railroad appliances. *United N. J. R. & C. Co.* v. *Mayor, etc., of Jersey City*, 54 *Am. & Eng. R. Cas.* 272, 55 *N. J. L.* 129, 26 *Atl. Rep.* 135.

(5) *The state board of assessors.*—To make a just valuation thereof, property used for railroad or canal purposes must be estimated with regard to its value for such purposes. *State Board of Assessors* v. *Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1, 2 *Atl. Rep.* 789.

Railroad and canal property is a peculiar class of property and the method of valuing it must be peculiar, and providing a state board of assessors for that purpose is appropriate and necessary. *State Board of Assessors* v. *Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1, 2 *Atl. Rep.* 789.

Under the act constituting a state board of assessors to value the property of railroads and canals, the case to be reviewed on *certiorari* by the supreme court should be made by the proofs and exceptions on the appeal before such board, and not on a rule to take testimony granted by the supreme court. *Central R. Co.* v. *State Board of Assessors*, 49 *N. J. L.* 1, 7 *Atl. Rep.* 306.

In estimating the value of railroad property for taxation, the cost of the acquisition of such property is not an absolute criterion of such value, but is an important element in the circumstances on which a judgment on the subject is to be formed. *Central R. Co.* v. *State Board of Assessors*, 49 *N. J. L.* 1, 7 *Atl. Rep.* 306.—FOLLOWED IN State (Williams, Pros.) *v.* Bettle, 42 Am. & Eng. R. Cas. 271, 50 N. J. L. 132.

A railroad taxation act directed the valuation of the property of companies to be made in a distributive mode; that is, first, on the main stem; second, the other real estate used for railroad purposes; third, the tangible personal property; fourth, the franchises. *Held*, that such system of valuations is constitutional and unobjectionable, and that the valuation of such property, including the franchises, is legal, and where there is no clear evidence showing the same to be exorbitant, they cannot be modified. *Central R. Co.* v. *State Board of Assessors*, 49 *N. J. L.* 1, 7 *Atl. Rep.* 306.—QUOTING State Board of Assessors *v.* Central R. Co., 48 N. J. L. 278.

The state board of assessors, in the valuation of property, must give its true value, and not be governed by the valuation of the local assessors. *State* (*Williams, Pros.*) v. *Bettle*, 50 *N. J. L.* 132, 11 *Atl. Rep.* 17; *affirmed in* 42 *Am. & Eng. R. Cas.* 271, 51 *N. J. L.* 512, 18 *Atl. Rep.* 750.

Debts cannot be deducted from the valuation of railroad property by the state board of assessors, unless applied for according to the Railroad Taxation Acts. *Williams* v. *Bettle*, 42 *Am. & Eng. R. Cas.* 271, 51 *N. J. L.* 512, 18 *Atl. Rep.* 750; *affirming* 50 *N. J. L.* 132, 11 *Atl. Rep.* 17.

275. New Mexico.—The assessment of the property of a railroad company, real and personal, for one year in a single item as $1,000,000, and in other years in two items, real and personal property, each at $250,000, is void. A list in detail must accompany

the assessment. *Valencia County Com'rs* v. *Atchison, T. & S. F. R. Co.*, 3 *N. Mex.* 380, 10 *Pac. Rep.* 294.

276. New York.—(1) *In general.*—The provisions of 1 Rev. St. 414, relating to the assessment of taxes upon incorporated companies, furnish a sufficient basis for the assessment and taxation of the lands of railroad corporations in towns and counties remote from their principal place of business. *People ex rel.* v. *Barker*, 48 *N. Y.* 70; *affirming* 33 *How. Pr.* 150, 48 *Barb.* 173.—FOLLOWED IN People ex rel. *v.* Keator, 36 Hun (N. Y.) 592.

The tax of a railroad, authorized by Gen. Laws, ch. 62, is not a town tax, and is not assessable in proportion to the taxation of other property in the towns in which the railroad is located. *Boston, C. & M. R. Co.* v. *State*, 60 *N. H.* 87.—FOLLOWED IN Mt. Washington R. Co. *v.* State, 60 N. H. 583.

In assessing a railway corporation for taxes under the Act of 1857, § 3, its indebtedness should be deducted from the value of its assets. *People ex rel.* v. *Barker*, 141 *N. Y.* 196, 36 *N. E. Rep.* 184, 56 *N. Y. S. R.* 834; *affirming* 72 *Hun* 126, 55 *N. Y. S. R.* 186, 25 *N. Y. Supp.* 340.

Suit was commenced to restrain the collection of a railroad tax imposed in the year 1885, upon the ground that the oath of the assessors was defective in following the form prescribed by the Act of 1851, ch. 176, § 8, instead of that of the Act of 1885, ch. 201. The two forms were the same, except that that of 1885 did not require the assessors to state that they had assessed the property as they would "in payment of a just debt due from a solvent debtor," as required by the former act. *Held*, that the oath was sufficient. *Rome, W. & O. R. Co.* v. *Smith*, 39 *Hun* (*N. Y.*) 332; *affirmed in* 101 *N. Y.* 684, *mem.*

In such case, after the assessment had been completed and the oath had been made in conformity with the act of 1831, another oath was taken by the same assessors which conformed literally to the act of 1885. *Held*, that even if the first oath was irregular or wholly defective, the assessors had power to supply the defect by taking a second oath; the fact that it was made in October was immaterial, as the time in which the oath should be made is only directory. *Rome, W. & O. R. Co.* v. *Smith*, 39 *Hun* (*N. Y.*) 332; *affirmed in* 101 *N. Y.* 684, *mem.*

(2) *Where property is taxable.*—In taxing railroads under 1 Rev. St. 414, § 2, a return is to be made to the assessors of every town in which real estate of the company is situated. *People ex rel.* v. *Cheetham*, 20 *Abb. N. Cas.* (*N. Y.*) 44.—FOLLOWING People ex rel. *v.* Cassity, 46 N. Y. 46.

A railroad corporation is not liable to taxation upon its capital as personal estate for that part thereof which is vested in the lands over which the road runs, and in the railway and other fixtures connected therewith; but that part of the corporate body is to be taxed as real estate in the several towns and wards in which the same is situated, and at its actual value at the time of the assessment. *Mohawk & H. R. Co. v. Clute*, 4 *Paige* (*N. Y.*) 384.—FOLLOWED IN People ex rel. *v.* Niagara County Sup'rs, 4 Hill (N. Y.) 20.

The capital stock which is not invested in its railway or other real estate is to be taxed as personal property, in the town or ward in which the principal office or place for transacting the financial concerns of the company is situated. *Mohawk & H. R. Co.* v. *Clute*, 4 *Paige* (*N. Y.*) 384.

That part of the capital stock of a railroad company which is not invested in its real estate, or its road, is liable to taxation as personal property. So an assessment of $40,000 against a company, in a city where it had its principal place of business, was sustained where there was nothing to show what amount of capital stock the company had in the place uninvested in real estate. *People ex rel.* v. *Shields*, 6 *Hun* (*N. Y.*) 556.

A railroad company created a sinking fund for the sole purpose of paying a debt owed to a city, the debt being held and managed by trustees who lived in the city and were taxable inhabitants of the state. *Held*, that the fund was properly assessed in the hands of the trustees to its full value in the city. *People* v. *Board of Assessors*, 40 *N. Y.* 154.

The fact that the rails, ties, and tracks of a street surface railroad are property and subject to taxation generally affords no sufficient reason for taxing them for street improvements, when the law has not made them specially assessable for such purposes. *People ex rel.* v. *Gilon*, 126 *N. Y.* 147, 27 *N. E. Rep.* 282, 37 *N. Y. S. R.* 17; *reversing* 58 *Hun* 76, 33 *N. Y. S. R.* 838, 11 *N. Y. Supp.* 439.

(3) *Street railways.*—Under 1 Rev. St. 360, §§ 1, 2, providing that "all lands within

this state * * * shall be liable to taxation," and that the term "land" shall be construed to include the land itself and all buildings and other articles erected upon or affixed to the same, and that the terms "real estate" and "real property" shall be construed to mean the same as the word land, the tracks of a horse-car company are to be assessed as land. *People ex rel.* v. *Cassity*, 46 *N. Y.* 46; *affirming* 2 *Lans.* 294. — APPLIED IN People ex rel. *v.* Com'rs of Taxes, 2 Am. & Eng. R. Cas. 343, 82 N. Y. 459. FOLLOWED IN People ex rel. *v.* Cheetham, 20 Abb. N. Cas. (N. Y.) 44.

Commissioners, in assessing the capital stock of a street-car company, may value such stock at its actual value, after deducting therefrom the cost of the real estate of the company, and may refuse to deduct the company's indebtedness. In ascertaining the value of the capital stock, the commissioners cannot disregard the indebtedness of the company; but after the stock is valued, the amount of indebtedness cannot be deducted from the valuation. *People ex rel.* v. *Com'rs of Taxes*, 1 *T. & C.* (*N. Y.*) 635. — FOLLOWED IN People ex rel. *v.* Com'rs of Taxes, 64 How. Pr. (N. Y.) 405.

The commissioners of taxes and assessments in a city, in estimating the value of the capital stock of city railroad corporations, should deduct from the actual value of such stock: (1) the assessed value of its real estate; (2) the value of United States stock owned by it; (3) the value of stock in other corporations owned by it. After these deductions are made the provisions of the statutes directing special deductions are complied with, and it becomes the duty of the commissioners to return the balance of the capital stock, subject to assessments. *People ex rel.* v. *Com'rs of Taxes*, 46 *How. Pr.* (*N. Y.*) 227, 1 *T. & C.* 635; *affirmed in* 60 *N. Y.* 638, *mem.* — DISTINGUISHING People ex rel. *v.* Com'rs of Assessments, 32 Barb. 509; Bank Tax Case, 2 Wall. (U. S.) 200; People ex rel. *v.* Ferguson, 38 N. Y. 91.—APPLIED IN Manhattan R. Co. *v.* Mayor, etc., of N. Y., 13 Am. & Eng. R. Cas. 261, 18 Fed. Rep. 195.

After making due allowance for the indebtedness of the corporation as diminishing the value of its capital stock the estimate of the commissioners will be conclusive, and the court should not interfere with it, as no further deduction of its valuation can legally be made. *People ex rel.* v. *Com'rs of Taxes*, 46 *How. Pr.* (*N. Y.*) 227, 1 *T. & C.* 635; *affirmed in* 60 N. Y. 638, *mem.*

The tracks of a horse-railroad company are liable to assessment and taxation as real estate, under the Act of 1881, ch. 293. *People ex rel.* v. *Com'rs of Taxes*, 21 *N. Y. S. R.* 358, 51 *Hun* 641, *mem.*, 4 *N. Y. Supp.* 41.

(4) *Resident or non-resident lands.*—Railroad corporations are not, in the purview of the tax laws, non-residents of any town in which they possess lands; such lands are to be assessed against them the same as against inhabitants of the town, and not as non-resident lands. *People ex rel.* v. *Cassity*, 46 *N. Y.* 46; *affirming* 2 *Lans.* 294.—DISTINGUISHING Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449; Western Transp. Co. *v.* Scheu, 19 N. Y. 408.

The real estate of railroad corporations, occupied and used by them for railroad purposes, cannot properly be assessed as "non-resident lands." *People ex rel.* v. *Barker*, 48 *N. Y.* 70, 2 *Am. Ry. Rep.* 149; *affirming* 33 *How. Pr.* 150, 48 *Barb.* 173.

A company whose railroad passes through several counties is, for the purposes of taxation, to be regarded as a resident of each town and county through which it passes; and its real estate is properly assessed *in personam* as the land of a resident, and not as that of a non-resident. *Buffalo & S. L. R. Co.* v. *Erie County Sup'rs*, 48 *N. Y.* 93, 2 *Am. Ry. Rep.* 163.

In the case of a non-resident, lands are to be assessed without naming the owner, and no person is charged with the taxes nor liable to pay the same. When the tax upon the land of a non-resident remains unpaid, the land is eventually to be sold by the state comptroller. *So held*, where a railroad track and property were classed as non-resident lands, and the town tax collector levied upon freight cars of the company to enforce payment of the tax. *New York & H. R. Co.* v. *Lyon*, 16 *Barb.* (*N. Y.*) 651.

Nor can the collector levy a tax upon any personal property of non-residents, inasmuch as his warrant only authorizes him "in case any person named in the assessment roll shall refuse or neglect to pay his tax, to levy the same by distress and sale of the goods and chattels of such person," and does not authorize the seizure and sale of the property of persons not named, or whose names, it is apparent from the face of the papers, the assessors had no right to set

down. *New York & H. R. Co.* v. *Lyon*, 16 *Barb.* (*N. Y.*) 651.

(5) *For highway purposes.*—The Act of 1837, § 1, provides that commissioners of highways, in apportioning the residue of the highway labor to be performed in their town, after assessing one day's work upon every male inhabitant of full age, "to include among the inhabitants of such town, among whom such residue is to be apportioned, all moneyed or stock corporations which shall appear on the last assessment roll of their town to have been assessed therein," must follow the previous action of the assessors. They are to take the last assessment roll, and to include in their assessment every corporation therein assessed, and they cannot tax any corporation which is not upon the roll. *People ex rel.* v. *Pierce*, 31 *Barb.* (*N. Y.*) 138.—APPLIED IN Fowler *v.* Westervelt, 17 Abb. Pr. (N. Y.) 59.

The Act of 1837 gives to the highway commissioners of a town power to assess highway labor which shall "be performed in such district or districts as the commissioners of highways of the town shall direct." *Held*, that this authorized the assessment of labor on a railroad company to be performed in a road district in the town where the company did not have property. *New York, L. E. & W. R. Co.* v. *Delaware County Sup'rs*, 67 *How. Pr.* (*N. Y.*) 5; *affirmed in* 30 *Hun* 222, *mem.*

(6) *For local and school purposes.*—It seems that the Act of 1867, ch. 694, "in relation to the valuation of property of railroad companies in school districts for the purpose of taxation," has no relation to general taxation for town purposes; it does not contemplate that the apportionment between the school districts therein provided for shall be indicated on the town assessment roll, but by a certificate of the assessors, to be prepared and filed in the town clerk's office after the roll is completed. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

Under the charter of the village of Little Falls (Laws of 1873, ch. 158, § 39), in relation to taxation for village purposes, the valuation of property in the assessment rolls of the towns "parts of which comprise the territory of said village" is made the general rule of valuation for village taxes; the trustees of the village, as its board of assessment, are required to adopt it, "as far as practicable," unless the valuation has changed by reason of the circumstances mentioned in said provision. The power given to the board to "reduce or add to the valuation" is confined to the exceptional cases specified in the provision. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

While, however, neither said Act of 1867 nor the general statutes require town assessors to assess the real property of a railroad corporation separately, according to the particular district or locality in the town where it may be located, the fact that the assessors of the town in which said railroad is located, in making up their assessment roll, apportioned the valuation of such property among the school districts of the town by way of discharging the duty imposed upon them by said act, does not invalidate the assessments, nor may the valuation be disregarded by the board of assessment of the village. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

Where, therefore, in proceedings by *certiorari* under the Act of 1880, ch. 269, to review certain village assessments upon real estate of a railroad company, a portion of which is located in each of the towns in which the village lies, it appeared that the said board entirely disregarded the valuation upon the assessment roll of one of the towns, in which that portion of the property lying in said village was valued separately, as in a school district, and where it was not claimed that the valuation had changed by reason of circumstances specified in said provision of the charter—*held*, that the assessment was erroneous. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

The error was not cured because of the fact that in the valuation, in the assessment

roll of the other town, of that portion of the relator's property lying therein, the valuation of that part of it lying within the limits of the village was not separately stated, thus rendering it necessary for the board to make an original valuation of that part; that they were bound to follow the town valuation as far as practicable. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

It appeared that, in the case of one of the assessments complained of, the relator did not appear before the board on "grievance day" and object to the assessment, but relied upon unofficial information that the assessment would be the same as in the year preceding. *Held*, that by its laches it had lost its right to avail itself of the remedy given by the act of 1880; that as the board had jurisdiction to assess, but adopted an erroneous principle of valuation, the case was rather one of overassessment than of a void assessment. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

As to another assessment, no notice was published as to the final completion of the roll. *Held*, that the limitation of time prescribed by the Act of 1880, § 9, within which a party aggrieved might sue out a writ of *certiorari*, did not apply. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

The fact that the assessment rolls sought to be corrected were not in the possession of the village trustees when the writs were issued was not material. *People ex rel.* v. *Adams*, 125 *N. Y.* 471, 26 *N. E. Rep.* 746, 36 *N. Y. S. R.* 166; *affirming* 56 *Hun* 645, *mem.*, 32 *N. Y. S. R.* 398, 10 *N. Y. Supp.* 295. *See also People ex rel.* v. *Edick*, 32 *N. Y. S. R.* 404, 10 *N. Y. Supp.* 299.

(7) *Assessing capital stock, generally.*—The earning capacity of railroad or canal property is a controlling consideration, in assessing it for taxation; but the cost of creating it may also be considered. *People ex rel.* v. *Roosa*, 2 *How. Pr. N. S.* (*N. Y.*) 454.—FOLLOWING People ex rel. *v.* Keator, 67 How. Pr. 277.—*People ex rel.* v. *Keator*, 2 *How. Pr. N. S.* (*N. Y.*) 479.

Under the Act of 1857, ch. 456, § 3, the capital stock of a company should be assessed at its actual and not at its par value. *People ex rel.* v. *Com'rs of Taxes*, 64 *How. Pr.* (*N. Y.*) 405.—DISTINGUISHING People ex rel. *v.* Board of Assessors, 39 N. Y. 81. FOLLOWING People ex rel. *v.* Com'rs of Taxes, 1 T. & C. 635.

The mode by which commissioners are to arrive at "the actual value" of capital stock is not pointed out in the statute (Act of 1857, ch. 456), and must be left to the discretion of the commissioners; but they may not disregard any legal rules, or adopt principles erroneous in law, and where they do so, their action is subject to review. Beyond that the court will not interfere with such violation. *People ex rel.* v. *Com'rs of Taxes*, 46 *How. Pr.* (*N. Y.*) 227, 1 *T. & C.* 635; *affirmed in* 60 *N. Y.* 638, *mem.*

In ascertaining such value the commissioners cannot disregard the fact of indebtedness. It enters as much into the value of the stock as it does in the assessment of the personal estate of an individual. The capital stock should be valued at what it is actually worth. *People ex rel.* v. *Com'rs of Taxes*, 46 *How. Pr.* (*N. Y.*) 227, 1 *T. & C.* 635; *affirmed in* 60 *N. Y.* 638, *mem.*

Under the Act of 1857, ch. 456, § 3, providing that the capital stock of every company liable to taxation, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall "be assessed at its actual value," it is the duty of the tax commissioners to examine and determine "the actual value" of the stock; and where it appears that the stock is of no value whatever, by reason of the indebtedness of the company exceeding the value of its assets, it should not be assessed. *People ex rel.* v. *Com'rs of Taxes*, 31 *Hun* (*N. Y.*) 32.

In assessing the capital stock of a corporation the assessors have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business of the corporation, its property, the value of its assets, the amount and nature of its present and contingent lia-

bilities, the amount of its dividends, and the market value of its shares of stock in the hands of individuals. They may resort to any or all of these, as to them seems best, and they are not confined to one of them. They may take the test which they think will be most likely to give to them the actual value of the stock, and they may disregard all others. And in their estimate they are at liberty to consider not only the property and liabilities of the company, but also the value of the franchise secured to the owner as a corporation. *People ex rel.* v. *Com'rs of Taxes*, 21 *N. Y. S. R.* 350, 51 *Hun* 641, *mem.*, 4 *N. Y. Supp.* 43.

The assessment of the capital stock of a company at par sustained where the market value was forty-one per cent. above par. *People ex rel.* v. *Com'rs of Taxes*, 21 *N. Y. S. R.* 357, 51 *Hun* 641, *mem.*, 4 *N. Y. Supp.* 47.

And where a dividend of eight per cent. has been paid the last two years, and the stock is worth 130 per cent., it is reasonable to assume that the value of the stock is the same, and that the commissioners were justified in assessing it at its par value. *People ex rel.* v. *Com'rs of Taxes*, 21 *N. Y. S. R.* 355, 51 *Hun* 641, *mem.*, 4 *N. Y. Supp.* 45.

An assessment of capital stock at ninety-four and one half per cent. sustained where the actual value was one hundred and thirty per cent. and it was yielding an annual dividend of eight per cent. *People ex rel.* v. *Com'rs of Taxes*, 21 *N. Y. S. R.* 350, 51 *Hun* 641, *mem.*, 4 *N. Y. Supp.* 43.

Under Laws of 1880, ch. 542, § 3, as amended in 1881, ch. 361, if a corporation makes dividends of six per cent. or more on the par value of its capital stock during the year it shall pay one quarter mill upon the capital stock for each one *per centum* of dividend, but if no dividends or if dividends less than six per cent. were declared, then it shall pay one and one half mills on each dollar of the value of the stock. Defendant paid five and three quarter per cent. dividends. The actual value of its stock was 110.16 per cent. It appeared that if taxed under the second clause it would actually pay more than if it had declared six-per-cent. dividends. *Held*, that the law was not inequitable, and that the company was properly taxed under the second clause. *People* v. *Delaware & H. Canal Co.*, 54 *Hun* 598, 27 *N. Y. S. R.* 624, 7 *N. Y. Supp.* 890; *affirmed in* 121 *N. Y.* 666, *mem.*, 24 *N. E. Rep.* 1093, *mem.*

(8) *Deductions to be made.*—Under the Act of 1857, ch. 456, in reference to the assessment of taxes on corporations, the capital stock of a corporation, less the part thereof owned by the state or by literary or charitable institutions, or exempted from taxation by 1 Rev. St. 388, § 4, is to be assessed at its actual value, whether more or less than its nominal amount, deducting therefrom, however, the assessed value of its real estate and shares owned by it in other taxable corporations, and also from its surplus or reserved fund, if any, an amount not exceeding ten per cent. of its capital. *People ex rel.* v. *Com'rs of Taxes*, 104 *N. Y.* 240, 10 *N. E. Rep.* 437, 5 *N. Y. S. R.* 647; *affirming* 40 *Hun* 631, *mem.*

Where a corporation, liable to taxation under said act, has real estate in another state or country, the provision directing a deduction of the assessed value of such real estate requires that the deduction shall be measured by its actual value; and in the absence of other and better evidence, the price paid for the real estate may be taken as representing such value. *People ex rel.* v. *Com'rs of Taxes*, 104 *N. Y.* 240, 10 *N. E. Rep.* 437, 5 *N. Y. S. R.* 647; *affirming* 40 *Hun* 631, *mem.*

To entitle a company to deduct the assessed value of real estate held by it, it must affirmatively appear that such real estate was paid for out of the capital of the company. *People ex rel.* v. *Com'rs of Taxes*, 31 *Hun* (*N. Y.*) 32. — DISTINGUISHING People ex rel. *v.* Com'rs of Taxes, 23 N. Y. 193; Oswego Starch Factory *v.* Dolloway, 21 N. Y. 455.

Funded and floating debts owed by a company are not within the deductions provided for by Laws 1857, ch. 456, § 3, and cannot be used by way of absorbing the balance adopted by the commissioners as the amount for which the company is assessable. *People ex rel.* v. *Com'rs of Taxes*, 21 *N. Y. S. R.* 350, 51 *Hun* 641, *mem.*, 4 *N. Y. Supp.* 43.

(9) *Assessing real estate, generally.*—When assessors add anything to the valuation by reason of the increased cost of the road, or on account of its income or productiveness, so far they transcend the authority vested in them and their act is void. *Albany & W. S. R. Co.* v. *Canaan*, 16 *Barb.* (*N. Y.*) 244.

Under the Act of 1851, ch. 176, § 5, all real and personal estate liable to taxation is to be assessed at its full and true value. *Held*, that the fact that the assessors did not obey the statute, and assessed property generally at one third of its value, would not justify the court in reducing a railroad assessment which was fixed at one third of the actual value of the property as ascertained by the assessors, but at more than that amount as valued by the company, but at less than the actual value fixed by the company. The company valued its property in the town at $24,000 and it was assessed at $17,500. *People ex rel.* v. *Dixon*, 8 *Hun* (*N. Y.*) 178.

But where it appears that other property in the town has not been assessed at more than forty per cent. of its actual value, computed as the statute requires it to be computed, while railroad property has been assessed at its full actual value, the valuation of the railroad property should be reduced sixty per cent. *People* v. *Keator*, 67 *How. Pr.* (*N. Y.*) 277; *affirmed in* 36 *Hun* 592.

One of the chief factors in determining the value of a railroad for the purposes of assessment is the amount earned by the company, or its capacity to do business, and the return of a fair equivalent to its stockholders for the money invested. In assessing the real estate of a railroad corporation the assessors are not required to assess it as an isolated piece of land, but each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom. It is to be regarded as part and parcel of the whole railroad, and the whole line is to be taken into consideration; its capacity for earnings, and its expenses, etc., are all to be taken into account, and from that, among other things, is to be evolved the proper amount which should be assessed upon the company's property in each town through which the line passes. *People* v. *Wilder*, 3 *N. Y. S. R.* 159.—QUOTED IN People ex rel. *v.* Assessors, 17 N. Y. S. R. 980.

There was no process by which the assessors of Newburgh, in 1884, could fix the value of the West Shore railway. It had no value save for a sale to its more powerful rival, whose inducement to purchase could only come from the desire to end the relentless cutting of rates. It was thought to be only a question of time and price, but no one could do more than guess at either. The situation of the company made it impracticable for the Newburgh assessors to consider the value of the whole route, or to value the two miles in that city ratably with the whole. *People ex rel.* v. *Toohey*, 4 *N. Y. S. R.* 895.

But it seems that the requirement of the statute will be complied with by stating the number of miles of road, without adding the quantity of land embraced. *Albany & W. S. R. Co.* v. *Canaan*, 16 *Barb.* (*N. Y.*) 244.

(10) *Cost and earnings must be considered.*—In estimating the value of railroad property within a town, its cost is not to govern solely. Its productiveness for railroad purposes, and other things, must be considered. *People ex rel.* v. *Pond*, 13 *Abb. N. Cas.* (*N. Y.*) 1; *appeal dismissed in* 92 *N. Y.* 643, *mem.*—FOLLOWED IN People ex rel. *v.* Keator, 36 Hun 592.—*People ex rel.* v. *Keator*, 36 *Hun* (*N. Y.*) 592, 17 *Abb. N. Cas.* 369; *affirming* 67 *How. Pr.* 277; *appeal dismissed in* 101 *N. Y.* 610, *mem.*, 3 *How. Pr. N. S.* 210.—FOLLOWING People ex rel. *v.* Weaver, 20 Wkly. Dig. 565; People ex rel. *v.* Pond, 13 Abb. N. Cas. 1; People ex rel. *v.* Barker, 48 N. Y. 70.—*People ex rel.* v. *Keator*, 67 *How. Pr.* (*N. Y.*) 277; *affirmed in* 36 *Hun* 592.

And it is not competent for the company to show the average net earnings of the company for the last four years, and what part thereof was derived from other sources than the use of the taxed property, such as earnings of freight cars on other roads, profits of its storage and elevator business, etc. *People ex rel.* v. *Pond*, 13 *Abb. N. Cas.* (*N. Y.*) 1; *appeal dismissed in* 92 *N. Y.* 643, *mem.*

The amount of dividends is not the sole evidence of the productiveness of a road, for the purpose of taxation. The actual value of the stock is some evidence on that point; and the legislature may in some cases determine the rate of taxation by the dividends received, and in others by the actual value of the stock. *People* v. *Delaware & H. Canal Co.*, 54 *Hun* 598, 27 *N. Y. S. R.* 624, 7 *N. Y. Supp.* 890; *affirmed in* 121 *N. Y.* 666, *mem.*, 24 *N. E. Rep.* 1093, *mem.*

Under the Act of 1851, all real and personal estate liable to taxation is required to be assessed at its full and true value as the assessors would "appraise the same in payment of a just debt due from a solvent debtor," and no distinction is made between the property of a corporation and that of an

individual; and it is required that the assessors shall enter the quantity of real estate owned by any company situate within their town or ward at the actual value thereof, estimated as in other cases. *Held*, that it is the duty of the assessors to estimate the value of land of a railroad and the erections and fixtures thereon, irrespective of whether the road is well managed or not, or whether it is profitable to the stockholders or not. Such property is to be appraised in the same manner as the adjacent lands belonging to individuals, and without reference to other parts of the railway. *Albany & S. R. Co.* v. *Osborn*, 12 *Barb.* (*N. Y.*) 223. — QUOTED IN Albany & W. S. R. Co. *v.* Canaan, 16 Barb. 244. REVIEWED IN State *v.* Central Pac. R. Co., 10 Nev. 47.

It is the duty of assessors to estimate and assess that portion of a railroad within their town "at its full and true value." In ascertaining this value, the superstructure and fixtures, and everything annexed to the land, are to be taken into account. But whether the stock of the company is above or below par, or whether the business of the road is productive or unproductive, are questions with which the assessors have nothing to do. *Albany & W. S. R. Co.* v. *Canaan*, 16 *Barb.* (*N. Y.*) 244.—QUOTING Albany & S. R. Co. *v.* Osborn, 12 Barb. 223.—REVIEWED IN State *v.* Central Pac. R. Co., 10 Nev. 47.

The law requires real estate to be assessed at its actual value. Actual sales of the same, or similar property, may be taken into consideration in determining this value, and also the earning capacity of the property; but mortgages on the property cannot be deducted. *People ex rel.* v. *Haren*, 19 *N. Y. S. R.* 818, 3 *N. Y. Supp.* 86.

In assessing a piece of a railroad passing through a town, the earning capacity of the whole road may be considered. In ascertaining such earning capacity it is proper to deduct operating expenses, but not interest on mortgages. *People ex rel.* v. *Haren*, 19 *N. Y. S. R.* 818, 3 *N. Y. Supp.* 86.

The real property of a railroad should not be valued for taxation with reference to the earning capacity of the road alone; but the original cost, the cost of present reproduction, and its earning capacity should be considered. *People ex rel.* v. *Ganley*, 29 *N. Y. S. R.* 130, 8 *N. Y. Supp.* 563, 56 *Hun* 639; *affirmed in* 131 *N. Y.* 566, *mem.*, 42 *N. Y. S. R.* 947, 30 *N. E. Rep.* 64.

It is proper for assessors, in valuing the property of a railroad corporation in their town liable to assessment, to take into consideration the verified reports of the company as to earnings, made as required by law. *People ex rel.* v. *Hicks*, 105 *N. Y.* 198, 7 *N. Y. S. R.* 359, 11 *N. E. Rep.* 653; *affirming* 40 *Hun* 598, 2 *N. Y. S. R.* 294.

(11) *The road as a whole is to be considered.*—And the value of the part of the road which is in the town is to be ascertained by valuing, as a part of a whole, a continuous way to carry passengers and freight from one commercial business point to another, and the profits of its use for that purpose. *People ex rel.* v. *Pond*, 13 *Abb. N. Cas.* (*N. Y.*) 1; *appeal dismissed in* 92 *N. Y.* 643, *mem.* *People* v. *Zoeller*, 15 *N. Y. Supp.* 684. *People ex rel.* v. *Keator*, 67 *How. Pr.* (*N. Y.*) 277; *affirmed in* 36 *Hun* 592.—FOLLOWED IN People ex rel. *v.* Roosa, 2 How. Pr. N. S. (N. Y.) 454.

Under the Act of 1884, ch. 57, requiring assessors to value "real property at its full, fair value, as the same would be appraised in the payment of a just debt by a solvent debtor," the assessors may take into account the cost, location, feeders, probable increase of business, and, if practicable, should ascertain the aggregate net earnings of the road, which they may capitalize and consider in determining what is the full and fair value; but they should do this with a knowledge of the road as a whole, with its net earnings and expenses. *People ex rel.* v. *Assessors*, 17 *N. Y. S. R.* 980, 2 *N. Y. Supp.* 240.—QUOTING People ex rel. *v.* Hicks, 40 Hun 601; People ex rel. *v.* Wilder, 3 N. Y. S. R. 159.

In assessing the real estate of a railroad corporation, assessors are not required to assess it as an isolated piece of land, but each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom. *People ex rel.* v. *Barker*, 48 *N. Y.* 70, 2 *Am. Ry. Rep.* 149; *affirming* 33 *How. Pr.* 150, 48 *Barb.* 173.

(12) *Hearings and proceedings before the board.*—Under 1 Rev. St. 393, §§ 19, 20, providing that all persons conceiving themselves aggrieved by an assessment are entitled to a hearing before the board of assessors, a corporation is entitled to such a hearing, as well as any natural person, and it cannot be deprived thereof by its failure to comply with the statutory provisions

requiring the filing of a written statement. *People ex rel.* v. *Pitman*, 9 *N. Y. S. R.* 469, 45 *Hun* 588, *mem. People ex rel.* v. *Cheetham*, 20 *Abb. N. Cas.* (*N. Y.*) 44. *People ex rel.* v. *Duguid*, 68 *Hun* 243, 52 *N. Y. S. R.* 190, 22 *N. Y. Supp.* 988.

The omission of the agent of a company to appear before the assessors on grievance day, through reliance upon the assurance of one of the assessors that if the board did not then reduce the company's assessment, it would adjourn to another day to enable the agent to present his complaint, is excusable and is not such laches as precludes the railroad company from reviewing the assessment by *certiorari* under the act of 1880. *People ex rel.* v. *Duguid*, 68 *Hun* 243, 52 *N. Y. S. R.* 190, 22 *N. Y. Supp.* 988.

A company objected that an assessment roll was in three parts on the review day when such roll was inspected by it, and an objection made to the valuation of its property as excessive, and that afterwards the three parts were made into a single roll, which was verified. *Held*, that this did not show any material departure from the statute, as there is nothing forbidding the roll to be originally made out in parts. *People ex rel.* v. *Clapp*, 46 *N. Y. S. R.* 509, 64 *Hun* 547, 19 *N. Y. Supp.* 531.

The Rev. St. ch. 13, title 4, § 24, as amended by ch. 536 of the Acts of 1857, makes it the duty of every railroad company to deliver on or before the first day of May in each year, to the assessors of each town or ward in which its road may run, a list of all real estate and the value thereof. By section 26 a penalty is imposed upon any company omitting to furnish the list within thirty days after the first day of May. *Held*, that if the list be delivered within the thirty days, the assessors must be controlled by it in like manner as if it had been delivered by the first day of May; and if received at any time before the rolls are completed, it must be regarded as *prima facie* evidence of value. *People ex rel.* v. *Ross*, 15 *How. Pr.* (*N. Y.*) 63.

But if such list be not delivered until after the completion of the roll, the assessors are not obliged to give it any effect or consideration, and the roll is to be regarded as completed when the assessors are ready to make a copy for public inspection, and give notice of a meeting for review. *People ex rel.* v. *Ross*, 15 *How. Pr.* (*N. Y.*) 63.

The relator, a corporation liable to taxation for state purposes under the Act of 1880, ch. 542, was omitted from the assessment roll by the assessors of the city in which it was taxable, and no tax upon its personal property for city and county purposes was imposed for that year. In 1881 it was assessed for that year, and, in addition, for the omitted year, under the act of 1865, the valuation for the year 1879 being taken. Notice was given as prescribed by the statute, and attention was also called to the laws of both years. *Held*, that the act of 1865 was adjustable to the change made by the act of 1880, and that the assessment was valid. *People ex rel.* v. *Board of Assessors*, 92 *N. Y.* 430; *affirming* 27 *Hun* 614, *mem.*

(13) *Reviewing assessments in court.*—It is incumbent upon a corporation, before it is entitled to call upon the court to correct an assessment by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish *data* showing that the actual value exceeds the sum fixed by the assessors. It is not enough that the evidence raises a doubt or permits a conjecture that injustice may have been done. *People ex rel.* v. *Com'rs of Taxes*, 104 *N. Y.* 240, 10 *N. E. Rep.* 437, 5 *N. Y. S. R.* 647; *affirming* 40 *Hun* 631, *mem.*

Assessors were required to pay costs in a case where they refused to be bound by the law and the evidence, and fixed an erroneous and outrageous valuation on railroad property for no other reason than that it was in their power so to do. *People ex rel.* v. *Wilder*, 3 *N. Y. S. R.* 159.

The Act of 1880, ch. 269, § 1, relating to reviewing tax assessments by *certiorari* upon petition, requires that the petition shall be duly verified, but the form for the pleading is not prescribed; therefore a verification by an agent which does not state that there is no officer or director of his company then in the county, but does state that no such officer or director resides in the county, is sufficient. *People ex rel.* v. *Cheetham*, 20 *Abb. N. Cas.* (*N. Y.*) 44.

The Act of 1880, ch. 269, provides for reviewing an assessment and taxation upon *certiorari*, and authorizes the court to order a reassessment, or a correction, where property has been assessed at a higher proportionate value than other property. It appeared that the property of a railroad company in a town had been assessed at nearly its full value, while other property in

the town was assessed at not more than forty per cent. of its value. *Held*, that the court would order a ratable reduction of the assessment of the railroad property. *People* v. *Zoeller*, 15 *N. Y. Supp.* 684.

Section 4 of the above act provides that the court may appoint a referee to take such evidence as it may direct in a proceeding to review such assessment. A return to a writ of *certiorari* contained a written statement signed by the assessors, to the effect that they had refused to hear testimony in reference to the assessment, offered by the agent of a railroad company in addition to his own affidavit. *Held*, that a reference should be ordered to take other testimony. *People* v. *Zoeller*, 15 *N. Y. Supp.* 684.

In such case the assessors testified that they understood that such written statement only showed that the agent of the company appeared before the board; but the chairman of the board testified that the statement was read before being signed. *Held*, that it would be taken as conclusive evidence against the assessors as to their refusal to hear other evidence. *People* v. *Zoeller*, 15 *N. Y. Supp.* 684.

Where a writ of *certiorari* to review an assessment is made returnable to a county clerk's office instead of at special term, it may be amended under 3 Rev. St. ch. 7, § 10, giving to the court power to amend a special proceeding. *People ex rel.* v. *Cook*, 42 *N. Y. S. R.* 245, 62 *Hun* 303, 17 *N. Y. Supp.* 546.—REVIEWING Bohlen *v.* Metropolitan El. R. Co., 121 N. Y. 546, 31 N. Y. S. R. 888; People ex rel. *v.* Assessors, 6 Civ. Pro. 297.

In a proceeding to review the assessment of that portion of a railroad situated in a certain town which was leased to a foreign corporation for the term of the corporate existence of the company owning the road, the lessee to pay the taxes on the property, the matter was referred to a referee. *Held*, that it was proper for him to take the rentals received by the lessor and to divide the same by the length of the road, and to capitalize the amount so obtained, after making proper deductions for the cost of equipment, improvements, etc. *People ex rel.* v. *Reid*, 46 *N. Y. S. R.* 408, 64 *Hun* 553, 19 *N. Y. Supp.* 528.

277. North Carolina.—The legislature chartered a railroad with an exemption from taxation for a certain term, with the right to impose a tax thereafter whenever the annual profits should exceed six per cent. The profits exceeded six per cent. in the year 1866, but the legislature did not demand a tax until the year 1891, when a tax was imposed for each of the preceding years back to 1866. *Held*, that as the right to tax depended upon the charter contract, the legislature was not debarred from imposing the tax. It appeared that the company had failed to report its business, as required by its charter, until the year 1889, and this would excuse any apparent laches on the part of the legislature. *State ex rel.* v. *Seaboard & R. R. Co.*, 52 *Fed. Rep.* 450.

The right to value the tangible real and personal property of a corporation, as distinguished from its franchise, is vested by the Constitution in the township boards of trustees. Such franchise is capable of valuation, apart from the property which the corporation may happen to own; and a valuation of the franchise does not necessarily or properly include a valuation of the corporate property. *Wilmington, C. & A. R. Co.* v. *Brunswick County Com'rs*, 72 *N. Car.* 10.—APPROVED IN Wilmington R. Bridge Co. *v.* New Hanover County Com'rs, 72 N. Car. 15; Richmond & D. R. Co. *v.* Orange County Com'rs, 74 N. Car. 506. FOLLOWED IN Richmond & D. R. Co. *v.* Brogden, 74 N. Car. 707.

A franchise is property; and the franchise of a railroad corporation should be assessed for taxation separately and apart from its other property, and without taking such other property into consideration. *Richmond & D. R. Co.* v. *Brogden*, 74 *N. Car.* 707, 13 *Am. Ry. Rep.* 114.—QUOTING Wilmington R. Co. *v.* Reid, 13 Wall. (U. S.) 264.

The general assembly has no right to confer upon the governor, treasurer, and auditor the power to value the tangible, real, and personal property of a railroad corporation; such power is vested by the Constitution in the township board of trustees alone, and cannot be taken from them. *Richmond & D. R. Co.* v. *Brogden*, 74 *N. Car.* 707, 13 *Am. Ry. Rep.* 114.—FOLLOWING Wilmington, C. & A. R. Co. *v.* Brunswick County Com'rs, 72 N. Car. 10; Richmond & D. R. Co. *v.* Orange County Com'rs, 74 N. Car. 506.

In revising the tax lists the commissioners of a county, *ex mero motu*, at their August meeting, increased the valuation put upon the property of a company and then caused

notice to be served upon the company to appear at their September meeting and show cause why the same should not be fixed at the increased sum. *Held*, that the notice was sufficient and the action of the board warranted in law. *Cleaveland County Com'rs* v. *Atlanta & C. A. L. R. Co.*, 13 *Am. & Eng. R. Cas.* 266, 86 *N. Car.* 541.

The penalty prescribed by the Code, § 1960, against corporations for failure to make the returns required by the preceding section can only be recovered in an action brought by the state. A private relator cannot maintain the action. *State ex rel.* v. *Marietta & N. G. R. Co.*, 108 *N. Car.* 24, 12 *S. E. Rep.* 1041.—DOUBTING Katzenstein *v.* Raleigh & G. R. Co., 84 N. Car. 688.

A tax is a "debt" which the state and county may enforce against a corporation by creditors' bill for the appointment of a receiver. The state and county are not precluded from bringing such a suit because there is a specific remedy for the collection of taxes in the revenue act; nor because the state has the right to have the charter of the corporation declared forfeited when it fails to pay its taxes. *State* v. *Georgia Co.*, 54 *Am. & Eng. R. Cas.* 299, 112 *N. Car.* 34, 17 *S. E. Rep.* 10.

278. Ohio.—The provisions of the one-mile assessment pike law, together with the statutes that prescribe the duties of county auditors in this state, afford sufficient means for such officers to ascertain what personal property, and what property of a railroad company, is properly taxable in a taxing district created pursuant to the law. *New York, L. E. & W. R. Co.* v. *Marion County Com'rs*, 48 *Ohio St.* 249, 27 *N. E. Rep.* 548.

Where a track runs through a taxing district created under the one-mile assessment pike law (Rev. St. ch. 7, tit. 7), it is subject to taxation in such district in the proportion that the mileage of its track therein bears to its whole track, according to the rules for taxing railroads in this state prescribed by Rev. St. §§ 2770–2776. *New York, L. E. & W. R. Co.* v. *Marion County Com'rs*, 48 *Ohio St.* 249, 27 *N. E. Rep.* 548.

279. Oregon.—After the assessment of all the taxable property has been made and returned, and a tax levied thereon, the common council of a city has no power to order an additional assessment to be made of property subsequently coming within the city limits, but persons not previously taxed or assessed who shall commence, subsequently to the levying of the taxes, to sell and barter goods may be assessed. *Oregon Steam Nav. Co.* v. *Portland*, 2 *Oreg.* 81.

Under the laws of Oregon there are, for the purpose of assessment and taxation, but three kinds of real property; by this classification the state board of equalization is bound, and cannot, either on the basis of present ownership, source of title, or otherwise, change the same so as to add new kinds, or to increase the assessments of individuals or classes of people holding lands of the kinds thus invented. The board has no authority to classify railroad lands and tracks and change their valuation separately, but can only change the aggregate valuation of the class to which they belong. *Oregon & C. R. Co.* v. *Croisan*, 54 *Am. & Eng. R. Cas.* 312, 22 *Oreg.* 393, 30 *Pac. Rep.* 219.

Under the Act of 1891 (Sess. Laws, 124), the actual value of a railroad is the correct basis for taxation, and not the bonded indebtedness, capital stock, and current indebtedness. *State* v. *Southern Pac. Co.*, 55 *Am. & Eng. R. Cas.* 539, 23 *Oreg.* 424, 31 *Pac. Rep.* 960.

A law authorizing a tax collector to add to the tax roll property omitted therefrom by the assessor, without notice to the owner, is not unconstitutional where there is an equalization board with power to correct the assessment rolls, when the time of its meeting is fixed by statute and the owner may appear and be heard. *So held*, in a proceeding by a company to enjoin a tax collector from selling its lands so listed without notice to the company. *Oregon & C. R. Co.* v. *Lane County*, 23 *Oreg.* 386, 31 *Pac. Rep.* 964.—QUOTING Railroad Tax Cases, 13 Fed. Rep. 766.

280. Pennsylvania.—The dividends of passenger-railway companies are distributable to paid stock, and are liable for city taxes; and the annual official reports made to the auditor-general of the state by the company are the best evidence of the amount of such stock. *Citizens' Pass. R. Co.* v. *Philadelphia*, 49 *Pa. St.* 251.—FOLLOWED IN Second & T. St. Pass. R. Co. *v.* Philadelphia, 51 Pa. St. 465; Philadelphia *v.* Ridge Ave. Pass. R. Co., 102 Pa. St. 190.

A company was bound by its charter to pay to the city on the excess of dividends above six per cent. per annum. *Held*, that the basis on which the estimate of tax was to be made was the capital actually paid in,

not the cost of the road nor the authorized capital. *Second & T. St. Pass. R. Co.* v. *Philadelphia*, 51 *Pa. St.* 465.—FOLLOWING Citizens' Pass. R. Co. *v.* Philadelphia, 49 Pa. St. 251. — FOLLOWED IN Philadelphia *v.* Ridge Ave. Pass. R. Co., 102 Pa. St. 190.

It is the right of financial officers of a corporation to retain the three-mill tax under the Act of April 29, 1844, without assessment by the county officers. The tax laws prior to the Act of April 30, 1864, imposed a tax on corporation bonds in the hands of non-residents. *Delaware, L. & W. R. Co.* v. *Com.*, 66 *Pa. St.* 64.—REVIEWED IN Com. *v.* Lehigh Valley R. Co., 16 Phila. (Pa.) 584.

Pennsylvania Act of June 7, 1879, after providing for the taxation of certain corporations, provides for a tax on dividends declared by any company or association during the year ending with the first Monday of November, and where no dividends have been declared, requires a report of the appraised value of capital stock between the 1st and 15th days of November of each year. *Held*, that stock is to be valued by its selling price between the 1st and 15th of November, and not by the average sales during the year. *Pennsylvania R. Co.* v. *Com.*, 94 *Pa. St.* 474.

Under the laws for the taxation of corporation indebtedness or loans, the return by the corporation of the amount of its indebtedness does not constitute an assessment. Neither does the account settled by the auditor-general against the corporation. A valid assessment must precede the collection of the tax, and the owner of the property, to wit, the bonds and mortgages, etc., must have notice and the right of appeal. *Com.* v. *Lehigh Valley R. Co.*, 13 *Am. & Eng. R. Cas.* 347, 104 *Pa. St.* 89.

Railroad grounds on which are laid tracks used as approaches to stations and other buildings used in connection with the business of the railroad, together with freight and passenger stations, offices, roundhouses, machine shops, and all public works of the company, with their necessary appliances, are taxable as personalty. *Northumberland County* v. *Philadelphia & E. R. Co.*, (*Pa.*) 9 *Atl. Rep.* 504.—APPROVING Pennsylvania R. Co. *v.* Pittsburgh, 104 Pa. St. 522.

The Revenue Act of 1879, § 2, provides that the secretary and treasurer of any corporation which has declared no dividends shall in each year, between November 1st and 15th, appraise its capital stock at its cash value, at not less than an average price for which it was sold during the year, for the purposes of taxation. *Held*, that the average price of stock between these dates is not conclusive as to its value. So where a company was in the hands of receivers pending a foreclosure, and the value of its stock depended upon the success or failure of certain plans for the reorganization of the company, the average price of stock between the above dates was held not conclusive. *Com.* v. *Philadelphia & R. R. Co.*, (*Pa.*) 22 *Atl. Rep.* 235.—DISTINGUISHING Pennsylvania R. Co. *v.* Com., 94 Pa. St. 474. QUOTING Com. *v.* Lehigh Valley R. Co., 37 Leg. Int. 407.

When a corporation is in the hands of receivers, and its treasurer is also treasurer of the receivers, it is clearly the duty of the treasurer, under the act of 1885, to assess the tax upon the company's bonds, on payment by the receivers of interest thereon. *Com.* v. *Philadelphia & R. C. & I. Co.*, 137 *Pa. St.* 481, 20 *Atl. Rep.* 531, 580.

If such assessment were made by the treasurer, it would be the duty of the receivers to pay the tax to the commonwealth; and if he make default in the assessment, the corporation is liable therefor, and an account for the tax may properly be settled against it. *Com.* v. *Philadelphia & R. C. & I. Co.*, 137 *Pa. St.* 481, 20 *Atl. Rep.* 531, 580.

Under the Act of May 24, 1878, the powers of the board of revenue commissioners are limited to the equalization of the valuation of property taxable for state purposes, and it has no authority where a county has been divided to apportion a credit allowed by the commonwealth to the old county and transfer a part of it to the new county. *Lackawanna County* v. *Com.*, 156 *Pa. St.* 477, 26 *Atl. Rep.* 1119.

A proper basis of assessment to ascertain the proportion of property upon which the Pullman Palace Car Company, incorporated under laws of another state, should be taxed, is such proportion of the capital stock of the company as the number of miles over which it runs cars within this state bears to the whole number of miles in this and other states over which its cars are run. *Com.* v. *Pullman Palace Car Co.*, 2 *Pa. Dist.* 618.—FOLLOWING Pullman Palace Car Co. *v.* Com., 107 Pa. St. 156.

Such part of the line and ground of a railroad as can be acquired under the statute

as right of way, with the structures, including houses for trackmen, thereon, immediately necessary for the corporate franchises, and offices of superintendents and assistants on same lot, with depot and reasonable approaches between them, are not taxable as real estate. *Appeal of Western Pa. R. Co.*, 18 *Phila.* (*Pa.*) 614.—QUOTING Pennsylvania R. Co. *v.* Pittsburgh, 104 Pa. St. 540; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 29.

281. South Dakota.—The Organic Act of the territory of Dakota provides that "all property subject to taxation shall be taxed in proportion to its value." *Held*, that this limitation has no application to assessments for local municipal improvements, but only relates to general territorial, county, and municipal taxes, levied to defray the ordinary expenses of the government. *Winona & St. P. R. Co.* v. *Watertown*, 1 *S. Dak.* 46, 44 *N. W. Rep.* 1072.—REVIEWING Neustadt *v.* Illinois C. R. Co., 31 Ill. 484.

An assessment for improving an avenue in a city was apportioned on the property of plaintiff, as well as all other property abutting on said avenue, along the line of the same, at a fixed sum per front foot. *Held*, that such an apportionment is not repugnant to or in conflict with the Organic Act of the territory, and was a proper exercise of the power of the city under its charter, and therefore legal and valid. *Winona & St. P. R. Co.* v. *Watertown*, 1 *S. Dak.* 46, 44 *N. W. Rep.* 1072.

282. Tennessee.—(1) *Under Act of 1873.*—A county assessment of a railroad for taxation, by estimating the value of the whole road, in the state and out of it, including rolling stock, equipments, and buildings, and then taking the average value per mile and multiplying by the number of miles in the county, is not objectionable. *Louisville & N. R. Co. v. State*, 8 *Heisk.* (*Tenn.*) 663, 19 *Am. Ry. Rep.* 107.—CRITICISING Sangamon & M. R. Co. *v.* Morgan County, 14 Ill. 163. REVIEWING Farmers' L. & T. Co. *v.* Hendrickson, 25 Barb. (N. Y.) 484. REVIEWED IN State *v.* Memphis & C. R. Co., 14 Lea (Tenn.) 56.

A railroad is not to be estimated as so much land used for farming purposes, but according to its value as a railway. *Louisville & N. R. Co.* v. *State*, 8 *Heisk.* (*Tenn.*) 663, 19 *Am. Ry. Rep.* 107.—APPLYING People ex rel. *v.* Barker, 48 N. Y. 70, 2 Am. Ry. Rep. 149; People *v.* Fredericks, 48 Barb. 173. REVIEWING State *v.* Illinois C. R. Co., 27 Ill. 64.

There are four elements of property in all joint stock companies to be considered in estimating the same for taxation: (1) the capital stock; (2) the corporate property; (3) the franchise; (4) the individual stock of the stockholders. *Louisville & N. R. Co.* v. *State*, 8 *Heisk.* (*Tenn.*) 663, 19 *Am. Ry. Rep.* 107.—OVERRULED IN Mayor, etc., of Chattanooga *v.* Nashville, C. & St. L. R. Co., 7 Lea (Tenn.) 561.

The provision for separate assessments of the property in each civil district, by the several district assessors, does not prevent the county judge or other officer required to assess property omitted from assessing, in gross, property of the same taxpayer, in this instance a railroad, extending through several districts. *Louisville & N. R. Co.* v. *State*, 8 *Heisk.* (*Tenn.*) 663, 19 *Am. Ry. Rep.* 107.

The assessment of property is not subject to any exact standard, and that of the assessors appointed by law is to be presumed correct until the contrary appears. *Louisville & N. R. Co.* v. *State*, 8 *Heisk.* (*Tenn.*) 663, 19 *Am. Ry. Rep.* 107.

Code, § 488, which provides that "the rate of taxation for county purposes shall not exceed the rate of state taxation for the time being," prohibits the counties, after making a levy for general county purposes equal to the rate of state taxation, to make additional levy for special purposes, unless specially authorized by law. County purposes are such charges in the way of expenditures as are fixed by law upon the counties, and appertain to the general administration of county affairs. The expense of keeping up bridges, being a duty imposed upon the county, is included in the tax for general county purposes, and a special bridge tax is therefore unauthorized. But a special tax may be levied to meet a special burden imposed on the county by the legislature, or when that body specially authorizes the county courts to levy such tax—as under the Act of 1873, § 39, where an "additional school tax" is allowed, not to be included in the assessment for general county purposes. Counties may levy a tax equal to the state tax for school purposes, although a levy has been made for general county purposes. The legislature has so authorized. *Nashville, C. & St. L. R. Co.* v. *Franklin*

County, 7 *Am. & Eng. R. Cas.* 258, 5 *Lea* (*Tenn.*) 707.—OVERRULED IN PART IN Nashville, C. & St. L. R. Co. *v.* Hodges, 7 Lea 663.

(2) *Under Act of* 1875.—The Act of March 20, 1875, providing for aggregating the value of railroad property, and dividing the same by the number of miles in the road, and multiplying the result by the number of miles of road in any county or municipal corporation, for the purpose of taxation, is in conflict with that provision of the state Constitution requiring taxation to be [illegible] and uniform throughout the state, and providing that no species of property shall be taxed higher than any other species of property of the same value. *Mayor, etc., of Chattanooga* v. *Nashville, C. & St. L. R. Co.*, 7 *Lea* (*Tenn.*) 561.—OVERRULING Louisville & N. R. Co. *v.* State, 8 Heisk. 663.—QUOTED IN Franklin County *v.* Nashville, C. & St. L. R. Co., 12 Lea 521. REVIEWED IN State *v.* Memphis & C. R. Co., 14 Lea 56.

The act further provides that "from the aggregate value is to be deducted the real cash value of individual shares." The constitutional mandate that "all property shall be taxed" prevents the legislature from granting any exemption whatsoever, no matter what the consideration. The grant of the exemption is unconstitutional and void. *Mayor, etc., of Chattanooga* v. *Nashville, C. & St. L. R. Co.*, 7 *Lea* (*Tenn.*) 561. —OVERRULING Louisville & N. R. Co. *v.* State, 8 Heisk. 663. QUOTING Memphis & C. R. Co. *v.* Gaines, 3 Tenn. Ch. 611.

Taxes authorized to be assessed for a special purpose, as for the construction of public bridges, are not included in computing the maximum rate at which taxes may be assessed for county purposes. *Nashville, C. & St. L. R. Co.* v. *Hodges*, 7 *Lea* (*Tenn.*) 663.—OVERRULING IN PART Nashville, C. & St. L. R. Co. *v.* Franklin County, 5 Lea 711.

A board of railroad tax assessors appointed by the state was proceeding under an imperative statute to assess several railroad companies for state and local taxation, the roads extending through a number of counties, and whose charters contained certain exemptions from taxation. *Held*, that the companies were entitled to a temporary injunction until the questions involved could be heard and determined. *Memphis & C. R. Co.* v. *Gaines*, 3 *Tenn. Ch.* 478.

(3) *Under amendments of* 1877, 1879, 1881, 1882, *and* 1883.—Under Tenn. Constitution the mode of ascertaining the value of particular kinds of property for taxation is left to the discretion of the legislature, and that body may adopt a mode of assessment by assessors for the state at large, and such a mode for ascertaining the value of the franchise, roadway, rolling stock, and other property not having a local *situs*, of a railroad company is eminently proper. *Franklin County* v. *Nashville, C. & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 445, 12 *Lea* (*Tenn.*) 521.—QUOTING Mayor, etc., of Chattanooga *v.* Nashville, C. & St. L. R. Co., 7 Lea 566.

No better mode of determining the value of the portion of the roadway of a company in any one county for taxation, and of the value of the franchise, rolling stock, and other property without a *situs*, for that part of the roadway, has been devised than to ascertain the value of the whole road, the whole rolling stock, and the whole of the non-local property, and apportioning the value for county taxation by the relative length of the road within the county to the whole length. *Franklin County* v. *Nashville, C. & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 445, 12 *Lea* (*Tenn.*) 521.—QUOTING State R. Tax Cases, 92 U. S. 608.

The Act of 1875, ch. 78, and the acts amendatory thereof, which provide for the appointment of a board of state assessors to value the property of railroad companies, and a revising board of examiners, are so far constitutional, notwithstanding some severable unconstitutional provisions in the earlier acts, that assessments under them acquiesced in by the railroad company in paying, and by a county in receiving, the county tax on the county's proportional part of the valuation, are binding, when it appears that the county has received a larger amount of taxes than it would have been entitled to upon a strictly legal assessment. *Franklin County* v. *Nashville, C. & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 445, 12 *Lea* (*Tenn.*) 521.

The Act of 1879, ch. 79, authorizing the tax collectors to assess all property which, by mistake of law or fact, has not been assessed, applies to a case where there has been a failure to assess at all, and not to a case where the property has already been legally assessed, although not in every respect correctly. *Franklin County* v. *Nashville, C. & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 445, 12 *Lea* (*Tenn.*) 521.

If the board of railroad assessors does not follow the provisions of the statute, its

action is subject to the revisory jurisdiction of the courts, invoked by *certiorari*. Although the boards of assessors and examiners may be officers of the state, and proposing to discharge their duties as such, yet if they overleap the prescribed limits of the law under which they act, it is the right of those about to be injured to ask for, and the duty of the courts to grant, restraining relief; and this may be done by petition for and writs of *certiorari* and *supersedeas*. *Louisville & N. R. Co.* v. *Bate*, 17 *Am. & Eng. R. Cas.* 494, 12 *Lea* (*Tenn.*) 573.—FOLLOWED IN Louisville & N. R. Co. *v.* Bate, 22 Fed. Rep. 480.

As such assessments may be reviewed by the writ of *certiorari* and *supersedeas* in the state court, a federal court will not grant an injunction. *Louisville & N. R. Co.* v. *Bate*, 22 *Fed. Rep.* 480.—FOLLOWING Louisville & N. R. Co. *v.* Bate, 12 Lea (Tenn.) 573.

The Tenn. statutes require that all proof be reduced to writing, sworn to and subscribed, etc. If the assessors base their estimates of value upon their personal knowledge formed from inspection and examination, which they may do, like all other testimony it should be reduced to writing, and an opportunity to cross-examine allowed the railroad. *Louisville & N. R. Co.* v. *Bate*, 17 *Am. & Eng. R. Cas.* 494, 12 *Lea* (*Tenn.*) 573.

The assessors should assess separately each railroad owned by a company. The fact that the company buys or leases a road in continuation, or rather in extension, of the original line, can make no difference. The main stem, roads bought or leased, and branches should be separately assessed, and counties through which branches run are only entitled to the tax on the branches according to their respective values. *Louisville & N. R. Co.* v. *Bate*, 17 *Am. & Eng. R. Cas.* 494, 12 *Lea* (*Tenn.*) 573.

The roadbed, franchise, and superstructure of railroads are so essentially intermingled, and each so indispensable to the value of the others, that they should be assessed together. *Louisville & N. R. Co.* v. *Bate*, 17 *Am. & Eng. R. Cas.* 494, 12 *Lea* (*Tenn.*) 573.

The mandate of the statute requiring assessors to assess rolling stock and other distributable property of a company separately from its other property implies an authority to value it together as a whole. *Louisville & N. R. Co.* v. *Bate*, 17 *Am. & Eng. R. Cas.* 494, 12 *Lea* (*Tenn.*) 573.

Under the Act of 1879, ch. 79, property should be assessed at its value on Jan. 10 of each year. It seems that if property changes hands after that date an assessment in the name of the subsequent owner would be valid and fix a lien on the property. *Chesapeake, O. & S. R. Co.* v. *State*, 13 *Lea* (*Tenn.*) 348.

Railroad property is liable for highway taxes upon its assessed value as returned by the commissioners. Whether the proper distribution of the taxes among the road districts has been made is a matter for the districts, and not for the company, to determine. *State* v. *Cincinnati, N. O. & T. P. R. Co.*, 13 *Lea* (*Tenn.*) 500.

The property of a company liable to taxation for years previous to the act of 1875, which first created a state board of assessors for the assessment of such property, may be assessed under a subsequent act of the legislature expressly providing for its assessment for the taxes of those years. *State* v. *Memphis & C. R. Co.*, 14 *Lea* (*Tenn.*) 56.—REVIEWING Louisville & N. R. Co. *v.* State, 8 Heisk. 663; Mayor, etc., of Chattanooga *v.* Nashville, C. & St. L. R. Co., 7 Lea 561.

Under the acts of 1879 and 1883 making it the duty of all collectors of taxes to assess omitted property the comptroller of the state is the proper officer to make the assessment of railroad property. *State* v. *Memphis & C. R. Co.*, 14 *Lea* (*Tenn.*) 56.

Under the Act of 1879, ch. 79, and the subsequent acts amending the same, the trustee of a county is the proper officer to assess railroad property for county taxation, where the same has been omitted by the state assessors; and where his assessment is disputed by the company, the assessment declared by the chairman of the county court will be binding when properly made. *Chesapeake, O. & S. W. R. Co.* v. *Lauderdale County*, 16 *Lea* (*Tenn.*) 688.

If from such assessment the county asks an appeal to the chairman of the county court, that is a sufficient proceeding, under the statute, to entitle the company to a revaluation of the property before the chairman. And if the trustee, notwithstanding the proceeding, issue a distress warrant, or its equivalent, for the collection of the taxes, the company may take the case into the circuit court by writs of *certiorari* and *supersedeas*, and the judgment of this court sustaining the assessment but quashing the

warrant would be final, requiring no remand of the cause, and only a *procedendo* to the chairman of the county court to make the revaluation. *Shelby County* v. *Mississippi & T. R. Co.*, 16 *Lea* (*Tenn.*) 401, 1 *S. W. Rep.* 32.

The taxes for the years antedating the act of 1875 and amendatory acts providing for the assessment of railroad property for purposes of taxation by a board of state assessors may be assessed under the general revenue laws of the particular years, but the company, upon the revaluation by the chairman of the county court, may furnish all the data railroad companies are required to furnish to the state board. *Shelby County* v. *Mississippi & T. R. Co.*, 16 *Lea* (*Tenn.*) 401, 1 *S. W. Rep.* 32.

Bonds issued by an organized and going corporation to its stockholders, upon a merely colorable consideration, as a "bond dividend," and assessed as bonds for taxation, are to be treated, in determining validity of assessment, as bonds and not as stock shares. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

Assessment, as omitted property, of the entire amount of a corporation's bonds, in a single item, to "unknown owners," without notice to any holders of the bonds, or their agents or representatives, is void. The corporation is not, for this purpose, to be deemed, under the Act of 1887, ch. 2, § 24, the "agent" or "representative" of its bondholders. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

Notice to a corporation is sufficient, under Act of 1887, ch. 2, § 24, for assessment of shares of stock to their holders as omitted property, but not as to like assessment of bonds against the bondholders. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

Statutes authorizing assessment for taxation of property omitted from the regular assessment are valid and constitutional. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

The proper method is to assess a street railroad as a whole, including, as elements of value, its franchise, right of way, iron rails, ties, spikes, etc.; but an assessment of its right of way and franchise, as a separate item from its other property, is not invalid. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

Right of way acquired by a street railroad over streets of a city is an easement in realty and assessable for taxation as such. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

Under Tennessee statutes the fact that railroad property has been assessed and a tax collected under an unconstitutional statute does not estop the municipality receiving the taxes from disputing the correctness of the valuation and making a new assessment. *Cincinnati Southern R. Co.* v. *Guenther*, 19 *Fed. Rep.* 395.

And the provision of the statute allowing collectors to assess property which has escaped regular assessment by mistake applies to railroad property. *Cincinnati Southern R. Co.* v. *Guenther*, 19 *Fed. Rep.* 395.

Where railroad property has been intentionally assessed at an exaggerated value, which renders the tax unconstitutional, the company may be required to pay the tax justly due without a new assessment. *Cincinnati Southern R. Co.* v. *Guenther*, 19 *Fed. Rep.* 395.

283. Texas. — Where a special tax is levied, no special assessment of the taxable property on which it is to be collected is required to be made. *Hall* v. *Houston & T. C. R. Co.*, 39 *Tex.* 286.

The state board of equalization created by the state Constitution has the power to determine the value of railroad property for taxation in a proper case; and the fact that the company thinks the valuation excessive does not give to it the right to resort to court. *International & G. N. R. Co.* v. *Smith County*, 7 *Am. & Eng. R. Cas.* 263, 54 *Tex.* 1.—FOLLOWING Houston & T. C. R. Co. *v.* Presidio County, 53 Tex. 518.

When a taxpayer renders his tax list to the assessor in person, and, after answering all questions by him, subscribes the oath prescribed by the statute, if the assessor, for cause deemed sufficient, proceeds then and there to change the valuation, and the taxpayer then makes oath that the valuation is excessive, the case is one coming within the Act of 1876, § 17. If, however, the valuation be forwarded by mail, oath being made to the list, out of the county in which it is rendered, before some other officer, the case

is then under the provisions of section 5, and the assessor, if dissatisfied, is neither required nor empowered to affix a valuation, but should refer the same to the board of equalization. If not forwarded by mail, but conveyed by another party, it would still be under section 5. *International & G. N. R. Co.* v. *Smith County*, 7 *Am. & Eng. R. Cas.* 263, 54 *Tex.* 1.

The acts of *de facto* deputy assessors, in raising the valuation of property listed for taxes, are not rendered invalid because they may have been legally disqualified from acting as deputies by reason of their holding other offices. *Texas & P. R. Co.* v. *Harrison County*, 54 *Tex.* 119.

284. Virginia.—The Constitution, art. 9, § 1, provides that taxation by state, county, or corporate bodies shall be equal, uniform, and *ad valorem*. *Held*, that if a county levy on railroads within the county be of ever so little higher rate than it is on other property in the county, such levy violates the Constitution. *Shenandoah Valley R. Co.* v. *Clarke County Sup'rs*, 78 *Va.* 269.

285. Wyoming.—The Act of Dec. 13, 1879, entitled "An act in relation to the assessment of railways and telegraph lines," only refers to territorial and county taxes, and does not include municipal taxes. (Peck, J., dissenting.) *Union Pac. R. Co.* v. *Ryan*, 2 *Wyom.* 408.

The property of railway and telegraph lines within the limits of a city is taxable in the same manner as other property in the city, according to the provisions of the city charter. *Union Pac. R. Co.* v. *Ryan*, 2 *Wyom.* 408.

286. New Brunswick.—Where a company neglects to furnish to the assessors the statement for taxation, under oath, required by 52 Vict. c. 27, the court may refuse to review the assessment by *certiorari*. *Ex parte Cram*, 30 *New Brun.* 545.

VIII. COLLECTION.

1. *In General.*

287. Statutory schemes for collection.—Under California Constitution, prohibiting the enactment of special laws for the collection of taxes, the scheme for the collection of taxes on railroads situated in two or more counties provided by the Pol. Code, §§ 3665-3670, which differs from that found in the general law, is unconstitutional and void. *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.

The enactment of the special provisions for the collection of such taxes is not authorized by the provision of Cal. Const. art. 13, that the franchise, roadbed, and property of railroads operated in more than one county shall be assessed by the state board of equalization, and that the legislature shall pass all laws necessary to carry out that provision, it being applicable only to assessments, and not to the levy or collection of the tax on the property when assessed, and conferring no power upon the legislature to pass special laws for those purposes. (Beatty, C.J., and Thornton, J., dissenting.) *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.

Kan. Tax Law of 1876, § 37, which provides for the collection of state taxes on railroad property in the unorganized counties of the state, is not in conflict with the provision of the Constitution requiring all laws of a general nature to have a uniform operation throughout the state, nor with the provision requiring the legislature to provide for a uniform and equal rate of assessment and taxation. *Francis* v. *Atchison, T. & S. F. R. Co.*, 19 *Kan.* 303, 19 *Am. Ry. Rep.* 20.

It is not an insuperable objection to Missouri Act of March 10, 1871, providing for the taxation of railroads, that it designates no particular mode by which cities and towns can collect the taxes from the roads under the valuation made by the state board of assessors. Where a statute creates a right and gives no remedy, the usual remedy is applicable to the case. *State ex rel.* v. *Severance*, 55 *Mo.* 378.

Pennsylvania Act of April 24, 1874, providing for the taxation of corporations, does not repeal section 4 of the General Revenue Act of May 1, 1868, establishing a tax rate against stocks; it only provides additional security for the payment of the taxes. In retaining the tax from dividends, a corporation must deduct it *pro rata* from the dividends on old preferred stock, as well as on new. *Whelen* v. *Catawissa R. Co.*, 9 *Phila.* (*Pa.*) 220.

The legislature has power to enact a change in the method of collection of taxes which were assessed and levied under a former law, as the method of collection is merely a matter of remedy and not of contract right. *Spokane County* v. *Northern Pac. R. Co.*, 5 *Wash.* 89, 31 *Pac. Rep.* 420.

288. Effect of repeal of tax law.—A statute authorizing the laying of a tax was repealed after an assessment of such tax, but before its collection. *Held*, that the repeal did not prevent the collection of such tax, it being regulated by the general tax law, which remained unrepealed; but that a penalty of twelve per cent. on failure to pay the tax could not be collected after the repeal of the statute, the rule being that the assessment of the tax was a thing passed and completed, and could not be affected by the repeal; *contra*, with respect to the penal percentage. *Belvidere* v. *Warren R. Co.*, 34 *N. J. L.* 193.

289. Making corporation agent for collection.—Under Pa. Acts of 1879 and 1881, imposing a state tax of four mills on the dollar of the value of all mortgages, money owned by solvent debtors, etc., and providing that corporations paying interest on loans liable for state taxes should pay into the state treasury said four-mill tax, and deduct the same from interest on such loans—*held*, that such tax is not upon the corporation but on its indebtedness in the hands of its creditors, the corporation only being charged with its collection. Therefore, where the tax was paid through other agencies, the corporation is not chargeable therewith. *Com.* v. *Lehigh Valley R. Co.*, 13 *Am. & Eng. R. Cas.* 347, 104 *Pa. St.* 89.

It is competent for the legislature to require that foreign corporations doing business in Pennsylvania shall become responsible for the assessment and collection of the tax imposed by law upon bonds issued by them and owned by residents of that state; and the Act of June 30, 1885, § 4, authorizes a tax settlement in such case. *Com.* v. *Delaware & H. Canal Co.*, 150 *Pa. St.* 245, 24 *Atl. Rep.* 599.

In the collection of the tax on corporate loans under the Act of 1885, the corporation or its treasurer is merely the agent or instrument of collection for the convenience of the state. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

The question is not whether the company has in effect and through its agencies paid the interest, but whether it paid at such time and in such manner that the treasurer could perform the duty imposed upon him by the Act of 1885 of deducting the tax from each shareholder's interest, or whether the omission to collect the tax was such a default as to make the company directly liable for the amount. *Com.* v. *Philadelphia & R. R. Co.* 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

The tax of five per cent. out of dividends payable by a bank, railroad company, etc., is a tax on the income of the holder of the stock, and only differs in the mode of collection from other income tax. The corporation, under the Act of 1864, §§ 120, 122, is made the agent of the government for its collection. *Philadelphia & R. R. Co.* v. *Barnes*, 7 *Phila.* (*Pa.*) 543. — REVIEWING Jackson *v.* Northern C. R. Co., Chase's Dec. (U. S.) 268.

Where a corporation fails to pay the interest on its bonded indebtedness, and is not financially able to pay the same, for a current year, so that its treasurer could not retain from the bondholders and pay over to the state treasurer the tax due on its bonds for said year, but did assess the amount of its indebtedness at its normal value and made report thereof to the auditor-general in due form within the time prescribed by law, said corporation is not liable under the Act of June 30, 1885, § 4, for failure to retain and pay over said tax. *Com.* v. *Philadelphia, N. & N. Y. R. Co.*, 2 *Pa. Dist.* 731. — QUOTING Com. *v.* Philadelphia & R. R. Co., 150 Pa. St. 312.

That another corporation, which had guaranteed said interest, paid the same, because of its guaranty, out of its own funds, without connection with the debtor corporation, and still holds the coupons for said interest, uncanceled, unredeemed, and uncollectible, does not render the corporation which issued such bonds and coupons liable for the state tax which accrued on such bonds during the year on which interest was thus paid. *Com.* v. *Philadelphia, N. & N. Y. R. Co.*, 2 *Pa. Dist.* 731.

A statute is valid which requires a corporation to retain and pay out of dividends due to its stockholders the tax assessed against them upon their shares. Such is the meaning of Tenn. Act of 1887, ch. 2, §§ 8–12. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. & Eng. R. Cas.* 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

The above statute, so far as it undertakes to convert corporations into agencies for collection of taxes laid upon their bondholders, is so faulty, defective, and onerous to corporations that it is void. *South Nashville St. R. Co.* v. *Morrow*, 39 *Am. &*

Eng. R. Cas. 518, 87 *Tenn.* 406, 2 *L. R. A.* 853, 11 *S. W. Rep.* 348.

290. Payment, generally. — A statute imposed a tax on the gross earnings of railroads, one half payable on or before the 15th day of February, and one half on or before the 15th day of August in each year. A company paid on March 5 a sum much larger than that for which it was constitutionally liable during the entire year. *Held*, that the payment operated as a discharge of the taxes for the entire year, and the company might restrain the treasurer from selling property to pay the August instalment. *Northern Pac. R. Co.* v. *Raymond*, 37 *Am. & Eng. R. Cas.* 379, 5 *Dak.* 356, 1 *L. R. A.* 732, 40 *N. W. Rep.* 538, 2 *Int. Com. Rep.* 321.

291. Tender.—Where, upon payment of taxes, the statute requires the tax receiver to give a receipt, a tender of taxes is not rendered invalid because such a receipt is demanded. *State* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 275, 21 *Nev.* 247, 30 *Pac. Rep.* 686.

292. What is receivable in payment.—The provision in the Legal Tender Act of 1862 making United States notes a legal tender for debts does not apply to state taxes. *Lane County* v. *Oregon*, 7 *Wall.* (*U. S.*) 71.—DISTINGUISHED IN Baltimore & O. R. Co. *v.* State, 36 Md. 519.

The revenue bond scrip issued by South Carolina in exchange for bonds of the Blue Ridge railroad which the state had guaranteed are not receivable for the taxes on said road. *Hagood* v. *Southern*, 117 *U. S.* 52, 6 *Sup. Ct. Rep.* 608. — FOLLOWED IN North Carolina *v.* Temple, 134 U. S. 22.

Virginia Funding Act of March 30, 1871, authorized coupons cut from consolidated bonds to be receivable in payment of all dues to the state. Subsequently the legislature passed an act requiring the validity of all coupons offered in payment of public dues to be tested by a certain proceeding in court. Still later it passed an act providing that officers should only receive money in payment for taxes, but provided a method by which a taxpayer might pay in coupons to the state treasurer. A railroad company disregarded these requirements and tendered the amount of taxes due on its property in coupons, which were refused. *Held*, that the coupons must be received, and a penalty of thirty per cent. under the statute was improperly imposed, and the company might restrain the authorities from selling its property. (Hughes, J., dissenting.) *Baltimore & O. R. Co.* v. *Allen*, 17 *Fed. Rep.* 171.

293. Duties of tax receiver. — It is the duty of a tax receiver to receive the full taxes on the least subdivision entered on the assessment roll, when properly tendered, and to give his receipt therefor. When a public officer has been clothed by statute with power to do an act which concerns the rights of third persons, the execution of the power may be insisted on, though the phraseology of the statute be permissive merely, and not peremptory. *State* v. *Central Pac. R. Co.*, 21 *Nev.* 94, 25 *Pac. Rep.* 442.

The law permits the taxpayer, and he has a right, to pay the tax on subdivisions of his property without paying the taxes upon his entire property. *State* v. *Central Pac. R. Co.*, 21 *Nev.* 94, 25 *Pac. Rep.* 442.

294. Appointment of collector.— Under a statute, a precinct in a county subscribed stock in a railroad company. The county judge was required to appoint a "collector of taxes so levied for said precinct" and attempted to find a collector, but failed. Appellees sought the aid of the circuit court to compel payment by the taxpayers, and the court adjudged that payment be made through its receiver. *Held*, that the power to levy or collect taxes is not one of the inherent powers of any judicial tribunal. The duty and the power are legislative, and when the legislature fails to enact proper legislation, or to provide the means of collecting taxes imposed, if the judiciary may interpose, the theory of the government and the distribution of powers are destroyed. The chancellor exceeded his power both in appointing a collector in the precinct, and in rendering judgment against the taxpayers. *McLean County* v. *Deposit Bank*, 81 *Ky.* 254.—APPROVING Pennington *v.* Woolfolk, 79 Ky. 13. QUOTING Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655; Rees *v.* Watertown, 19 Wall. 107; Barkley *v.* Levee Com'rs, 93 U. S. 258.

295. Special collector. — The order of a county court that the collector should collect a railroad tax, a duty belonging properly to a special collector, does not affect the liability of the sureties of the collector, nor release them from the obligation of their bond. *McLean* v. *State*, 8 *Heisk.* (*Tenn.*) 22.

A railroad tax in Tennessee is to be collected by a special tax collector, whether it

is collected for the company or for the county where it has issued warrants or bonds for the subscription. *McLean* v. *State*, 8 *Heish.* (*Tenn.*) 22.

The county court has no power to impose the duty of collecting a railroad tax on the regular county tax collector. It may appoint him railroad tax collector, but his sureties on his general bond will not be liable for the non-performance of his duties in that behalf. *McLean* v. *State*, 8 *Heish.* (*Tenn.*) 22.

296. Statement of clerk and return of collector.—The statement of the county clerk issued under Missouri Act of April 14, 1877, is not void because the tax is designated as a delinquent tax for the year 1875 instead of for 1876, it appearing that the proper tax had been levied for the proper period of time. *Morrison* v. *St. Louis, I. M. & S. R. Co.*, 96 *Mo.* 602, 9 *S. W. Rep.* 626, 10 *S. W. Rep.* 148.

A statement issued by a clerk under the above statute is in effect an execution. The return to such writ may be amended by the officer who made the return, even after the expiration of his term of office. *Morrison* v. *St. Louis, I. M. & S. R. Co.*, 96 *Mo.* 602, 9 *S. W. Rep.* 626, 10 *S. W. Rep.* 148.

A sale of property under a statement which includes a penalty for the non-payment of the tax, issued under the above statute by a county clerk, is not open to the objection that a ministerial officer cannot impose a penalty, it appearing that at the sale only a portion of the principal debt was realized. *Morrison* v. *St. Louis, I. M. & S. R. Co.*, 96 *Mo.* 602, 9 *S. W. Rep.* 626, 10 *S. W. Rep.* 148.

297. Demand before issuing warrant.*—N. Y. Act of 1882, ch. 410, § 848, known as the Consolidation Act, relating to New York city, requires the receiver of taxes to "demand payment of all taxes assessed on incorporated companies in said city from the president or proper officer of such companies" before attempting to enforce collection. By section 853 he is authorized to issue a warrant and to collect taxes by distress and sale. *Held*, that the statutory demand should precede a warrant to a marshal to collect taxes from a corporation. *McLean* v. *New York & S. B. F. & S. T. Co.*, 60 *Hun* 80, 14 *N. Y. Supp.* 74.

298. Warrant, how far protects officer.—Although a warrant for the collection of a tax or assessment, pursuant to a statute of the state, may have been issued erroneously or irregularly, if on its face it gives authority to the officer to collect the tax or assessment, replevin cannot be sustained for property taken by virtue of the warrant. *Troy & L. R. Co.* v. *Kane*, 72 *N. Y.* 614; *affirming* 9 *Hun* 506.

299. Settlements and compromises. — A certain portion of a railroad was conceded to be subject to an *ad valorem* tax, and in the course of extensive correspondence between the attorney of the company and the attorney-general only that portion was referred to, for which it was finally agreed that a certain sum should be paid and received. *Held*, that this was not a settlement releasing other portions of the road from an *ad valorem* tax. *State* v. *Southwestern R. Co.*, 70 *Ga.* 11.

A county court in Missouri has no authority to compromise city taxes. *Kansas City* v. *Hannibal & St. J. R. Co.*, 22 *Am. & Eng. R. Cas.* 239, 81 *Mo.* 285. — DISTINGUISHING St. Louis, I. M. & S. R. Co. *v.* Anthony, 73 Mo. 431; State *v.* St. Louis, K. C. & N. R. Co., 77 Mo. 202.

A company owing a certain amount of taxes for three years entered into a compromise with the board of county commissioners, whereby it paid a certain less amount and received a receipt purporting to be in full for all the taxes. *Held*, that such receipt was not evidence of payment in full for the tax of any one year. *State* v. *Central Pac. R. Co.*, 9 *Nev.* 79. — FOLLOWED IN State *v.* Central Pac. R. Co., 10 Nev. 47.

County commissioners have no power to compromise and settle suits instituted by the state against a railroad for the collection of delinquent taxes. *State* v. *Central Pac. R. Co.*, 9 *Nev.* 79.

Neither the county commissioners nor a district attorney have any authority to make a compromise or composition with delinquent taxpayers, nor to release them from payment of taxes. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 47.

Where two railroad companies are consolidated under the Pa. Act of March 24, 1865, and a new company is created, a debt due by one of the old companies to the state may be settled by the auditor-general against the new company. The settlement is not vitiated by naming both the com-

* Notice of assessment, see note, 13 AM. & ENG. R. CAS. 282.

panies as debtors. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

Substance, and not form, is required in the settlements by the auditor-general and state treasurer for corporation taxes; hence a settlement is valid which is made against a corporation formed by a consolidation of two companies, for a debt due by one of the old companies, and for a debt due by the new corporation. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

If a new company formed by consolidation of two corporations makes a second consolidation and assumes another name, it cannot thereby escape payment of a debt due before the second consolidation. A settlement can be made against it in its own name. *Buffalo & E. R. Co.* v. *Com.*, 3 *Brews.* (*Pa.*) 374.

300. Lists of delinquents.—A delinquent list, filed on application for judgment against a railroad track for road district taxes, described the property as follows: "Ohio and Mississippi railway company railway track: A strip of land extending on each side of said railway track, and embracing the same, together with all the stations and improvements thereon, commencing at the point where said railway crosses the northern and eastern boundary line of Clay county in entering said county, and extending to the point where said track crosses the southern and western boundary line of said county in leaving the same, containing 594.76 acres. District road tax and back district road tax for the years 1883–1884, * * * to wit," giving a statement of the road taxes in seven different townships. *Held*, that the description was in conformity with the requirements of the law. *Ohio & M. R. Co.* v. *People ex rel.*, 119 *Ill.* 207, 10 *N. E. Rep.* 545.

The object of 2 Nev. Comp. L. 3164, § 4, authorizing the board of commissioners to strike off from the delinquent list such taxes as cannot be collected, is to provide a means of balancing the account between the auditor and district attorney; the delinquent taxpayer cannot claim any advantage from it. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 87.

The statute regulating the manner in which lists of delinquent taxpayers shall be made out by the sheriff is directory; and if its essential requirements be complied with, it is sufficient. *Houston & T. C. R. Co.* v. *State*, 39 *Tex.* 148.

301. Interest on overdue taxes.* —A county tax on railroads, payable by statute at a certain time, does not, in the absence of a statutory provision, bear interest if not paid when due, nor can such interest be collected as damages. *Kentucky C. R. Co.* v. *Pendleton Co.*, (*Ky.*) 2 *S. W. Rep.* 176. *State* v. *Southwestern R. Co.*, 70 *Ga.* 11.

The receivers appointed by the court being in possession of the defendant road during vacation, the tax bills in question were presented to them for payment. Doubts existing as to the legality of some of the levies, an arrangement was entered into between the attorneys of the receivers and petitioners, that the advice of the court should be taken upon the question. *Held*, that defendant company did not come within the terms of Mo. Act of March 15, 1875, which provide a penalty of two and one-half per cent. where any railroad shall fail to pay taxes levied upon it, but that the court would award interest at the rate of ten per cent. per annum from the day the taxes became due, in lieu of the penalty. *Ketchum* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 41.

In receiving from a company a tax on dividends, city authorities, as well as the company, by mutual mistake, treated the authorized capital as the basis of calculation. *Held*, that the company was not liable for interest on the amount underpaid until demand. *Second & T. St. Pass. R. Co.* v. *Philadelphia*, 51 *Pa. St.* 465.

302. Penalties.—No machinery being provided for the return, for the purpose of county taxation, of property of a railroad not necessary to its franchise, and it being a question admitting of doubt whether the legislature intended it to return and pay county tax at all, it would be inequitable to exact a double tax for laches in not making such returns and payment. *Savannah, F. & W. R. Co.* v. *Morton*, 71 *Ga.* 24.

Where lands omitted by the assessor or clerk have been placed upon the tax list by the county treasurer, penalties commence to run from the time when such entry was in fact made; and that the treasurer does not sell land upon which taxes are delinquent does not prevent the accumulation of penalties. *Cedar Rapids & M. R. R. Co.* v. *Carroll County*, 41 *Iowa* 153.

That penalties have largely accumulated while litigation has been pending respecting

* See also *post*, **322.**

the validity of the tax will not justify a court of equity in remitting or diminishing them. *Cedar Rapids & M. R. R. Co.* v. *Carroll County*, 41 *Iowa* 153.

The repeal of a statute under which penalties have accrued for the non-payment of taxes does not affect the liability of the owner for the amount of such penalties. *Cedar Rapids & M. R. R. Co.* v. *Carroll County*, 41 *Iowa* 153.

The ten per cent. penalty required by law to be added to taxes in case of failure to pay by January 10 becomes, when added, a part of the taxes due. *Kansas Pac. R. Co.* v. *Amrine*, 10 *Kan.* 318.

303. Sale of rails and cars for non-payment — When in hands of receiver.*—Railroad property in the hands of a receiver appointed by a federal court is not subject to seizure and levy for the collection of a state tax. The remedy of the collector is by application to the federal court, where the validity of the tax may be determined and where an order may be had for the payment of the tax if it is found to constitute a prior lien. *In re Tyler*, 149 *U. S.* 164, 13 *Sup. Ct. Rep.* 785.

Illinois Act of Feb. 14, 1855, amending the revenue laws of the state, in so far as it provides that railroad tracks shall be considered "fixed and stationary personal property" creates a species of personal property not before known to the law; and if a tax on such property is not paid, the collector may levy upon the rails and remove them from the track for the purpose of enforcing payment. *Maus* v. *Logansport, P. & B. R. Co.*, 27 *Ill.* 77.

But the above statute only makes the track personal property for the purposes of taxation, and does not change its character for other purposes. *Maus* v. *Logansport, P. & B. R. Co.*, 27 *Ill.* 77.

And that portion of the act of 1853 which makes real property liable for taxes on personal property, and *vice versa*, has no application to a tax on a railroad track. Such property must bear its own burden of taxation. *Maus* v. *Logansport, P. & B. R. Co.*, 27 *Ill.* 77.

Property of a company in the limits of towns may be assessed and taxed for municipal purposes, but cars are not subject to seizure and sale by a ministerial officer to satisfy such taxes. The sale of two freight cars levied on by a town marshal was perpetually enjoined. The collection of such taxes can only be enforced, like the claims of creditors of the company, by a court of equitable jurisdiction. *Elizabethtown & P. R. Co.* v. *Elizabethtown*, 12 *Bush* (*Ky.*) 233. — DISTINGUISHED IN Ludlow *v.* Cincinnati Southern R. Co., 7 Am. & Eng. R. Cas. 231, 78 Ky. 357. QUOTED IN Lincoln County Court *v.* Louisville & N. R. Co., (Ky.) 7 Am. & Eng. R. Cas. 320; Adams Exp. Co. *v.* Lexington, 83 Ky. 657.

The rolling stock of a company is personal property, and may be seized for the collection of taxes. *Randall* v. *Elwell*, 52 *N. Y.* 521.—FOLLOWING Stevens *v.* Buffalo & N. Y. C. R. Co., 31 Barb. (N. Y.) 590; Beardsley *v.* Ontario Bank, 31 Barb. 619. NOT FOLLOWING Farmers' L. & T. Co. *v.* Hendrickson, 25 Barb. 485. — FOLLOWED IN Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 714.

304. Fees and commissions. — A company commenced an action against a county treasurer and a sheriff to restrain the collection of certain taxes. The injunction was refused, and judgment was rendered in favor of the officers, and against the company, for costs. The case was taken to the supreme court by the company, and the judgment was affirmed. The county attorney attended to the suit for the treasurer and sheriff as county attorney, but without being employed by any person. The company then paid the taxes, but neglected to pay the ten per cent. penalty which had accrued thereon. The county attorney then filed a *præcipe* with the treasurer for a tax warrant to collect said penalty. The treasurer issued the warrant, and delivered it to the sheriff, and the sheriff, by virtue of the warrant, collected said penalty, and paid it over to the treasurer. *Held*, that said taxes and penalty were collected under the law, and not under said judgment; that such *præcipe* is unknown to the tax laws, and amounted to nothing more than an opinion of the county attorney; that the treasurer and sheriff collected the taxes and penalty, and not the county attorney; and that the county attorney was not, under the statutes, entitled to ten per cent. of the taxes and penalty for collecting the same. *Johnson County Com'rs* v. *Ogg*, 13 *Kan.* 198.

With a single exception, provided by Miss. Laws of 1890, p. 74, in case of levee

* See also RECEIVERS, 44.

taxes paid by railroad companies direct to the levee board, a tax collector is never entitled to commission on taxes not actually collected by him. *Yazoo & M. V. R. Co.* v. *Love*, 69 *Miss.* 109, 12 *So. Rep.* 266. — APPLYING Wynne *v.* Mississippi & T. R. Co., 45 Miss. 569.

Where such levee taxes are paid by a company to the levee board direct, after Dec. 15, the tax collector, although entitled to his usual commissions from the board, is not entitled to recover from the company the ten per cent. additional compensation which, under Miss. Code 1880, § 524, he would have been entitled to if the delinquent taxes had actually been received by him. *Yazoo & M. V. R. Co.* v. *Love*, 69 *Miss.* 109, 12 *So. Rep.* 266.

305. Rebates. — Parties paying taxes on railroad property in the unorganized counties of the state, levied under Kansas Act of 1876, are entitled to the same rebate as taxpayers in the organized counties. *State ex rel.* v. *Francis*, 23 *Kan.* 495.

2. *Lien for Taxes.*

306. In general. — Failure of the collector to return taxes assessed against railroad property as delinquent will not affect the rights of the state or municipalities. The taxes become a lien from the first day of May, and such lien continues until they are paid. The omission to make such return is cured by Ill. Revenue Act, § 191. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.

A tax upon the capital stock and franchise of a railroad company, whether they be regarded as real or as personal property, is a lien upon the real property of the company. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.

There being no lien, under the statute, against any part of a "railroad track" for road taxes, except upon the specific portion thereof upon which the same were levied, it is error to render judgment against the entire railroad in the county for the taxes due to a particular road district. *Wabash, St. L. & P. R. Co.* v. *People ex rel.*, 137 *Ill.* 181, 27 *N. E. Rep.* 456.

There is no warrant for holding that the lien for taxes on one tract of land, or upon a part or portion of a tract of land, extends to another tract of land upon which such taxes have not been levied, although owned by the same person or corporation. The lien upon a railway track for road taxes in one district is confined to the track, etc., in such district. *Wabash, St. L. & P. R. Co.* v. *People ex rel.*, 137 *Ill.* 181, 27 *N. E. Rep.* 456.

The county board of equalization ordered certain railroad iron to be assessed for taxation, ascertaining its value from the surveyor of customs in whose charge it was at the time or from some other person not an officer of the railroad company, and the auditor, by direction of the board, made the entry on the assessor's roll and afterwards entered it upon the treasurer's books. *Held*, that such an assessment was invalid, and did not create any lien on the property. *Evansville & I. R. Co.* v. *Hays*, 118 *Ind.* 214, 20 *N. E. Rep.* 736.

How. Mich. St. § 3362, gives to the state a paramount lien upon the personal property of a company for all taxes due from the company owning or operating the railroad, which lien attaches upon the filing by the commissioner of railroads with the auditor-general of a computation of the amount of such tax pursuant to section 3358, and is not lost by the failure of the auditor-general to issue his warrant or commence suit for the collection of such taxes, his power to do so not being limited to any specified time. *Stevens* v. *Lake George & M. R. R. Co.*, 82 *Mich.* 426, 46 *N. W. Rep.* 730.

A railroad right of way cannot be charged with the lien of a special tax bill for street improvements done under the charter of a city. *Sweaney* v. *Kansas City R. Co.*, 54 *Mo. App.* 265.

There is not in Missouri any personal liability of the abutting property owner for street improvements, and special taxes therefor are alone a charge against the property. *Sweaney* v. *Kansas City R. Co.*, 54 *Mo. App.* 265.

When taxes are levied they become a lien, and when the board of equalization has acted an obligation immediately arises on the part of the company taxed to pay to the state the amount due; and thereafter county commissioners can neither release the property from the lien nor discharge the party from his obligation. *State* v. *Central Pac. R. Co.*, 9 *Nev.* 79.

307. Priority between tax lien and other encumbrances. — The lien of the state of Georgia for taxes upon the property of a company, rightfully in the custody of the law, is prior to all other liens

whatsoever, except the lien of judicial costs. *Georgia* v. *Atlantic & G. R. Co.*, 3 *Woods* (*U. S.*) 434.

Taxes on personal property are not a lien or charge upon any specific property until the tax books are delivered to the collector. After such delivery, the collector may levy on any personal property found in the hands of the person against whom the taxes have been assessed; but this levy will be subject to any incumbrance on the property created prior to the time he received the books. So a tax on the capital stock of a railroad company, being a tax on personal property, is subject to this rule. *Cooper* v. *Corbin*, 13 *Am. & Eng. R. Cas.* 394, 105 *Ill.* 224.

Where, at the time the taxes assessed upon the capital stock of a company become a lien on its property, a prior lien has been created upon the same by the execution and recording of a valid mortgage thereon, the tax lien will attach only on the company's equity of redemption; and when that equity is cut off by a foreclosure and sale under the mortgage, the purchaser will take the property free from any lien for such taxes, and a court of equity will enjoin a sale of the rolling stock of such company for the payment of the taxes. *Cooper* v. *Corbin*, 13 *Am. & Eng. R. Cas.* 394, 105 *Ill.* 224.

308. Use of property subject to lien.—A company and its assignees are entitled to the use and possession of the corporate property as against the lien of the state thereon for taxes until the proper officers of the state, by some of the methods provided by law, have taken steps to reduce it to possession for the purpose of enforcing such lien. *Stevens* v. *Lake George & M. R. R. Co.*, 82 *Mich.* 426, 46 *N. W. Rep.* 730.

309. Lien not divested by sale of road.—How. Mich. St. § 3403, authorizing the absolute sale of a railroad, makes such sale subject to all the obligations and duties prescribed by the general railroad laws of the state, and the vendee cannot claim to be a *bona fide* purchaser as against the lien of the state for taxes due from the vendor company. *Stevens* v. *Lake George & M. R. R. Co.*, 82 *Mich.* 426, 46 *N. W. Rep.* 730.

310. Enforcement against purchaser of road.—In a suit to enforce a lien for taxes, although a common-law judgment for the taxes has been rendered it is necessary, as against one who has purchased the property since the rendition of that judgment and was therefore not a party to it, to aver the preliminary steps necessary to create the lien, as if no judgment had been rendered. *Kentucky C. R. Co.* v. *Com.*, 92 *Ky.* 64, 17 *S. W. Rep.* 196.

A warrant for the collection of taxes in Michigan differs in no essential particular from an execution, and must be levied upon the property of the corporation therein named. Therefore where all the property of a railroad company has been conveyed for a valuable consideration, and the purchasers are in peaceable possession, the lien of the state for taxes against the former owner cannot be enforced by a warrant; at least until a court of equity has adjudicated the right of the state against both the present and the former owners. *Hackley* v. *Mack*, 60 *Mich.* 591, 27 *N. W. Rep.* 871.

3. *Actions for Taxes.*

311. Jurisdiction and power of the court.—The circuit court of a particular county has no jurisdiction to enforce a penalty against a company for refusing to give a true list of its taxable property, under a statute providing that all proceedings in the name of the commonwealth against corporations, "for demands due to the state," shall be commenced and determined in the circuit court of that county. *Louisville & N. R. Co.* v. *Com.*, 1 *Bush* (*Ky.*) 250.

In a proceeding to enforce payment of taxes against a railroad, the fact that the land against which a tax is sought to be enforced is exempted from taxation does not affect the jurisdiction of the court in which the proceedings are brought to try and determine the legality of the tax. *Chisago County* v. *St. Paul & D. R. Co.*, 27 *Minn.* 109.—FOLLOWED IN Chauncey *v.* Wass, 35 Minn. 1.

In a suit for the recovery of taxes in Missouri, the court cannot go behind the assessment and valuation made by the board of equalization, as to the number of miles of a railroad in a specified county. It cannot equalize and adjust the amount of taxable property in a county, nor correct mistakes of fact made by the board of equalization. *Ketchum* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 41, *n.*

312. Election of remedies and forms of action.*—When an assessment has been made by the agent of the auditor

*Specific statutory remedy not exclusive, see 54 AM. & ENG. R. CAS. 305, *abstr.*

in the manner prescribed, and reported to the auditor, he may then proceed in the Franklin circuit court against a delinquent corporation, by motion or ordinary proceeding, to coerce the payment of the amount so assessed; and no right of action exists for the non-payment of taxes until after the assessment has been made as prescribed by law. The right to assess or coerce assessment is not affected or barred by the statute of limitations. *Louisville & N. R. Co.* v. *Com.*, 1 *Bush* (*Ky.*) 250.

Under New York Corporation Tax Act of 1880, which provides that taxes shall be collected for the use of the state as other taxes are recoverable by law from corporations, and that taxes may be sued for in the name of the people of the state and recovered in any court of competent jurisdiction, in an action brought by the attorney-general at the instance of the comptroller, the remedy so provided does not preclude the court from ordering the receiver of an insolvent corporation to pay the corporation tax upon the franchise out of the money in his hands which is derived from the exercise of the corporate powers as authorized by the franchise, where such corporation is largely and hopelessly insolvent. *Central Trust Co.* v. *New York City & N. R. Co.*, 35 *Am. & Eng. R. Cas.* 9, 110 *N. Y.* 250, 18 *N. Y. S. R.* 30, 18 *N. E. Rep.* 92; *reversing* 47 *Hun* 587, 15 *N. Y. S. R.* 178.—DISTINGUISHING Com. *v.* Lancaster Sav. Bank, 123 Mass. 493.

The state and county, having, through the board of commissioners sitting with the justices of the peace, assessed the property of a corporation for taxation and placed the tax list in the hands of the sheriff, who cannot find any property of the corporation upon which to levy, are creditors holding a debt against such corporation, and are entitled, under N. Car. Code, §§ 668, 701, to bring a proceeding in the nature of a creditor's bill against such corporation, with or without proceedings for its dissolution. *State* v. *Georgia Co.*, 112 *N. Car.* 34, 17 *S. E. Rep.* 10.

The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the state to pursuing that method, nor preclude it from seeking the aid of the superior court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect the revenue, and not the sovereign. *State* v. *Georgia Co.*, 112 *N. Car.* 34, 17 *S. E. Rep.* 10.

An assessed tax on property of a railroad is a debt of the owner of the property during the period for which the assessment is made, and may be enforced like any other debt, although the statute authorizing the assessment prescribes a specific mode of treatment. *State* v. *Memphis & C. R. Co.*, 14 *Lea* (*Tenn.*) 56.—DISTINGUISHING Colcough *v.* Nashville & N. W. R. Co., 2 Head (Tenn.) 171.

313. Demand before suit.—It is a general rule that before distraint can be had or suit brought for taxes a demand of payment must be made; but a demand is not necessary where a statute provides that taxes on railroads shall be due and payable at a time certain. *Kentucky C. R. Co.* v. *Pendleton County*, (*Ky.*) 2 *S. W. Rep.* 176.

A proceeding was instituted by a municipal corporation against a city railway to recover a tax upon the earnings of the company, the times for the payment of which were definitely fixed by ordinance. *Held*, that the failure to pay the tax at the times prescribed by the ordinance was a breach of duty which fastened upon the company a liability to be proceeded against without any demand being made. *Union Pass. R. Co.* v. *Mayor, etc., of Baltimore*, 71 *Md.* 238, 17 *Atl. Rep.* 933.

314. The proper party plaintiff.—For railroad taxes assessed under Mo. Act of 1871, suit is properly brought in the name of the county. *Livingston County* v. *Hannibal & St. J. R. Co.*, 60 *Mo.* 516.

Collectors of taxes were not authorized by Mo. Act of March 20, 1872, §§ 1, 2, to institute suits for taxes against railroad companies after the expiration of their terms of office, but were only authorized to continue the prosecution of such as had been commenced while they were in office. *Gordon* v. *Lafayette County*, 74 *Mo.* 426.

Under Mo. Act of March 15, 1875, § 7, a city is authorized to sue in its own name for city taxes assessed against railroads. *Kansas City* v. *Hannibal & St. J. R. Co.*, 22 *Am. & Eng. R. Cas.* 239, 81 *Mo.* 285.

The district attorney is authorized to commence suit for delinquent taxes stricken off the delinquent list by a void order of the board of county commissioners. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 87.

Under N. Y. Act of 1874, ch. 296, subjecting the property of the New York and Oswego Midland railroad company to taxation, and appropriating the amount of the

county taxes thereon, in any town which has issued bonds in aid of the road, to such town, to be devoted to the payment of its bonds, after such tax has been collected the moneys belong to the town, and any diversion thereof from their lawful purpose is an injury to the town, which may maintain an action for its protection. *Bridges* v. *Sullivan County Sup'rs*, 92 *N. Y.* 570; *affirming* 27 *Hun* 175.—FOLLOWED IN Strough *v.* Jefferson County Sup'rs, 119 N. Y. 212, 23 N. E. Rep. 552, 28 N. Y. S. R. 967.

In such case the town is not confined to the remedy of an action against the collector and his sureties, under section 4 of the above statute. An action on behalf of the town may be brought by the supervisors of the town, under Code Civ. Pro., § 1926. *Bridges* v. *Sullivan County Sup'rs*, 92 *N. Y.* 570; *affirming* 27 *Hun* 175.

A county is a delegated part of the authority of the state, and the joinder of a county with the state cannot affect the latter's right to sue—a right which it has by implication under various statutes, aside from the fact that it has inherently all remedies not voluntarily and unequivocally relinquished. *State* v. *Georgia Co.*, 112 *N. Car.* 34, 17 *S. E. Rep.* 10.

315. Complaint.—The sufficiency of a complaint in an action to recover delinquent taxes must be tested by the rules regulating pleadings in civil actions. *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.

A complaint in an action against a company to enforce the payment of taxes which avers the fact of assessment of "the franchise, roadway, roadbed, rails, and rolling stock of the defendant" is insufficient if it does not aver that defendant is the owner of such or any property situate in the state and within the jurisdiction of the board making the assessment. *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.

Such complaint is also defective if it contains an averment that the state board of equalization apportioned the assessment to different counties, but does not show the authority of the board to make such apportionment, or that any portion of the property was situate in any one of the counties. *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.

Notwithstanding the provisions of a statute that "no assessment, or act relating to assessment or collection of taxes, is illegal on account of informality, nor because the same was not completed within the time required by law," a complaint to enforce the payment of taxes must show facts sufficient to make out a *prima facie* case of a valid tax and that it is delinquent viz.: the assessment of the tax upon property of defendant, the general character of the property assessed, and that its *situs* is within the state or the county where assessed. *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.

The provisions of Cal. Political Code authorizing the use of a special form of complaint to enforce the payment of taxes on railroads situated in more than one county are in violation of the constitutional prohibition against the passing of special laws "to regulate the practice of courts of justice," and are invalid, notwithstanding the fact that the code in which they are inserted is a general law. *People* v. *Central Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 653, 83 *Cal.* 393, 23 *Pac. Rep.* 303.—FOLLOWING Dundee Mortgage-Trust Inv. Co. *v.* School Dist. No. 1, 10 Sawy. (U. S.) 52.

A description of unsurveyed lands as certain odd-numbered sections "as their designation will appear when the surveys of the government are extended over them" is insufficient for their identification for taxation and is not such a description as is required by the revenue laws of Nevada. This principle applies equally when it is only the possessory claim to the land that is assessed. *State* v. *Central Pac. R. Co.*, 21 *Nev.* 94, 25 *Pac. Rep.* 442.

316. Petition.—A petition in an action against a company for delinquent taxes, under Mo. Rev. St. 1879, § 6889 *et seq.*, need not describe the property otherwise than as so many miles of a given value, with a proper proportion of the value of the rolling stock added. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.

It is not necessary, when suing for railroad taxes levied under Mo. Township Railroad Aid Act of March 23, 1868, to state the number of miles of road in the township, the petition stating the amount of railroad tax levied in the township on defendant's property. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.

It is immaterial, as to the validity of the tax levied under said act, whether the county in which the levy was made had or had not a township organization. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.

317. Plea, answer, affidavit of defense.—In a suit against a company to recover taxes under an assessment made in the absence of a legal statement, defendant set up in answer that the assessment was made by the assessor, fraudulently and contrary to his official judgment, at a sum nearly three times greater than the fair value of the property. *Held*, that such answer stated good matter of defense, and was not demurrable. *State* v. *Central Pac. R. Co.*, 7 *Nev.* 99.

In answer to a tax suit, the defense was fraud in the assessment, and it was alleged that in a certain statement furnished to the assessor (but which was informal), the property was "set down as of the value of $6000 per mile, which was a fair valuation thereof, and so known and believed by the assessors." *Held*, that this amounted to an allegation that $6000 per mile was a just and fair value, and consequently that an assessment of $15,000 per mile was excessive. *State* v. *Central Pac. R. Co.*, 7 *Nev.* 99.

In a suit to recover delinquent taxes defendant company pleaded that it had paid to plaintiff a certain less sum and that plaintiff had accepted and received the same in full satisfaction and discharge. *Held*, that the pleading did not amount to an answer that the taxes had been paid, or constitute a defense to the action. *State* v. *Central Pac. R. Co.*, 9 *Nev.* 79.

An answer in an action by the state for taxes upon lands granted to a company which denies all ownership to the lands "except such ownership as the defendant may have, obtain, or secure, as yet unknown and uncertain on account of the non-action of the government through its land department," is evasive and uncertain, and is not sufficient under the Nevada statute permitting defendants in actions for taxes to deny all claim, title, or interest in the property assessed at the time of the assessment. *State* v. *Central Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 467, 20 *Nev.* 372, 22 *Pac. Rep.* 237.

In an action to recover delinquent taxes and penalties an answer denying a possessory claim to the lands, and stating facts showing that the rights claimed are untaxable, presents a good defense, although it does not deny all claim, title, or interest in the property assessed. *State* v. *Central Pac. R. Co.*, 21 *Nev.* 94, 25 *Pac. Rep.* 442.

The settlement of a state tax due by a corporation under Pa. Act of June 7, 1879 (P. L. 112), upon the basis of a report furnished by the corporation to the auditor-general, is a ministerial act, which need not necessarily be performed by the auditor-general and state treasurer in person, but may be performed by clerks acting respectively under the direction and by the authority of those officers. *Philadelphia & R. R. Co.* v. *Com.*, 13 *Am. & Eng. R. Cas.* 365, 104 *Pa. St.* 86.

In an action of debt by the commonwealth against a corporation, upon an account for state tax settled against it, defendant filed an affidavit of defense, averring that inasmuch as said settlement was made, not by the accounting officers of the commonwealth, but by other persons claiming to act for them, the settlement exhibited no cause of action. *Held*, that, in the absence of an averment that the persons so claiming to act for said accounting officers acted in the premises without authority from the latter, the affidavit of defense was insufficient to prevent judgment. *Philadelphia & R. R. Co.* v. *Com.*, 13 *Am. & Eng. R. Cas.* 365, 104 *Pa. St.* 86.

318. What defenses are open.—Where the levy by a county clerk on the property of a railroad was illegal because the levy on the property owned by the company on August 1, 1875, was made at the rate which was levied on property owned by individuals on August 1, 1874, but the company paid the tax so illegally levied on the property owned by it August 1, 1875, such payment should be allowed it as a credit in an action against it under a new levy made on its property under the Act of April 22, 1879. *State ex rel.* v. *Missouri Pac. R. Co.*, 92 *Mo.* 137, 6 *S. W. Rep.* 862.—REVIEWING State ex rel. *v.* Hannibal & St. J. R. Co., 87 Mo. 236.—FOLLOWED IN State ex rel. *v.* Union Trust Co., 92 Mo. 157.

Under Nev. Gen. St. § 1205, where property is claimed for taxation by two different counties, its regular assessment by one of the counties, and the payment of the taxes to that county prior to the commencement of the action for delinquent taxes in the other county, constitute a complete defense

to the latter action. *State* v. *Central Pac. R. Co.*, 21 *Nev.* 172, 26 *Pac. Rep.* 225, 1109.

319. Unavailing defenses.—Under Ala. Act of Feb. 9, 1870 (declared unconstitutional), the auditor instructed the tax collector of a county not to collect of the company the county taxes for the year 1869, whereupon the tax collector did not collect such taxes. *Held*, not to be an instruction as to any matter arising under the Revenue Law of 1868, and hence not binding on the county officer; and the company was liable to pay the county tax levied for the year 1869. *Perry County* v. *Selma, M. & M. R. Co.*, 58 *Ala.* 546, 20 *Am. Ry. Rep.* 372.

That the commissioners' court acquiesced in the unconstitutional act of 1870 which remitted certain taxes assessed against a company, by not requiring the tax collector to collect or account for the said company's tax the previous year, is no surrender of the claim, or bar to its present assertion. *Perry County* v. *Selma, M. & M. R. Co.*, 58 *Ala.* 546, 20 *Am. Ry. Rep.* 372.

In a proceeding against a receiver to collect taxes on a railroad, levied under the law of 1868, the auditor's certificate to the county assessor as to the number of miles of track in the county is not a condition precedent to the right to collect the taxes. Such facts may be established in an equitable proceeding and the receiver directed to pay the taxes. *Perry County* v. *Selma, M. & M. R. Co.*, 7 *Am. & Eng. R. Cas.* 298, 65 *Ala.* 391.

The reversal of a decree enjoining the collection of a special assessment on railroad property removes that impediment to the recovery of a judgment on the assessment. *Ottawa* v. *Chicago & R. I. R. Co.*, 25 *Ill.* 47.

In case the levy of an invalid tax by the state board of equalization is brought about by the landowner's own voluntary act in returning the land as "railroad track" when it is not any part of such track, a payment of such tax must be regarded as a voluntary payment, in respect of which the law affords no remedy; and the payment of such invalid tax will furnish no defense against an application for judgment for taxes properly levied on an assessment of the property by the local assessor. *Chicago, B. & Q. R. Co.* v. *People ex rel.*, 136 *Ill.* 660, 27 *N. E. Rep.* 200.

The fact that a decree has been rendered in a United States circuit court enjoining a city from the collection of taxes from a company, in a suit instituted by a stockholder, to which the company was neither privy nor party, and of whose proceedings no benefit was claimed, cannot be pleaded in bar of a recovery of municipal taxes. *Davenport* v. *Chicago, R. I. & P. R. Co.*, 38 *Iowa* 633.—APPROVED IN State ex rel. *v.* Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.

The provisions of the statute for a delinquent list are merely directory; a failure to comply with them does not avail the defendant in a tax suit. *State* v. *Central Pac. R. Co.*, 10 *Nev.* 47.

The payment of a tax upon the franchise of a corporation, valued upon erroneous principles, is no defense against a tax legally levied by the county authorities under the general law. *Wilmington, C. & A. R. Co.* v. *Brunswick County Com'rs*, 72 *N. Car.* 10.

It is no defense to a legal assessment and claim of taxes that taxes have been paid under an illegal or irregular assessment. *North Carolina R. Co.* v. *Alamance Com'rs*, 82 *N. Car.* 259.—REVIEWING Richmond & D. R. Co. *v.* Orange County Com'rs, 74 N. Car. 506.

320. Evidence and burden of proof.—In a suit to collect taxes, tax bills purporting to be certified by duly authorized officers are presumed to be correct, and the burden of proof as to their legality lies upon those contesting them. *Ketchum* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 41.

Although a tax bill sued on describes incorrectly the property on which the tax sued for was levied, this defect is cured by evidence, received without objection, establishing that the property was correctly described on the assessment roll, or that, if it was not, defendant, by its action while the rolls were open, acquiesced in the description as made and waived objections thereto. *New Orleans* v. *New Orleans & C. R. Co.*, 35 *La. Ann.* 650.

In a suit by a county to recover the amount of taxes assessed by the board of equalization against a railroad, the state auditor's certificate to the county court is not competent evidence to prove the action of the board. The record of its proceedings which the board is required by law to keep, or its exemplification, is the best and only proper evidence for that purpose when attainable. *Washington County* v. *St. Louis & I. M. R. Co.*, 58 *Mo.* 372.

Semble, that the certificates of the clerk of a county court, made in conformity to the provisions of the statute, as to the amount of taxes due from a railroad are *prima facie* evidence of the latter's liability. *Kansas City* v. *Hannibal & St. J. R. Co.*, 22 *Am. & Eng. R. Cas.* 239, 81 *Mo.* 285.—QUOTED IN St. Louis & S. F. R. Co. *v.* Apperson, 97 Mo. 300.

The order of a county court, levying railroad taxes for omitted years under Mo. Rev. St. 1879, § 6879, which recites that the years were omitted, is *prima facie* evidence of such omission, and, in an action for said taxes, it is not necessary for plaintiff, in order to make out a *prima facie* case, to introduce the levy of those years made upon property other than railroad property. *State ex rel.* v. *Hannibal & St. J. R. Co.*, 41 *Am. & Eng. R. Cas.* 581, 101 *Mo.* 136, 13 *S. W. Rep.* 505.—RECONCILING Kansas City *v.* Hannibal & St. J. R. Co., 81 Mo. 294.

321. Judgment, and its effect.—In enforcing a road tax it is not necessary to render a separate judgment against each separate portion of railroad track located in each separate road district, when the tax is not paid in any of the districts, but the judgment may be against the entire track in the county, for all the taxes levied in the several districts. The whole line of the railroad in the county constitutes but a single and entire property. If any tax is paid, that part of the road so taxed will not be sold for the road tax due on the track in other road districts. *Ohio & M. R. Co.* v. *People ex rel.*, 119 *Ill.* 207, 10 *N. E. Rep.* 545.

A company filed objections to the rendition of judgment against it for a road tax of 1889 for these reasons: (1) because the board of supervisors did not cause such tax to be levied as required by law; (2) because there was no order of record showing the levy; (3) because no notice was given to the company to appear and work out such tax; (4) because the overseer did not deliver the list of delinquent road tax to the supervisor in the time required by law; (5) because the county collector failed to designate on the tax books to what district the tax belonged; (6) because the property was not properly described in the collector's advertisement. The court sustained the objections. *Held*, that the judgment was no bar to a further application for judgment for the same tax and that of the next year. *People ex rel.* v. *Chicago & A. R. Co.*, 140 *Ill.* 210, 29 *N. E. Rep.* 730.

Under Iowa Revision, § 3135, it is proper for a district court to render judgment against a company for city taxes upon a certain property for a particular year, in an action by a municipal corporation for the taxes for a period of years, where the company does not controvert its liability, but confesses that the taxes were due and payable and offers judgment therefor. The case does not come within § 3404. *Davenport* v. *Chicago, R. I. & P. R. Co.*, 38 *Iowa* 633.

322. Recovery of interest, penalties, and fees.*—Where a suit is instituted against a railroad to collect a tax, and the statutory penalty for not paying, and interest and attorneys' fees, and it is decided that the tax is void, it follows that the company is not liable for the penalties, interest, and fees. *San Bernardino County* v. *Southern Pac. R. Co.*, 118 *U. S.* 417, 6 *Sup. Ct. Rep.* 1144.

In an action, under Cal. Political Code, § 3670, to recover delinquent taxes assessed against a railroad operated in more than one county, plaintiff, upon a judgment in its favor, is not entitled to recover interest on the taxes, at the rate of two per cent. per month, from the time they became delinquent. Section 3803 only authorizes such interest on the taxes mentioned in the sections immediately preceding it. *People* v. *North Pac. Coast R. Co.*, 24 *Am. & Eng. R. Cas.* 610, 68 *Cal.* 551, 10 *Pac. Rep.* 45.

Taxes are not "debts" within the legal meaning of the term, and in the absence of a statutory provision interest cannot be recovered thereon. *Louisville & N. R. Co.* v. *Com.*, 41 *Am. & Eng. R. Cas.* 595, 89 *Ky.* 531, 12 *S. W. Rep.* 1064. *Perry County* v. *Selma & M. R. Co.*, 65 *Ala.* 391.

Mo. Act of March 29, 1875, § 4, allows a sum equivalent to five per cent. of the sum recovered to be sued for as attorneys' fees "whenever any railroad company shall fail or shall have heretofore failed, within the time prescribed by law, to pay any taxes assessed and levied against it," etc. *Held:* (1) that the petitions in this suit were not suits for the recovery of taxes, within the meaning of said act; (2) that the amicable arrangement entered into between the parties to settle the amount of taxes due, by asking

*See also *ante*, **301.**

the advice of the court, did not come within the act. *Ketchum* v. *Pacific R. Co.*, 4 *Dill.* (*U. S.*) 41, *n.*

323. Appeals.—A foreclosure suit was brought, and the municipal corporation within which the mortgaged property was situate was allowed to intervene and set up a claim for taxes thereon. *Held*, that the order of the circuit court rejecting such claim was binding upon the corporation, and where the amount of taxes is sufficient to give jurisdiction to the supreme court, the corporation is entitled to an appeal. *Savannah* v. *Jesup*, 9 *Am. & Eng. R. Cas.* 573, 106 *U. S.* 563, 1 *Sup. Ct. Rep.* 512.

324. Enforcement by mandamus.—When it appeared that a company was the owner of the reversion of the entire real estate constituting its roadbed, the court, for the purpose of shortening litigation, expressed its opinion that the defense set up by the railroad in the return against the tax in question, of inability to pay the same, was disproved by the facts, and that it had a right, in view of its debts, to require the rent reserved on its lease to be paid to it instead of its stockholders, and that if the merits were to be disposed of, the return would present no adequate reason against issuing a peremptory mandamus. *Silverthorn* v. *Warren R. Co.*, 33 *N. J. L.* 372.

325. Summary proceedings.—Upon appearance of a taxpayer in summary proceedings under Arizona Revenue Laws, ch. 7, to enforce payment of delinquent taxes, the court has not the power to rectify excessive taxation, except in cases of fraud. *Atlantic & P. R. Co.* v. *Yavapai County*, (*Ariz.*) 39 *Am. & Eng. R. Cas.* 543, 21 *Pac. Rep.* 768.

In summary proceedings to enforce payment of delinquent taxes, it is error to fix penalties and percentages at a gross amount and impose them upon the tax both upon railway and lands. *Atlantic & P. R. Co.* v. *Yavapai County*, (*Ariz.*) 39 *Am. & Eng. R. Cas.* 543, 21 *Pac. Rep.* 768.

IX. SALE OF LANDS FOR NON-PAYMENT—TAX TITLES.

326. Application for order to sell.—The amended charter of the city of Chicago adopted in Feb., 1857, only provides for one tax collector and his assistants; and an application to a court for an order to sell lands for taxes must be by the collector, and not by a special collector. *Chicago* v. *Rock Island R. Co.*, 20 *Ill.* 286.—LIMITED IN Chicago *v.* Colby, 20 Ill. 614.

327. Conduct and validity of the sale.—When taxes are delinquent upon a whole section, belonging to one owner and lying in one contiguous body, it is the duty of the county treasurer, under the Iowa statute, to advertise the whole tract in a single description. *Cedar Rapids & M. R. R. Co.* v. *Carroll County*, 41 *Iowa* 153.

Lands, delinquent for railroad taxes, were not publicly offered for sale, and no one bid for them, or offered to take them. After the sale, the treasurer, in pursuance of a previous arrangement with one representing the company, executed and delivered tax certificates for such lands to such person, receiving receipts for the tax. *Held*, that such certificates, and the tax title attempted to be created, were thereby absolutely void, even as against one claiming thereunder as purchaser under a warranty deed, without notice. *Truesdell* v. *Green*, 7 *Am. & Eng. R. Cas.* 369, 57 *Iowa* 215, 10 *N. W. Rep.* 630.

Where, on payment of a privilege tax by a company, part of a tract of land owned by it is exempt because used in operating the road, and part is not exempt, a tax sale of the whole is good as to the part not exempt, if the taxes due thereon are not paid or tendered before sale. *Lewis* v. *Vicksburg & M. R. Co.*, 67 *Miss.* 82, 6 *So. Rep.* 773.

328. Certificate and deed.—Minn. Laws 1874, ch. 1, contemplates that the auditor's certificate of tax sale shall be executed at the time of the sale, or within such time thereafter as may be reasonably necessary for that purpose. A certificate not executed until many years after the sale is without statutory authority, and is of no effect. *Stewart* v. *Minneapolis & St. L. R. Co.*, 36 *Minn.* 355.—FOLLOWED IN Gilfillan *v.* Chatterton, 37 Minn. 11.

If one procures the land of another to be assessed to himself with his own land as one tract, and the whole (being the smallest legal subdivision) is sold for the entire taxes, he becoming the purchaser, no title is acquired as to the land of such other, and the latter may have a cancellation of the tax deed. *Ragsdale* v. *Alabama G. S. R. Co.*, 67 *Miss.* 106, 6 *So. Rep.* 630.

329. Tax titles, and rights of purchasers.—One who buys the lands of a company at a delinquent tax sale has a right to a personal judgment against the

company for the taxes, penalty, interest, and costs, upon a failure of his title, under the Arkansas statute providing that if the sale shall prove invalid the purchaser shall receive from the proprietor of such land the amount of taxes, interest, penalty, and the cost of advertising and the amount of taxes subsequently paid. *St. Louis, I. M. & S. R. Co.* v. *Alexander*, 49 *Ark.* 190, 4 *S. W. Rep.* 753.

The rights of a purchaser at a tax sale are not extinguished by *ad quod damnum* proceedings to which he has not been made a party by proper notice. *Garmoe* v. *Sturgeon*, 65 *Iowa* 147.

An individual entered into a contract in writing, in 1868, with a company, to purchase certain real estate, and covenanted to pay all taxes which should be lawfully imposed on the premises. Under the contract he went into possession of the land, paid a small portion of the purchase money, and made valuable improvements. He defaulted as to the payment of taxes for the years 1873, 1874, 1875, and 1876. In May, 1877, there was a settlement between him and the company, and he relinquished all his right in the land and all his improvements to the company; the company accepted the surrender of his written contract, and released all its claims against him under the covenants thereof. *Held*, that he was thereby relieved of all duty or obligation to pay past or future taxes on the premises; and after such settlement, he was not debarred from acquiring a valid tax title to the premises, on account of his former relation with the company, under the contract of purchase. *Shoup* v. *Central Branch U. P. R. Co.*, 5 *Am. & Eng. R. Cas.* 125, 24 *Kan.* 547.

The omission of the name of the person to whom a tract of land is assessed, from the notice of the tax sale, and from the notice of the expiration of the time for redemption, will not invalidate the title conveyed by the tax deed to the tax purchaser of the real estate. *Shoup* v. *Central Branch U. P. R. Co.*, 5 *Am. & Eng. R. Cas.* 125, 24 *Kan.* 547.

Land was purchased on October 21, 1868, under Kan. Act of Feb. 23, 1866, providing for the sale of public lands to aid in the construction of certain railroads, and one half of the purchase money was paid at the time of the purchase in accordance with said act. *Held*, that the land was taxable for the year 1869, and that a person purchasing said land at a tax sale held May 3, 1870, for the taxes then due thereon, and afterwards procuring a tax deed for such land, would obtain just the interest which the original purchaser had. *Morgan* v. *Clay County Com'rs*, 27 *Kan.* 229.—FOLLOWING Oswalt *v.* Hallowell, 15 Kan. 154; Prescott *v.* Beebe, 17 Kan. 320.

A purchaser, at a tax sale in North Dakota, of lands in a land grant which by the laws of the United States were exempt from taxation by reason of non-payment of the cost of survey, cannot recover the price from the county without showing that the county treasurer knew of facts making the tax illegal. *Stutsman County* v. *Wallace*, 142 *U. S.* 293, 12 *Sup. Ct. Rep.* 227.

330. Redemption.—Ark. Act of 1869, providing that railroad companies to whom land that has been forfeited to the state for taxes should be donated or subscribed by the former owners to aid in the construction of their roads might redeem from the state without payment of the taxes and costs due on them, applies to lands forfeited under the general revenue laws and not to those sold under the Overdue-tax Law of 1881. The latter cannot be redeemed except upon payment of the amount due the state and the cost of the judicial proceedings. *Files* v. *State ex rel.*, 48 *Ark.* 529, 3 *S. W. Rep.* 817.

An owner of land redeemed from a tax sale thereof received from the auditor a certificate showing that he had paid the principal, penalty, and interest of the taxes for which the sale was made, together with the principal, penalty, and interest of the taxes for certain subsequent years, which had been paid by the purchaser. *Held*, that he was entitled to redeem from a future sale for certain special taxes, levied for one of the years covered by such certificate, but which were not included in those paid by the prior purchaser, although a deed had been executed upon such sale. *Iowa Falls & S. C. R. Co.* v. *Storm Lake Bank*, 55 *Iowa* 696, 8 *N. W. Rep.* 649.

Where, after land has been sold for taxes, a company condemns (though without notice to the tax purchaser) and takes possession of a right of way over the land, it is entitled to redeem from the tax sale, and to personal service of notice of the time when the period to redeem expired, and it is not affected by a tax deed made without such notice. *Garmoe* v. *Sturgeon*, 65 *Iowa* 147.

X. REMEDIES FOR UNLAWFUL TAXATION.

1. *In General.*

331. Abatement—Refunding.—The proper course of proceeding, under North Carolina statutes, for refunding an illegal tax which has been paid under protest, is for the commissioners of the county to refund the county tax illegally collected, and to certify to the auditor of the state the amount of state tax illegally paid into the treasury, and it is the auditor's duty to draw his warrant upon the treasurer for the amount due the taxpayer. *North Carolina R. Co.* v. *Alamance Com'rs*, 77 *N. Car.* 4.

Under New Hampshire laws a railroad corporation is entitled to interest on the sum abated from a tax assessed against it, payment of which it made under protest. *Boston & M. R. Co.* v. *State*, 25 *Am. & Eng. R. Cas.* 538, 63 *N. H.* 571, 4 *Atl. Rep.* 571.

332. Action to set aside sale and deed.—Where railroad property has been sold by the tax collector, for the nonpayment of taxes which have been remitted by act of the legislature before the sale, and the purchaser makes no attempt to assert his right to the property, but allows the company to retain possession, a court of equity will entertain a bill by the company to annul the sale, cancel the deed made to the purchaser, and enjoin him from asserting any claim to the property. *Mobile & G. R. Co.* v. *Peebles*, 47 *Ala.* 317.

Relief against a tax sale under an invalid tax can be obtained either by *certiorari* to bring up the record of the assessment for the purpose of having it quashed, or by bill in equity to declare the sale void and enjoin the setting up of title under it. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 5 *Mackey* (*D. C.*) 376.

In an action to set aside a tax sale of land embraced in a railway grant, the certificate of the secretary of the interior is admissible to show that other lands in the same section had been earned and were approved to the company before the taxes upon which the sale was made had accrued. *Chicago, B. & Q. R. Co.* v. *Holdsworth*, 47 *Iowa* 20.—DISTINGUISHED IN Dickerson *v.* Yetzer, 53 Iowa 681.

333. Affidavit of illegality.—To be entitled to the remedy provided by Georgia Act of 1874, a company must make the returns for taxation as provided by that act before execution is issued against it as a defaulting taxpayer. *Macon & A. R. Co.* v. *Goldsmith*, 62 *Ga.* 463. — DISTINGUISHING Goldsmith *v.* Southwestern R. Co., 62 Ga. 495.

In order to resist the process of the comptroller-general to collect a tax assessed by him by affidavit of illegality returnable to the superior court of Fulton county, under Ga. Act of February 28, 1874, and amendments thereto, the company should have complied with the condition precedent required by the Act of 1875, § 12, and should have made the return of its income therein required. *Goldsmith* v. *Augusta & S. R. Co.*, 62 *Ga.* 468.

Affidavit of illegality is not a remedy provided by law for resisting a *fi. fa.* issued by the comptroller-general for railroad taxes except where the assessment and *fi. fa.* are based upon a return of property made by the company for the given year. If the comptroller-general, for lack of the proper annual return of the company's property, has proceeded against the company as a defaulter, assessing both tax and penalty, there may be a remedy in equity by injunction, but the remedy at law provided by the Act of 1874, as modified and continued in force by subsequent acts, does not apply. *Goldsmith* v. *Georgia R. Co.*, 62 *Ga.* 485.

Where a company fails to make a return of its property for taxation the court has no jurisdiction to try an affidavit of illegality, and should dismiss it. *Goldsmith* v. *Southwestern R. Co.*, 62 *Ga.* 495.—DISTINGUISHED IN Macon & A. R. Co. *v.* Goldsmith, 62 Ga. 463.

No proper return having been made by a company, such as is required by Ga. Act of 1874, as a condition precedent to the remedy by affidavit of illegality returnable to the superior court of Fulton county, the affidavits should have been dismissed for want of jurisdiction — that remedy being good, and that court having jurisdiction only when such return is made. The remedy in equity by bill for injunction and relief is not before the court. *Goldsmith* v. *Central R. Co.*, 62 *Ga.* 509.

334. Certiorari—Petition.—The proceeding by a taxpayer in court contemplated by Cal. Act of 1860 is a proceeding by *certiorari* in the usual form, and the issuance of the writ is necessary to stay proceedings beyond ten days, though it seems that no formal injunction is necessary. *California*

Northern R. Co. v. *Butte County Sup'rs*, 18 *Cal.* 671.

N. H. Gen. Laws, ch. 61, § 9, provides that any person aggrieved by the decision of the board of tax assessors shall apply by petition for redress, within one year, to the supreme court, which shall give notice to the parties and grant a hearing. *Held*, that the special remedy therein provided must be followed. *Nashua & L. R. Co.* v. *Nashua*, 62 *N. H.* 602.

335. Replevin.—Under the statutes of Missouri back taxes upon real estate cannot be collected out of the personal property of subsequent purchasers of the realty; and if such property is levied upon the owner may maintain replevin therefor. *So held*, where a railroad was sold after a tax was levied thereon and before payment. *Atlantic & P. R. Co.* v. *Cleino*, 2 *Dill.* (*U. S.*) 175.

The provision of the charter of the city of Buffalo adopted in 1870, declaring that goods and chattels upon real estate upon which taxes are assessed shall be deemed to belong to the person to whom the land is assessed, does not apply to property belonging to another person in no way liable for the tax upon the land, and the collector cannot lawfully take such property for the taxes on the realty. *So held*, where an engine and cars were seized for taxes while temporarily standing on a private track, to satisfy taxes on the land on which the track was laid. *Lake Shore & M. S. R. Co.* v. *Roach*, 1 *Am. & Eng. R. Cas.* 184, 80 *N. Y.* 339.

Where such property is taken, an action by the owner to recover possession thereof may be maintained against the tax collector; and such property cannot be said to be taken for a tax within the meaning of N. Y. Code Pro. § 207; nor under the provision of 2 N. Y. Rev. St. 522, § 4, which provides that no replevin shall lie for any property taken by virtue of any warrant for the collection of taxes. *Lake Shore & M. S. R. Co.* v. *Roach*, 1 *Am. & Eng. R. Cas.* 184, 80 *N. Y.* 339.

2. *Action to Recover Back.*

336. When an action will lie.—Ordinarily a party paying a tax illegally assessed and collected has an ample remedy at law by an action either of trespass or of assumpsit. So where a statute requires rolling stock to be taxed in the several counties, towns, and cities *pro rata* according to the length of the track, and a company is taxed where it has only an easement or mere privilege of running its trains over the track of another company, the company taxed, after paying the tax, may maintain an action against the county to recover it back. *Cook County* v. *Chicago, B. & Q. R. Co.*, 35 *Ill.* 460.

Money voluntarily paid with full knowledge of the facts cannot be recovered back, and this rule applies to a voluntary payment of taxes; but the rule does not apply where the tax paid has been set aside by a court. *Mayor, etc., of Jersey City* v. *Riker*, 38 *N. J. L.* 225.

Plaintiff company, having, under protest, paid to the collector of defendant city the taxes assessed upon its property, which was exempt from taxation, can recover back only such of the taxes as were collected for the city's benefit, and not the state, county, and state school taxes, which defendant collected only as agent, and had paid over as directed by statute. *Vermont C. R. Co.* v. *Burlington*, 28 *Vt.* 193.

Where a board of supervisors "refused" to act upon a claim presented under Va. Code, § 844, claimant may sue the county under section 843. *Prince George County* v. *Atlantic, M. & O. R. Co.*, 87 *Va.* 283, 12 *S. E. Rep.* 667.—DISTINGUISHING Botetourt County *v.* Burger, 86 Va. 530; Fry *v.* Albemarle County, 86 Va. 195.

337. —— and when not.—To entitle one who has voluntarily paid taxes to have the same refunded, in accordance with Iowa Revision, § 762, the tax must be shown to be erroneous or illegal in assessment or levy. An action will not lie to recover from the county for taxes, paid under a misapprehension in regard to the ownership of the taxed property, where the taxpayer had full knowledge of all the facts upon which his claim of title is based. *Dubuque & S. C. R. Co.* v. *Webster County Sup'rs*, 40 *Iowa* 16.—DISTINGUISHED IN Butler *v.* Fayette County Sup'rs, 46 Iowa 326.

No action can be maintained against a collector by one who has been compelled to pay taxes levied to meet the interest on illegal bonds, for the recovery of the amount. The remedy of the taxpayer is a proceeding to arrest the collection of the tax. *Ranney* v. *Bader*, 67 *Mo.* 476.—FOLLOWING Rubey *v.* Shain, 54 Mo. 207. REVIEWING North Mo. R. Co. *v.* Maguire, 49 Mo. 483.

The mere fact that certain railroad lands were unpatented at the time taxes were levied thereon will not authorize the bringing of an action to recover back the taxes so paid. *Welton v. Merrick County Com'rs*, 17 *Am. & Eng. R. Cas.* 436, 16 *Neb.* 83, 20 *N. W. Rep.* 111.

338. What is a voluntary payment. —Where two persons claim the same lands under different grants from the United States, and, pending litigation to settle the title, one of the parties having refused to pay taxes on the lands assessed against him, the other, without request to do so, pays such taxes, he cannot recover back the amount so paid. *Iowa Homestead Co.* v. *Des Moines N. & R. Co.*, 17 *Wall.* (*U. S.*) 153. — DISTINGUISHED IN American Emigrant Co. *v.* Iowa R. Land Co., 52 Iowa 323. FOLLOWED IN United States *v.* Des Moines N. & R. Co., 142 U. S. 510; Dubuque & S. C. R. Co. *v.* Des Moines Valley R. Co., 54 Iowa 89. REVIEWED IN Bullard *v.* Des Moines & Ft. D. R. Co., 14 Am. & Eng. R. Cas. 529, 62 Iowa 382.

Certain lands granted to a railroad by the United States were taxed before the company obtained a patent therefor. The company paid the tax under protest, but before demanded, and before any effort to levy on property. It was afterwards judicially determined that the lands were not taxable. *Held*, not such compulsory payment as to give a right to recover them back, in the absence of any statute giving such right. *Union Pac. R. Co.* v. *Dodge County Com'rs*, 98 *U. S.* 541.

Taxes paid under a mistake of law cannot be recovered back unless the payment was involuntary; and the rule which treats the payment of taxes as involuntary, where the tax collector has authority to levy and sell on the refusal to pay, does not apply to the payment of taxes by railroad corporations, as against which the collection must be enforced by judicial proceedings. Therefore the payment by appellant of the taxes it seeks to recover back was voluntary, and not under compulsion, and it cannot recover. Moreover, as a portion of the property upon which the taxes were paid was legally liable therefor, the payment was not wholly without consideration, and for that reason the rule allowing a recovery, even if the payment had been under compulsion, would not apply. Nor do these cases belong to that class in which honor or good conscience requires the taxes to be refunded. *Louisville & N. R. Co.* v. *Hopkins County*, 37 *Am. & Eng. R. Cas.* 400, 87 *Ky.* 605, 9 *S. W. Rep.* 497.—QUOTING Fecheimer *v.* Louisville, 84 Ky. 306. REVIEWING Louisville *v.* Anderson, 79 Ky. 334.

When the collection of taxes cannot be enforced except by suit, as in case of railroads, a payment by the taxpayer without suit will be regarded as voluntary, and he cannot recover back the amount thus paid, upon the ground that the taxes were collected without legal authority, and were paid under a mistake of law. It is only where the collection of taxes can be enforced summarily that such a payment will not be regarded as voluntary. *Louisville & N. R. Co.* v. *Com.*, 41 *Am. & Eng. R. Cas.* 595, 89 *Ky.* 531, 12 *S. W. Rep.* 1064.

A collector of taxes for a town through which a railroad extended called at the office of the company in New York, and there exhibited to its treasurer a warrant and tax list issued by the board of supervisors of the county, commanding him to collect a tax of the company, and requested its payment; and the treasurer, with knowledge of all the facts touching the liability of the company, paid the amount of the tax to the collector without objection or protest. *Held*, that the company could not recover back the amount from the collector, although it was demanded from him before he paid it to the county treasurer, and there was a defect in the assessment, which appeared from the warrant, rendering the tax void. *New York & H. R. Co.* v. *Marsh*, 12 *N. Y.* 308. — DISTINGUISHING Corlies *v.* Waddell, 1 Barb. (N. Y.) 355.

339. What is an involuntary payment.—Where all steps for determining the amount of a tax upon personal property have been taken, the tax roll is complete and in the treasurer's hands, the taxes due, and it is made the duty of the treasurer at a specified date to issue a warrant to the sheriff to collect all unpaid taxes on personal property, and the duty of the sheriff within sixty days thereafter to levy upon and sell sufficient personal property to pay such taxes, penalty, and costs, and no discretion is given to any one to change the amount of the tax, or the time or manner of its collection, a payment to the treasurer of the tax, protesting its illegality, declaring that payment is made solely to avoid the issue of process, and asserting an intention

to sue for the sum illegally paid, should be considered an involuntary payment, or one made to prevent an immediate seizure of the taxpayer's property, although such payment was made seventeen days before the time fixed for the treasurer to issue his warrant. *Kansas Pac. R. Co.* v. *Wyandotte County Com'rs*, 16 *Kan.* 587.

A payment of an illegal tax item, the treasurer refusing to receive or to receipt for any tax unless the illegal portion was also paid, and where plaintiff protested against the illegality, and stated that the payment was made solely to avoid the issue of process, and gave notice that an action would be brought to recover that which was illegally exacted, is an involuntary payment. *Atchison, T. & S. F. R. Co.* v. *Atchison County Com'rs*, 47 *Kan.* 722, 28 *Pac. Rep.* 999. — FOLLOWING Kansas Pac. R. Co. *v.* Wyandotte County Com'rs, 16 Kan. 587.— FOLLOWED IN Atchison, T. & S. F. R. Co. *v.* Atchison, 47 Kan. 712.

When an attorney is sent to pay the legal and valid taxes assessed against his client and offers to pay illegal taxes, of the illegality of which he is unaware at the time, the client, after discovering such illegality, is not estopped from disputing such taxes. *St. Louis & S. F. R. Co.* v. *Apperson*, 97 *Mo.* 300, 10 *S. W. Rep.* 478.

A payment to the county treasurer by an express company of an illegal tax on its gross receipts from interstate business, under protest and with notice of an intention to bring action to recover back the amount paid, is an involuntary payment when made to avoid the penalties imposed by Ohio Rev. St. § 2843, and an action may be maintained to recover back the amount so paid. Such payment of the illegal tax, under protest and with notice, becomes involuntary by reason of the danger of destruction to the defaulting company's business, through the refusal of others to convey or carry packages, parcels, or merchandise for the company, on account of the statutory penalties for conveying the same. *Ratterman* v. *American Exp. Co.*, 49 *Ohio St.* 608, 32 *N. E. Rep.* 754.—QUOTING Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; Reading R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284. REVIEWING Ratterman *v.* Western Union Tel. Co., 127 U. S. 411.

340. Demand before suit.—Under Neb. Revenue Act, § 144, when an alleged illegal tax is paid under protest to a county treasurer, the treasurer receives it as the agent of the state school district, etc., for the benefit, or under the authority, or by the request, of which the same was levied, as well as of the county, and in order to lay a foundation for legal proceedings to recover such illegal taxes paid under protest, demand thereof must be made of the state treasurer, school district treasurer, etc., within the time limited by the statute. *Burlington & M. R. R. Co.* v. *Buffalo County*, 14 *Neb.* 51, 14 *N. W. Rep.* 539.

341. Pleading and evidence. — In an action by a railroad to recover taxes illegally collected, the declaration must set out the facts which show such illegality. *Montgomery & W. P. R. Co.* v. *Duer*, 46 *Ga.* 272.

In an action by a company against county commissioners, to recover back certain taxes paid, it was alleged in the petition that said taxes were illegal, and that they were paid under protest, and to prevent the county treasurer from issuing tax warrants for their collection; and it was claimed that they were illegal because they were levied as follows: "Two and a half mills incidental tax in school district No. 1"; "two mills incidental tax in school district No. 8," etc. But it was not alleged or shown in said petition that the county commissioners ever had anything to do with or concerning said taxes, either before or after their levy or collection. *Held*, that the petition did not state facts sufficient to constitute a cause of action in favor of the company and against the county commissioners. *Pawnee County Com'rs* v. *Atchison, T. & S. F. R. Co.*, 21 *Kan.* 748.

In an action by a railroad corporation against a town to recover back money paid for taxes assessed upon wood, upon the ground that its place of business was not in defendant town, the *onus* is upon plaintiff to show where it was. *Portland, S. & P. R. Co.* v. *Saco*, 60 *Me.* 196.

A petition by a company against a city collector for wrongfully levying on property to satisfy a tax, when the pleading only attacks the form and manner of making the assessment, but sets out no facts showing that the assessment is void, is bad on demurrer. If the city had jurisdiction over the subject matter, that would amount to a protection of the officer in executing his process. *Mayor, etc., of Jefferson* v. *Opel*, 49 *Mo.* 190.

3. *Injunction.*

342. In general.*—An injunction will not be granted to enjoin a state tax on lands granted by the United States to a railroad, where all costs due the United States had been paid before the final action of the assessing officers, and patents issued before the suit was brought, and where a doubt exists as to the time of assessment under the state law. *Hunnewell* v. *Cass County*, 22 *Wall.* (*U. S.*) 464.

Except under very special circumstances the power of taxation ought not to be interfered with by injunction. *Stevens* v. *New York & O. M. R. Co.*, 13 *Blatchf.* (*U. S.*) 104.

An injunction to restrain the sale of property assessed as omitted property will be refused where it appears that the property is taxable, and that if the taxes are paid, complainant will pay no more than its share of the public burdens. *Union Pac. R. Co.* v. *Lincoln County*, 2 *Dill.* (*U. S.*) 279.

A court of equity will not give to a party relief against that which it is his duty to do, by contract or otherwise. So, where complainant corporation has agreed with a railway company, for a consideration, to make advances to pay its taxes, when necessary to maintain its organization, and has been put into possession of all its property, it will not be allowed to enjoin the collection of such taxes which are proper and legal, on the assumed ground of its ownership of the property. *Archer* v. *Terre Haute & I. R. Co.*, 7 *Am. & Eng. R. Cas.* 249, 102 *Ill.* 493.

A company which acquiesces in the location and construction of a public ditch upon its right of way cannot, in a suit by it to enjoin the collection of an assessment for the cost of repairing the ditch, raise the question as to whether the ditch was rightfully located on its premises. *Davis* v. *Lake Shore & M. S. R. Co.*, 114 *Ind.* 364, 14 *West. Rep.* 269, 16 *N. E. Rep.* 639.

Courts of equity will not interfere by injunction to restrain the collection of taxes, when the property is subject to taxation and the tax is not excessive, merely because there are irregularities in the assessment. *Kansas Pac. R. Co.* v. *Russell*, 8 *Kan.* 558, 5 *Am. Ry. Rep.* 232.—APPROVING Missouri River, Ft. S. & G. R. Co. *v.* Morris, 7 Kan. 210.

N. Car. Act of 1887, ch. 137, § 84, forbidding the granting of injunctions to restrain the collection of any tax, unless such tax is levied for an illegal or unauthorized purpose, does not conflict with either the federal or state Constitutions. *Raleigh & G. R. Co.* v. *Lewis*, 99 *N. Car.* 62, 5 *S. E. Rep.* 82.

By a long course of decisions it has been settled that the remedy against an attempt to coerce the payment of an illegal tax is by injunction. *Shenandoah Valley R. Co.* v. *Clarke County Sup'rs*, 78 *Va.* 269.

343. There must be no remedy at law. — To warrant an injunction against the collection of a tax, it must appear clearly, from allegations and proofs, that the assessment works such an injury as a court of equity alone is competent to redress. *Chicago, B. & Q. R. Co.* v. *Siders*, 88 *Ill.* 320, 21 *Am. Ry. Rep.* 304.

A court of equity will not enjoin a county collector from applying for judgment against the right of way of a company for taxes due on its capital stock, on the ground that complainant claims to have succeeded to such company's rights, the defense, if any, being available at law, and this especially when complainant has obligated itself by contract to pay such taxes. *Archer* v. *Terre Haute & I. R. Co.*, 7 *Am. & Eng. R. Cas.* 249, 102 *Ill.* 493.

Under the law of Nebraska, where a taxpayer feels himself wronged by the assessment or valuation of his own or other property for taxation, he has an adequate legal remedy by a resort to the county board of equalization, and neglecting this he can have no standing in a court of equity for relief. *Burlington & M. R. R. Co.* v. *Seward County Com'rs*, 10 *Neb.* 211, 4 *N. W. Rep.* 1016.

A court of equity will not interfere by injunction to prevent a mere trespass, where there are no peculiar circumstances which would render the remedy at law inadequate. So a court of equity will not enjoin the sale of rolling stock for illegal taxes, where the seizing of the property is but a mere trespass for which a remedy at law exists. *Chicago & N. W. R. Co.* v. *Ft. Howard*, 21 *Wis.* 44.

344. Payment or tender of amount due. — No injunction to stay the collection of taxes levied against a railroad will be granted upon a bill which does not affirmatively show that so much of the tax has

* Relief in equity against taxation, see note, 3 AM. & ENG. R. CAS. 593.

been paid or tendered without demanding a receipt in full as is conceded ought to be paid, or so much as the court can see, or as can be shown by affidavits, should be paid. *Huntington* v. *Palmer*, 7 *Sawy.* (*U. S.*) 355, 8 *Fed. Rep.* 449.—REVIEWING Taylor *v.* Secor, 92 U. S. 575.

A bill to restrain the collection of taxes which does not show a payment or unconditional tender of so much of the tax as is conceded, or can be shown, to be properly due does not present any equity sufficient to justify either preliminary or final relief. *Huntington* v. *Palmer*, 7 *Sawy.* (*U. S.*) 355, 8 *Fed. Rep.* 449.

Even if a remedy has not been specifically provided for the county, if a railroad seeks to enjoin the collection of an excessive amount of tax, will not equity require that it pay a just and proper amount? *Quære. Savannah, F. & W. R. Co.* v. *Morton*, 71 *Ga.* 24

The power to levy a tax must be clearly and distinctly given by law, and if the limits fixed by the statute are transcended by levying a sum in excess may affect titles acquired by a sale of the property for such illegal tax. But this will not excuse a party praying for an injunction from tendering the amount of taxes justly due from him. *Burlington & M. R. R. Co.* v. *York County Com'rs*, 7 *Neb.* 487.—FOLLOWED IN Burlington & M. R. R. Co. *v.* Saunders County Com'rs, 9 Neb. 507; Union Pac. R. Co. *v.* Dawson County, 12 Neb. 254.

A bill to enjoin the collection of taxes on lands granted to a company on the ground that they are exempt from taxation under a statute which requires the company to pay three per cent. annually on its gross earnings will be dismissed for want of equity, where there is nothing to show that the three per cent. has been paid or tendered. *Northern Pac. R. Co.* v. *Walker*, 47 *Fed. Rep.* 681.

A company filed a bill to enjoin several county treasurers from collecting taxes, but admitted that a certain amount was due which it claimed to have tendered, but which had been refused. Thereupon the defendants asked for an order requiring the company to pay over the amount thus tendered. *Held*, that the company could not object to the payment of this amount on the ground that it might prejudice some of its rights, or that some advantage might be taken of it elsewhere. *Richmond & D. R. Co.* v. *Blake*, 49 *Fed. Rep.* 904.

In such case the company could not object that a part of the tax went to the state, that it was not a party, and that the action of the treasurers might not bind the state, especially where the company was seeking by its own bill to have the tax declared invalid without making the state a party; and that the court could not hold the money until the state submitted to its jurisdiction. *Richmond & D. R. Co.* v. *Blake*, 49 *Fed. Rep.* 904.

Where a company has not tendered or offered to pay the taxes that its lands should justly bear, it cannot enjoin a sale thereof on the ground that the tax collector assessed the taxes and added them to the tax roll without notice to the company. *Oregon & C. R. Co.* v. *Lane County*, 23 *Oreg.* 386, 31 *Pac. Rep.* 964.

345. Jurisdiction, generally.*—Tax executions having been issued against a railroad and levied upon property in a county where the company has its principal office, the superior court thereof has jurisdiction to enjoin the collection of the *fi. fas.* The case is not altered by a lease to another company. *Southwestern R. Co.* v. *Wright*, 68 *Ga.* 311. *Wright* v. *Southwestern R. Co.*, 64 *Ga.* 783.

Circuit courts have jurisdiction, by injunction, to stay any illegal proceedings to assess a tax upon and sell by coercive sale the property of an individual or corporation. *Louisville & N. R. Co.* v. *Warren County Court*, 5 *Bush* (*Ky.*) 243.—FOLLOWING Applegate *v.* Ernst, 3 Bush 648

346. —— of federal courts.—Where a portion of the stockholders are citizens of other states, they may seek relief in a federal court against an illegal taxation by the state, although there is no allegation that the tax violates the Constitution or laws of the United States; and the corporation, doing business in the state where the tax is assessed, may be made a defendant. *Paine* v. *Wright*, 6 *McLean* (*U. S.*) 395.

United States Rev. St. § 3224, which declares that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," applies only to taxes levied by the United States, and has no application to taxes levied by the District of Columbia, although under authority of the United States. *Alex-*

* Power of a court of equity to enjoin the collection of a tax, see note, 53 AM. REP. 110.

andria C., R. & B. Co. v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey (D. C.)* 217.

A company cannot obtain an injunction in the United States courts to restrain the levy of taxes imposed on it by a state on the ground that the assessment is under laws which discriminate unjustly against the corporation and deprive it of an opportunity of a hearing, in violation of the provisions of the fourteenth amendment to the Constitution of the United States, where an inspection of those laws shows that such is not the case. *Manhattan R. Co.* v. *Mayor, etc., of N. Y.*, 13 *Am. & Eng. R. Cas.* 261, 18 *Fed. Rep.* 195.—APPLYING People ex rel. *v.* Com'rs of Taxes, 60 N. Y. 638, 46 How. Pr. 227. DISTINGUISHING San Mateo County *v.* Southern Pac. R. Co., 13 Fed. Rep. 722.

347. Grounds, generally.*—Where a corporation has tendered coupons from state bonds in payment of taxes, under the Virginia Act of March 20, 1871, entitled "An act to provide for the funding and payment of the public debt," and the coupons have been refused, it is entitled to an injunction to restrain a levy on its rolling stock. (Waite, C.J., Miller, Bradley, and Gray, JJ., dissenting.) *Allen* v. *Baltimore & O. R. Co.*, 114 *U. S.* 311, 5 *Sup. Ct. Rep.* 925, 962. —DISTINGUISHED IN Hagood *v.* Southern, 117 U. S. 52.

Equity has jurisdiction to interfere in behalf of a company on these grounds: (1) because exactions are pressed upon it, in the form of annual taxes, inconsistent with and violative of its chartered rights, and destructive of its franchise; (2) because the exactions may be repeated if these are successful, and suits and costs be multiplied; (3) because it was misled by the action of the comptroller and a legal fraud perpetrated upon it; (4) because of mistake caused by the defendant's conduct; (5) because the numerous questions made as to different parts of the road and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and other questions in respect to other items of property in and out of this state, and in what degree or how they are connected with this road, and whether liable or not to be taxed, complicate the case to such a degree that a court of equity can unravel it better than a court of law. *Wright* v. *Southwestern R. Co.*, 64 *Ga.* 783.

A court of equity will not entertain a bill to restrain the collection of a tax except where it is unauthorized by law, or where it is assessed upon property not subject to taxation, and then only where the collection of the tax would produce irreparable injury or cause a multiplicity of suits. *Cook County* v. *Chicago, B. & Q. R. Co.*, 35 *Ill.* 460.—EXPLAINING Illinois C. R. Co. *v.* McLean County, 17 Ill. 291; Beverly *v.* Sabin, 20 Ill. 357. QUOTING Ottawa *v.* Walker, 21 Ill. 605.—QUOTED IN Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 561.

A court of equity will not entertain a bill to restrain the collection of a tax except in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation, or where the property has been fraudulently assessed at too high a rate. *Chicago, B. & Q. R. Co.* v. *Cole*, 75 *Ill.* 591.—FOLLOWED IN Taylor *v.* Secor, 92 U. S. 575; Chicago, B. & Q. R. Co. *v.* Paddock, 75 Ill. 616.

Or where the assessment or levy has been made without legal authority, or fraud has occurred. For all other grounds the party must be left to his remedy at law, if any. *Wabash, St. L. & P. R. Co.* v. *Johnson*, 17 *Am. & Eng. R. Cas.* 487, 108 *Ill.* 11.

In such case, in no event will an injunction lie unless it is clearly made to appear that the party has been wrongfully assessed, and will sustain irreparable injury unless the collection of the tax be enjoined. *Porter* v. *Rockford, R. I. & St. L. R. Co.*, 76 *Ill.* 561.—QUOTING Weaver *v.* Devendorf, 3 Den. (N. Y.) 119.

Where a county grants its swamp lands to a company to aid in the construction of a road, the company releasing the state and county from all liability for reclaiming the lands, a grantee of the company cannot ask an injunction to restrain the county from collecting a tax for ditching and draining them, notwithstanding the subsequent passage of an act providing that the county cannot release itself from the duty of making such improvements. *Hatch* v. *Pottawattamie County*, 43 *Iowa* 442.

An action to enjoin the collection of the tax upon the ground that the ditching has not benefited the land upon which the tax is levied is not the proper remedy. *Hatch* v. *Pottawattamie County*, 43 *Iowa* 442.

* Injunction to restrain levy of tax as casting cloud on title, see note, 17 AM. & ENG. R. CAS. 398.

In 1872 county commissioners levied a road tax upon the taxable property of the county. Afterwards the county clerk determined the amount to be charged to the different persons, companies, and corporations having property in the county, and placed the amount to be charged against a railroad company upon the tax roll of the county for that year. The company did not pay the amount. In February, 1873, the county treasurer issued his warrant to the sheriff of the county for the collection of the tax, and the sheriff was about to proceed to collect the same when the company commenced this action to enjoin the collection thereof, claiming that the tax could not be collected at that time, nor in that manner. *Held*, that, under the tax laws in force in 1872 and in 1873, all railroad property used in operating the road, including the real estate, was treated as personal property; and that, as all road taxes on personal property for the year 1872 should have been collected at the time and in the manner that the road tax against the company was attempted to be collected, the road tax against the company was properly collectible, and the company could not maintain the action. *Leavenworth, L. & G. R. Co.* v. *Clemmans*, 14 *Kan.* 82.

Equity will interpose to prevent the collection of an illegal tax when such tax would cast a cloud upon the title to real estate; and a tax record, regular upon its face, creates a lien upon real estate and is a cloud upon the title, where a tax deed is by law *prima facie* evidence of title. The rule is different where the tax is illegal on its face. Equity will interfere, also, to prevent the collection of a tax upon property which is exempt from taxation; to prevent a multiplicity of suits; to prevent the destruction of a franchise; to protect the quiet enjoyment of an easement; and to protect rights the evidence of which is liable to be lost. *Northern Pac. R. Co.* v. *Carland*, 17 *Am. & Eng. R. Cas.* 364, 5 *Mont.* 146, 3 *Pac. Rep.* 134.

Where the collection of illegal taxes against a company may work an irreparable injury, an injunction against the collector and other county officials will be granted. *Union Pac. R. Co.* v. *Carr*, 1 *Wyom.* 96.

An injunction will lie at the suit of a railroad to restrain a sale of its lands for taxes where sufficient ground for such relief is shown, such as saving a multiplicity of suits, or preventing irreparable injury or the casting a cloud upon the title of realty. *Canadian Pac. R. Co.* v. *Calgary*, 5 *Man.* 37.

348. Assessment of exempt property. — Where a state tax is assessed and levied against a company owning and operating a line of road within the state, the assessment being based upon the rolling stock used in operation of such road, a third party cannot enjoin the state from collecting, or the company from paying, a portion of such tax, on the ground that a part of the rolling stock included in such assessment is the property of such third party and is exempt from taxation. *Pullman Palace Car Co.* v. *Twombly*, 29 *Fed. Rep.* 658.

Under Idaho Code a party cannot bring a separate suit in equity to enjoin an action at law when the grounds of the bill might be set up as a defense to the action at law. So where a company claims an exemption from taxation it must set up the matter in defense to the action at law brought to collect the taxes, and not resort to a separate suit in equity. *Utah & N. R. Co.* v. *Crawford*, 1 *Idaho* 770.

Courts of equity will not enjoin the collection of the whole of a tax because in determining the valuation of an aggregate property exempt property may have been included as a factor. *Huck* v. *Chicago & A. R. Co.*, 86 *Ill.* 352, 17 *Am. Ry. Rep.* 419.

349. Cases of summary sales. — When a tax collector summarily seizes property and advertises it for sale for arrearages of taxes, and his right to do so is contested, he must show specifically what property he claims taxes on, what is the cash value of that property, and what the percentage on that value. Otherwise he will be enjoined from proceeding in the summary way allowed by the law. *Clinton & P. H. R. Co.* v. *Tax Collector*, 30 *La. Ann.* 626.

350. Fraud or unfairness. — The superstructure of a railroad, aside from the franchise to use it for railroad purposes, being of but little or no value, the finding its actual value with the franchise, for taxation, does not afford sufficient evidence of unfairness to justify a court of equity in restraining the collection of taxes levied on such valuation. *Chicago, B. & Q. R. Co.* v. *Siders*, 88 *Ill.* 320, 21 *Am. Ry. Rep.* 304.

Ordinarily, the fraud which may be urged against an assessment of railroad property must, in general terms, have consisted either in a wilful disregard by the members

of the board of equalization of a known duty, for the purpose of producing a result which could not otherwise have been produced, or in their denying or preventing the taxpayer from doing something that he might lawfully have done, and but for being denied and prevented by them would have done, which would or might have had the effect of causing a lower valuation of the property to be made. *East St. Louis Connecting R. Co.* v. *People ex rel.*, 119 *Ill.* 182, 10 *N. E. Rep.* 397.

A collector of taxes, in violation of an agreement between the county court and a tax debtor, was about to enforce collection of certain taxes assessed against the real estate of the latter. *Held*, that an injunction would lie to prevent a sale. *St. Louis, I. M. & S. R. Co.* v. *Anthony*, 7 *Am. & Eng. R. Cas.* 366, 73 *Mo.* 431.—DISTINGUISHED IN Kansas City *v.* Hannibal & St. J. R. Co., 81 Mo. 285.

351. Illegality.—A court of equity will not restrain the collection of an illegal tax unless irreparable injury will otherwise result. *Oliver* v. *Memphis & L. R. R. Co.*, 30 *Ark.* 128.

The rule that the mere illegality of a tax is no ground for the interposition of a court of equity, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, applies to taxes levied by the sovereign; it would seem not to be properly applicable to the case of an illegal tax levied by a municipal corporation. *Alexandria C., R. & B. Co.* v. *District of Columbia*, 7 *Am. & Eng. R. Cas.* 325, 1 *Mackey (D. C.)* 217.—QUOTING Taylor *v.* Secor, 92 U. S. 612.

Equity will enjoin the collection of a tax which is not authorized by law, and may adjust and settle the principles regulating the imposition of the tax. So a court of equity will interfere when it is apparent that the collection of a tax upon the entire property of a company, without regard to limitations in its charter, would be unconstitutional and illegal. *Southwestern R. Co.* v. *Wright*, 68 *Ga.* 311.

Where a tax is levied in excess of the legal limit, an injunction will not be granted to restrain the collection of the whole tax if the legal and illegal portions can be separated, but in order to obtain an injunction the taxpayer must tender the amount which is lawfully due. *Burlington & M. R. R. Co.* v. *York County Com'rs*, 7 *Neb.* 487.

A sinking-fund tax, levied to pay other than the bonded indebtedness of a county, may be enjoined. And the fact that the county commissioners, after the levy of the tax, formally rescinded the same, will not defeat the action where the tax is an apparent lien upon real property. *Burlington & M. R. R. Co.* v. *Clay County*, 13 *Neb.* 367, 13 *N. W. Rep.* 628.—FOLLOWING Union Pac. R. Co. *v.* Buffalo County Com'rs, 9 Neb. 449; Union Pac. R. Co. *v.* Dawson County, 12 Neb. 254.

Where county commissioners have caused to be placed on the duplicate a personal tax to be collected against a railroad, a resident owner of the land, as part of the cost of a county ditch affecting its land, under a proceeding of which such company had neither notice nor knowledge, such tax is illegal and its collection may be perpetually enjoined. The remedial provisions of Ohio Rev. St. §§ 4490, 4491, do not apply. *Baltimore & O. & C. R. Co.* v. *Wagner*, 43 *Ohio St.* 75, 1 *N. E. Rep.* 91.

352. Income not up to taxing mark.—Virginia Act of March 6, 1847, § 7, *held*, to mean that taxes may be assessed upon the Baltimore & O. R. Co. whenever the net income of the road shall exceed six per cent. per annum on the capital invested, and not when the net income of that portion of the road in Virginia (now West Virginia) shall exceed that amount. *Baltimore & O. R. Co.* v. *Marshall County Sup'rs*, 3 *W. Va.* 319.—FOLLOWED IN Baltimore & O. R. Co. *v.* Wheeling, 3 W. Va. 372.

It not being claimed or appearing in the record that the net income of the company, on the capital invested, exceeded six per cent. per annum for the year 1855, when the taxes in this cause were assessed, the order of the court below dissolving an injunction granted to said company to restrain the collection of taxes assessed on its property by the appellee for that year was erroneous. *Baltimore & O. R. Co.* v. *Wheeling*, 3 *W. Va.* 372.

353. Irregularities.* — A court of equity will not enjoin the collection of a tax, at the suit of a railroad, for mere irregularities, but only where the tax is unauthorized, or the property not subject to taxation. *Chicago, B. & Q. R. Co.* v. *Frary*, 22 *Ill.* 34. —QUOTED IN Wood *v.* Helmer, 10 Neb. 65.

* Irregularity in assessment as ground for injunction, see note, 17 AM. & ENG. R. CAS. 490.

A railroad tax will not be enjoined because the distribution of its taxable property, other than its local property, among the several counties through which it runs was made by the clerk of the board of equalization after the adjournment of the board, if made on the basis fixed by the statute, and if the burden on the company has not been increased. *Wilson* v. *Weber*, 5 *Am. & Eng. R. Cas.* 112, 96 *Ill.* 454; *affirming* 3 *Ill. App.* 125.

Failure of the state board of equalization to apportion the value of the capital stock of a company among the several counties through which the road is located, and the making of such apportionment by the auditor, so it is correctly made, is no ground for interfering with the collection of the tax. The company cannot object because the tax may not be distributed properly between the counties. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.—FOLLOWING Thatcher *v.* People ex rel., 79 Ill. 597; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602.

Equity will not interfere to restrain the collection of taxes authorized by law on account of errors or irregularities in the assessment; and when a road tax has been legally levied and is unpaid, equity will not relieve a taxpayer from the payment of such tax on account of irregularities in its return by the township clerk to the county treasurer. And where the statutory provision for the collection of taxes is plain, speedy, and adequate, equity will not interfere to enforce their collection. *Cedar Rapids & M. R. R. Co.* v. *Carroll County*, 41 *Iowa* 153.

In an action to enjoin certain taxes assessed by the local assessor upon material for the construction of a railroad which was piled up near a city and had so remained for a long time—*held:* (1) that the material was taxable, and in the absence of proof that it had been assessed by the state board there was no presumption to that effect; and (2) that the taxes assessed by the local assessor would not be enjoined. *Chicago, B. & Q. R. Co.* v. *Merrick County*, 36 *Neb.* 176, 54 *N. W. Rep.* 309.

Receivers of a railroad applied to court to enjoin certain tax collectors from executing warrants for taxes assessed under the laws of New York on the mortgaged property, on the ground of irregularities in the assessment of the taxes. So far as appeared, the warrants were regular on their faces and the tax collectors were acting thereunder in good faith, in the discharge of their duty. The injunction was refused. *Stevens* v. *New York & O. M. R. Co.*, 13 *Blatchf.* (*U. S.*) 104.

On application to enjoin the collection of the one per cent. school tax in a county, under Tex. Act of August 13, 1870—*held*, immaterial that the county was not subdivided into school districts; nor was it necessary to designate the property in the levy upon which the taxes should be collected, or that the treasurer of the board of school directors had ever given bond. *Hall* v. *Houston & T. C. R. Co.*, 39 *Tex.* 286.—FOLLOWING Kinney *v.* Zimpleman, 36 Tex. 554.

A charge, in a petition for injunction to restrain the collection of taxes, that the board of equalization added to the assessment property not owned by the taxpayer will be disregarded when it is at the same time shown that the amount of taxes first assessed against the taxpayer for the same species of property is not thereby increased by the board of equalization. *Texas & P. R. Co.* v. *Harrison County*, 54 *Tex.* 119.

354. Listing property in wrong name.—Listing of railroad property in a wrong name forms no ground for enjoining the collection of the tax thereon. The Revenue Act, § 253, makes all taxes on real estate a lien on the same from and after the first day of May in the year it is assessed, without regard to its ownership. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.

A construction company, bound by its contract to construct and equip a railroad, purchased and owned the rolling stock and other personal property used in the work of construction on the first day of May in a certain year, when the property was listed for taxation. *Held*, that the person making the return to the county clerk, not being the agent or superintendent of the railroad company, had no authority to act for the company, and the collection of the tax as against the railroad company should be enjoined. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.

355. Omission of other property subject to assessment. — Conceding a statute of Iowa exempting railroad companies from their due proportion of taxation to be unconstitutional, the omission, pursuant to such statute, to tax the property of railroad companies the same as that of individuals does not render void a tax levied upon the property of others which is

liable to taxation; and hence the owner of property properly assessed cannot, on the ground of an omisson to assess other property subject to taxation, enjoin the collection of taxes against his own property. *City of Muscatine* v. *Mississippi & M. R. Co.*, 1 *Dill.* (*U. S.*) 536.

Omissions or exemptions purposely made under a misapprehension of the law, and in the belief that the property is not taxable, are not sufficient ground for enjoining the collection of a tax upon other property which is otherwise legally imposed. *Burlington & M. R. R. Co.* v. *Seward County Com'rs*, 10 *Neb.* 211, 4 *N. W. Rep.* 1016.

Accidental omission, or intentional omission under mistake of law, of taxable property is no ground for enjoining the collection of taxes on property which is assessed. *Burlington & M. R. R. Co.* v. *Saline County Com'rs*, 7 *Am. & Eng. R. Cas.* 347, 12 *Neb.* 396, 11 *N. W. Rep.* 854.—REVIEWING Burlington & M. R. R. Co. *v.* Seward County Com'rs, 10 Neb. 211.

356. Overvaluation or assessment.—Where no fraud is charged in the assessment of railroad property, a chancellor will not be warranted in restraining the collection of a tax levied upon it merely because in his judgment the assessing board has overvalued it. *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 41 *Am. & Eng. R. Cas.* 589, 52 *Ark.* 529, 13 *S. W. Rep.* 254.

On a bill to enjoin the collection of taxes, on the alleged ground that the property has been doubly assessed, once by the state board of equalization and once by the local assessors, when such allegation is denied by the answer the burden of proof is on the complainant to prove the fact of double assessment, substantially as alleged. *Chicago, B. & Q. R. Co.* v. *Paddock*, 75 *Ill.* 616.—FOLLOWING Chicago, B. & Q. R. Co. *v.* Cole, 75 Ill. 591.

A bill to enjoin the collection of the tax of a company charged that the state board of equalization assessed the capital stock of the company, including its franchise, beyond its actual value, and that in making this assessment they added to what they had determined the value of the capital stock, not only the indebtedness of the company, but also the indebtedness of six other companies of which it was lessee, one of which lay without the state, for the payment of none of which the company was liable, such indebtedness of other companies so added being $6,756,000. This latter fact was admitted by a demurrer, and the court below sustained the demurrer. *Held*, that the court erred in sustaining the demurrer; that it was improper to take into consideration the indebtedness of the other companies in fixing the valuation of the property of the company seeking to enjoin the tax. *Chicago, B. & Q. R. Co.* v. *Cole*, 75 *Ill.* 591.

357. Prevention of multiplicity of suits.—While a bill will not lie to retain a tax merely because it is illegal, yet a bill will lie by a railroad company where it shows, in addition to the illegality of the tax, that it will save a multiplicity of suits, and that the tax will prevent the sale and cloud the title of a large amount of real estate that the company is offering for sale. *Union Pac. R. Co.* v. *Cheyenne*, 113 *U. S.* 516, 5 *Sup. Ct. Rep.* 601.

Equity will interfere to enjoin the collection of an illegal tax upon railroad property, where it appears that if the tax is paid it will require some forty suits to recover back the money; and a federal court will apply the remedy notwithstanding a state statute, passed since the company was chartered, prohibits injunctions against the collection of taxes. *Louisville & N. R. Co.* v. *Gaines*, 2 *Flipp.* (*U. S.*) 621, 3 *Fed. Rep.* 266.

Where a bill shows not only that a tax is illegal, but that if not enjoined a multiplicity of suits will arise and a cloud be cast upon the owner's title, and that he has no adequate remedy at law, it presents a case of equity cognizance. *Union Pac. R. Co.* v. *McShane*, 3 *Dill.* (*U. S.*) 303.

A bill in such case to enjoin the collection of state, county, and school taxes, which joins as defendants the various counties through which the railroad runs, is not multifarious, where the question on which the case turns is common to all and the counties are mere agencies of the state as to that part of the taxes which they must pay into the state treasury. *Union Pac. R. Co.* v. *McShane*, 3 *Dill.* (*U. S.*) 303. *Northern Pac. R. Co.* v. *Walker*, 47 *Fed. Rep.* 681.

The remedy by injunction against the collection of an invalid tax is available where, although the pleadings did not make out a case for such relief, the parties stipulated certain facts going to show that a multiplicity of suits would be avoided by jurisdiction being taken in equity. *Philadelphia*,

W. & B. R. Co. v. *Neary*, 5 *Del. Ch.* 600, 8 *Atl. Rep.* 363.

358. Parties.—A new corporation deriving title under foreclosure of a railroad mortgage is not entitled to file a bill of revivor to a suit formerly commenced by stockholders of the company to enjoin certain county officers from the collection of taxes thereon. *Keokuk & W. R. Co.* v. *Scotland County*, 152 *U. S.* 318, 14 *Sup. Ct. Rep.* 605.

359. Bill, complaint, or petition.—A statement in a bill to enjoin the collection of a tax against a railroad that the assessment was outrageously exorbitant, and was fraudulently made, without showing in what the overvaluation consists, and giving no facts, is not sufficient to enjoin the collection of the tax. A mere allegation of fraud is not sufficient, and an overvaluation will not of itself establish fraud. *Union Trust Co.* v. *Weber*, 3 *Am. & Eng. R. Cas.* 583, 96 *Ill.* 346.

Where a company files a bill for an injunction alleging that its lands are exempt from taxation under a statute which requires railroad companies to pay a certain amount in lieu of direct taxes on their property, except such property as is not necessary for the operation of the road, an averment in the bill that the lands are necessary for the proper operation of the road is equivalent to an allegation that they are actually used for such purpose. *Marquette, H. & O. R. Co.* v. *Marquette*, 35 *Mich.* 504, 16 *Am. Ry. Rep.* 179.

In an action to restrain by injunction the collection of a tax complained of as erroneous, a complaint which does not aver that the plaintiff sought the redress provided for in said statute, or tendered the amount admitted to be due, is bad on demurrer. *Northern Pac. R. Co.* v. *Patterson*, 10 *Mont.* 90, 24 *Pac. Rep.* 704.—FOLLOWING Dundee Mortgage Trust Inv. Co. *v.* Charlton, 13 Sawy. (U. S.) 25.

A petition seeking to enjoin the collection of a tax on railroad property, where it appears that the tax is only excessive, must allege that the company is ready to pay the taxes admitted to be due and that the company has used every means provided by law for its relief. *Rio Grande R. Co.* v. *Scanlan*, 44 *Tex.* 649.

A petition for an injunction to restrain the sale of land for taxes assessed under Tex. Act of Aug. 21, 1876, and which taxes were alleged to be excessive, is not sufficient to authorize the writ, if the petition shows no excuse for the failure of the plaintiff to take proper steps to refer, at the proper time, the valuation complained of to the board of equalization. *Houston & T. C. R. Co.* v. *Presidio County*, 53 *Tex.* 518.

When a party applies to a circuit court to enjoin the collection of taxes, or the collection of part of a tax, if there is any part which he admits to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that he has paid it or tendered it; and it is not a sufficient allegation to come and say that he is willing, or even that he has paid it into the court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his taxes, or any portion of them, cannot screen himself, during the course of a long litigation, from paying that which must be paid, or ought to be paid, by setting up a contest over that which is doubtful, and the payment of which may or may not be necessary. *Parmley* v. *St. Louis, I. M. & S. R. Co.*, 3 *Dill.* (*U. S.*) 25.

360. Demurrer—Evidence.—Where a bill to enjoin the collection of a tax on a railroad alleges that the road as organized was exempt from taxation, and that exemption passed to and vested in the complainant as purchaser of the road, the truth of the allegation is not admitted by a demurrer. A demurrer cannot admit a fact impossible in law. *Louisville & N. R. Co.* v. *Palmes*, 13 *Am. & Eng. R. Cas.* 380, 109 *U. S.* 244, 3 *Sup. Ct. Rep.* 193.

The admission in evidence of a tax duplicate showing that one who seeks to enjoin the collection of a railroad tax is delinquent as to other taxes is not objectionable. *Hill* v. *Probst*, 120 *Ind.* 528, 22 *N. E. Rep.* 664.

361. Hearing — Postponement.—A bill was filed to enjoin the collection, by the tax collector and sheriff, of certain *fi. fas.* issued against a railroad for state and county taxes, on the ground that they were illegal and that the legal taxes had been returned and paid to the comptroller-general, and upon a hearing it was shown that complainant's solicitors had written to the comptroller-general for certified copies of the tax returns, and in reply had received a letter, dated two days before the hearing, in which the comptroller-general stated

that he had written to the tax collector to recall the *fi. fas.* sought to be enjoined and to stop any further proceedings, and to notify complainant's solicitors. *Held*, that on such a showing the hearing should have been postponed and time allowed to obtain the depositions of the comptroller and tax collector. *Savannah, F. & W. R. Co.* v. *Morton*, 71 *Ga.* 24.

362. Granting injunction pendente lite.—Where all the facts of a case make it apparent that the collected tax upon the entire property of the company, without regard to the limitations contained in its charter, would be unconstitutional, the chancellor has a right to enjoin further proceedings until the final hearing of the cause. *Wright* v. *Southwestern R. Co.*, 64 *Ga.* 783.

A temporary injunction was granted restraining a county treasurer and the state treasurer from paying interest on certain county bonds issued in aid of a railroad. While the suit was still pending and the temporary injunction in force, the taxing officers of the county levied and were proceeding to collect a tax from the railroad company and others to pay interest on the bonds; whereupon the company filed a bill to enjoin the collection of the tax on the ground that the same was illegal and in violation of the temporary injunction. *Held*, that the granting of the injunction determined no rights, and that the tax could be collected while it was in force. *Leavenworth, L. & G. R. Co.* v. *Clemmans*, 14 *Kan.* 82.

Where an injunction is sought to restrain the collection of taxes on railroad property, on the ground that the assessment has been adjudged illegal and void, but it appears that the judgment has been reviewed on appeal and reversed, and the assessment in all respects confirmed, there is no longer any basis for the relief asked for, and an order denying a temporary injunction must be affirmed. *Delaware, L. & W. R. Co.* v. *Gordon*, 46 *N. Y. S. R.* 733, 19 *N. Y. Supp.* 533, 64 *Hun* 637, *mem.*

An injunction *pendente lite*, in an action to test the constitutionality of N. Car. Act of 1879, ch. 158, relating to railroad taxation, will not be granted to restrain proceedings under the provisions of the act, except to restrain the collection of the tax, until the merits of the controversy can be determined. The judicial authority should be reluctant to interfere and obstruct the execution of the expressed legislative will, on the ground that the end to be accomplished by the use of the prescribed means is unwarranted by the Constitution, until some substantial right of the complaining party is about to be injuriously affected. *North Carolina R. Co.* v. *Alamance Com'rs*, 82 *N. Car.* 259.

Under special circumstances, a temporary injunction to restrain the collection of retrospective taxes on a company's property, for all the years between 1860 and 1871, was allowed. *Moore* v. *Holliday*, 4 *Dill.* (*U. S.*) 52.

XI. ENGLISH POOR RATES AND OTHER RATES.

363. Company liable as occupier.—A company which is the sole occupier of wharves rented by it under agreement that wharfage dues were reserved to the owners and were paid direct to them by the owners or consignees of goods shipped is liable to be assessed for the poor rate in respect of the full ratable value of the premises, including the wharfage dues, without regard to the amount of benefit which it derived from the occupation. *Reg.* v. *Rhymney R. Co.*, *L. R.* 4 *Q. B.* 276, 10 *B. & S.* 198, 38 *L. J. M. C.* 75, 17 *W. R.* 530.

A line of railway is "land" within the meaning of 3 & 4 Will. IV., c. 90, § 33, providing that the owners and occupiers of houses and property (other than land) shall be rated a rate three times greater than that at which the owners and occupiers of land shall be rated. *Reg.* v. *Midland R. Co.*, *L. R.* 10 *Q. B.* 389, 44 *L. J. Q. B.* 137, 32 *L. T.* 753, 23 *W. R.* 921.

The E. C. R. Co. was the sole owner of a railway station, and in 1848, by an agreement by deed, the N. W. R. Co. was for 999 years to have exclusive use of part of the station, and the joint use with the E. C. Co. of another part at a certain sum per annum. The occupation of the station afterwards became of much less value to the N. W. Co. than the annual sum to be paid by it, under the agreement, to the other company. *Held*, that the effect of the deed (as regarded the part of the station jointly occupied) was only to give to the N. W. Co. the right to the joint occupation, and that the E. C. Co. was ratable as the sole occupier of this part of the station,

and that in rating it for such occupation the sum paid by the N. W. Co. must be considered as part of the profits. *Reg.* v. *Sherard*, 33 *L. J. M. C.* 5, 2 *Ry. & C. T. Cas.* 18.

Railway sleepers are substantially an addition to the freehold, and give an additional value to the land. They are therefore properly included as an item of value in an assessment. *Great Western R. Co.* v. *Melksham*, 34 *J. P.* 102, 2 *Ry. & C. T. Cas.* 20.

In ascertaining how much of the adjacent land occupied by a railway formed part of the stations and an element of their ratable value as distinguished from the line itself, all sidings, for whatever purpose used, should be included, and only the average quantity of the land required for the main tracks, and only the permanent way necessary to such tracks at any point in their length, should be excluded. *London & N. W. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 240.

364. No exemption in license to use.—A company entered into agreements giving to other companies the use of its line for a long term on an annual payment, but keeping part of the traffic in its own hands, doing the repairs, paying the servants, and receiving a rent for a crossing on the line. *Held*, that the agreement showed that the company had not parted with the possession, and therefore that it was liable to be rated in respect of its occupation of the railway. *Leeds, B. & H. R. Co.* v. *Armley*, 25 *J. P.* 711, 2 *Ry. & C. T. Cas.* 19.

A company permitted stables within its station premises to be used by certain coal owners, under an agreement by which the coal owners agreed that they would pay to the company the clear monthly rent or sum of twenty-five shillings, and agreed so long as they should occupy or use the stables to observe the by-laws, rules, and regulations which should for the time being be issued or prescribed by the company for the government and use of the railway stations, premises, and conveniences, and further agreed to quit and deliver up possession of the stables at the expiration of one month after notice in writing. The company did not exercise any control over or use the stables during the currency of the agreement, and none of the by-laws had any application to the stables. *Held*, that the company was liable to be rated to the poor rate in respect of the stables, for that, on the true construction of the agreement, having regard to the situation of the stables it was the intention of the company to retain control over them, and not to part with the exclusive occupation to the coal owners. *London & N. W. R. Co.* v. *Buckmaster*, *L. R.* 10 *Q. B.* 70, 44 *L. J. M. C.* 29, 2 *Ry. & C. T. Cas.* 20.

News agents, by agreement with a company, obtained, in consideration of yearly payments, the exclusive right to sell newspapers, books, and certain other articles at a railway station. The agreement described them as tenants, provided that the yearly payments should be recoverable as rent in arrear, gave them power to erect bookstalls secured to them access at reasonable times to the station, reserved to the company power to choose and vary the places for the bookstalls and to prevent the sale of objectionable papers, and gave to the station master control over the news agents' servants. The news agents erected bookstalls at a station and had the exclusive use of them, and these stalls were closed at night with shutters, and were locked up, the keys being kept by their servants. No rights of ingress and egress to and from the station, or of access to the bookstalls, were exercised by the news agents, their agents or servants, except under the provisions and for the purposes of the agreement. The company was assessed to the poor rate for the station generally. *Held*, that the news agents had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of the bookstalls. *Smith* v. *Lambeth Assessment Committee*, *L. R.* 10 *Q. B. D.* 327, 52 *L. J. M. C.* 1, 4 *Ry. & C. T. Cas.* xvii.

365. Making up deficiency caused by making railway.—Defendant company, under its act of incorporation, was liable to make good the deficiency in the assessment to poor rates caused by taking lands in a parish for its railway, until the entire system of railways was completed. *Reg.* v. *Metropolitan Dist. R. Co.*, *L. R.* 6 *Q. B.* 698, 40 *L. J. M. C.* 113.—OVERRULED IN East London R. Co. *v.* Whitechurch, L. R. 7 H. L. 81, 22 W. R. 665, 43 L. J. M. C. 159, 30 L. T. 412.

By the Lands Clauses Consolidation Act, 1845, § 133 (8 Vict. c. 18), the promoters of an undertaking are to make good the deficiency in the assessment for poor rates arising from their being in possession of lands liable to be assessed thereto. *Held*, that,

the borough rate under 45 & 46 Vict. c. 50, § 145, and the county rate under 15 & 16 Vict. c. 81, § 26, being respectively made chargeable on the poor rate, the deficiency in the assessment for the poor rate which the promoters of the undertaking are liable to make good includes any deficiency in respect of amounts raised for borough rate and county rate, as well as any deficiency in the assessment for poor-law purposes properly so called. *Farmer* v. *London & N. W. R. Co.*, 20 *Q. B. D.* 788, 6 *Ry. & C. T. Cas.* lxx.

366. Parochial principle of assessment.—The annual gross receipts over an entire system of tramways furnish the proper basis for estimating the rent in the assessment of rates, and the net receipts in each parish are the criterion of the ratable value therein. *London Tramways Co.* v. *Lambeth Assessment Committee*, 31 *L. T.* 319.

A line of railway in a parish should be rated on the basis of the receipts derived from the enhancement of the traffic on other parts of the system, and not on the basis of the gross earnings in a parish, where, owing to competition, they were exhausted by the working expenses. *London & N. W. R. Co.* v. *Irthlingborough*, 35 *L. T.* 327.

The ratable value of the portion of a railway in any particular parish is to be deduced from a comparison between the profits and the outgoings arising in that parish, and not by treating the whole line as one entire subject-matter, and the whole ratable value, however constituted, as entire, and then dividing it among the several parishes according to the length of line in each. *Queen* v. *London, B. & S. C. R. Co., L. R.* 15 *Q. B.* 313, 6 *Railw. Cas.* 440, 15 *Jur.* 372, 20 *L. J. M. C.* 124.

In imposing rates upon a company, all expenses necessary for keeping the property at the value which is made the measure of assessment may be considered, and not the amount at which the company is rated in another parish. *Queen* v. *London, B. & S. C. R. Co., L. R.* 15 *Q. B.* 313, 6 *Railw. Cas.* 440, 15 *Jur.* 372, 20 *L. J. M. C.* 124.

367. Same profits not assessed in more than one parish.—Where a railway belongs to two companies, each holding a moiety of the line, but having running powers over its entire length, it is error for the overseers of the parish through which that portion of the railway belonging to one company passed to rate the other company. *Midland R. Co.* v. *Badgworth*, 11 *Jur. N. S.* 14, 34 *L. J. M. C.* 25.

The ratable value of a portion of a railway, consisting of the net annual profits from the traffic upon the portion rated, cannot be increased by any part of the profits earned by the same traffic upon other portions of the line. *Great Eastern R. Co.* v. *Haughley, L. R.* 1 *Q. B.* 666, 12 *Jur. N. S.* 596, 35 *L. J. M. C.* 229, 14 *L. T.* 548, 14 *W. R.* 779. —FOLLOWED IN Reg. *v.* Llantrissant, L. R. 4 Q. B. 354, 38 L. J. M. C. 93, 20 L. T. 364, 17 W. R. 671.

A railway can only be rated upon its value within the rating parish, although it is connected with and rented by another railway in a different parish; it cannot in such case be rated at an increased amount in respect of its value in bringing traffic to the other line. *Reg.* v. *Llantrissant*, 38 *L. J. M. C.* 93, *L. R.* 4 *Q. B.* 354, 17 *W. R.* 671, 20 *L. T.* 364.

368. Prime cost immaterial.—In assessing rates against a railway the amount to be allowed as a deduction from the ratable value for interest on capital and tenant's profits is to be calculated upon the actual value of the rolling stock at the time when the rate is made, and not upon its cost price. *Reg.* v. *North Staffordshire R. Co.*, 7 *Jur. N. S.* 363, 30 *L. J. M. C.* 68, 3 *El. & El.* 392, 9 *W. R.* 235, 3 *L. T.* 554.

369. Ratability of company as a carrier.—In assessing the ratable value of a railway, no account should be taken of the payment to it by another company under agreement of such a sum as may be necessary to make a certain dividend on the cost of the line in consideration of the making of a part of it and of working it for the benefit of the latter company. *Newmarket R. Co.* v. *St. Andrew*, 3 *El. & Bl.* 94, 2 *C. L. R.* 621, 18 *Jur.* 572, 23 *L. J. M. C.* 76, 7 *Railw. Cas.* 858.

The rent of a leased line of railway, or the amount of the annuities paid to the stockholders in lieu of rent, when such railway is consolidated with the lessee company, is not the sole or exclusive criterion of the ratable value in assessing poor rates upon such railway. *South Eastern R. Co.* v. *Dorking*, 7 *Railw. Cas.* 877, 3 *El. & Bl.* 491, 18 *Jur.* 672, 23 *L. J. M. C.* 84.

In ascertaining the ratable value of a line of railway an amount which another company contributes in order to make up a dividend of a certain amount under an

agreement for the construction of a branch line between the roads of the two companies ought not to be considered. *Newmarket R. Co.* v. *St. Andrew*, 7 *Railw. Cas.* 858, 3 *El. & Bl.* 94, 18 *Jur.* 572, 23 *L. J. M. C.* 76, 2 *C. L. R.* 621.

In assessing rates against a company as to a station belonging to it, but occupied also by another company, the money paid to it by such other company should form a part of the ratable value of the station. *Reg.* v. *Flatton*, 30 *L. J. M. C.* 89, 3 *El. & El.* 450, 9 *W. R.* 309, 3 *L. T.* 689. *Reg.* v. *Sherard*, 33 *L. J. M. C.* 5.

In rating a railway it is error to take the annual rent as the basis of the ratable value without regard to evidence of the real value. *Reg.* v. *Eastern Counties R. Co.*, 18 *Jur.* 679, *n.*, 7 *Railw. Cas.* 900, *n.*

In rating a branch railway chiefly valuable as a feeding line, owing to its connection with lines of three other companies from which it diverted traffic and in consequence of which it was worked at very low fares, the fact that the three other companies would be willing to pay what was equivalent to a large rent for it, if it was in the market, should be considered in ascertaining the rent at which it might reasonably be expected to let from year to year. *Reg.* v. *London & N. W. R. Co.*, *L. R.* 9 *Q. B.* 134, 22 *W. R.* 263, 29 *L. T.* 910. *Reg.* v. *Bedford U. A. Committee*, 43 *L. J. M. C.* 81.

The rent which a lessee would pay for a railway is the amount on which a company is to be assessed to the poor rate. *Reg.* v. *London & S. W. R. Co.*, 2 *G. & D.* 49, 6 *Jur.* 686, 1 *Q. B.* 558, 2 *Railw. Cas.* 629.

The fact that other parties are also carriers on a railway, some providing locomotive power, carriages, etc., for themselves, and others finding carriages only and hiring power, does not affect the principle that the amount on which a railway company, acting as a carrier over its own line, is to be assessed to the poor rate, is the rent which a lessee would pay. *Reg.* v. *Grand Junction R. Co.*, 4 *Q. B.* 18, 4 *Railw. Cas.* 1, *D. & M.* 237, 8 *Jur.* 508, 13 *L. J. M. C.* 941.

A line of railway in a particular parish is to be rated in the proportion that the receipts in such parish bear to the receipts of the whole line, and not in the proportion which the length of the line in the parish bears to the whole line. *Reg.* v. *London & S. W. R. Co.*, 2 *G. & D.* 49, 6 *Jur.* 686, 1 *Q. B.* 558, 2 *Railw. Cas.* 629.

Parochial rates may be assessed against the company under East London Railway Act, 1865, § 128, at the original value of the land taken only so long as the company has not substituted another property capable of assessment, or actually assessed in the place of that taken. If the road or any part thereof is completed and worked within any parish, the company can claim, and is liable to be assessed in respect to the actual letting value of the road, or the part thereof completed and worked, whether it is or is not as valuable as the property for which it is substituted, and whether the road authorized by statute has or has not been completed. *East London R. Co.* v. *Whitechurch*, 43 *L. J. M. C.* 159, 22 *W. R.* 665, *L. R.* 7 *H. L.* 81, 30 *L. T.* 412; *reversing* *L. R.* 7 *Ex.* 424, 42 *L. J. M. C.* 18, 27 *L. T.* 494, *which reversed* *L. R.* 7 *Ex.* 248, 41 *L. J. M. C.* 133, 26 *L. T.* 635, 20 *W. R.* 705. — OVERRULING Reg. *v.* Metropolitan Dist. R. Co., L. R. 6 Q. B. 698, 40 L. J. M. C. 113.

370. Ratable value when passenger booked through.—By an agreement between two separate companies (forming together a continuous line) it was stipulated that the one should be at liberty to convey such of its passengers as had tickets for the entire distance over the line of the other, paying for each passenger a certain sum by way of toll to the latter company. *Held*, that in estimating the gross receipts earned by one company in respect of portions of its line running through different parishes, it was allowable for the company to deduct such sums as had been received by it and paid over to the other company in pursuance of the agreement. *Reg.* v. *St. Pancras*, 32 *L. J. M. C.* 146, 2 *Ry. & C. T. Cas.* 18.

371. Authorized toll not ratable if not charged.—A company was empowered by act of parliament to levy a toll on goods passing through a tunnel; it did not levy it, on the ground that if it did the carriage of the goods would be lost to it. *Held*, that the company was not ratable for such toll. *Reg.* v. *Stockton & D. R. Co.*, 8 *L. T.* 422, 2 *Ry. & C. T. Cas.* 19.

372. Terminal charges.—In rating a railway, terminal charges are to be considered as part of the general earnings of the line, and not of the stations at which they were earned. *Reg.* v. *Eastern C. R. Co.*, 9 *Jur. N. S.* 1339, 32 *L. J. M. C.* 174, 4 *B. & S.* 58.

Terminal charges must be included in estimating, for the purpose of assessing

rates, the amount of the gross earnings and expenses of the railway in a parish. *Reg.* v. *Eastern Counties R. Co.*, 9 *Jur. N. S.* 1339, 32 *L. J. M. C.* 174, 4 *B. & S.* 58.

Terminals must be brought into the gross receipts for the purpose of taxation, and confined to the line of railway that earns them. *Manchester, S. & L. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 53.

Collection and delivery, strictly so called, form no part of terminals or terminal service, and being performed off the line should not in any way be brought into the accounts for rating purposes. Where, therefore, they are included in the rates for conveyance, as in carted rates, the cost of the service and reasonable profit thereon should be deducted from them in the gross receipts, and no receipt or expenditure relating to them should appear in the accounts. *Manchester, S. & L. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 53.

Docks belonging to a company were connected with its line of railway, which they helped to feed with traffic, and included warehouses, siding, and rails laid down over a portion of the docks (so called) to take goods to and from the railway. The expenditure on account of the docks exceeding the receipts, they possessed no ratable value as docks beyond that of unimproved land. *Held*, as a matter of fact, that the basins, wharves, and other parts belonging to the sea transit, being strictly within the definition of docks, should be treated as such, and rated only as unimproved land, while the buildings, sidings, and rails belonging to the land transit should be treated as part of the railway, and rated as a portion of the adjoining goods station. *Manchester, S. & L. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 53.

373. Effect of leases and running powers. — The fact that a leased railway brings additional traffic to the main line which derives benefit from it is a matter giving additional value to the occupation of such railway in one of the parishes through which it passes, and is to be considered in fixing its ratable value for assessment purposes. *South Eastern R. Co.* v. *Dorking*, 7 *Railw. Cas.* 877, 3 *El. & Bl.* 491, 18 *Jur.* 672, 23 *L. J. M. C.* 84.

A line of railway connecting two towns belonged to two companies, each holding a moiety of the line in fee simple, and enjoying running powers over its entire length. *Held*, that the company owning the line which passed through the parish was ratable, and that the rate ought to be made upon the principle of assessing the profits made in the parish, enhanced by the right to run free over the half of the line belonging to the other company. *Great Western R. Co.* v. *Badgworth*, *L. R.* 2 *Q. B.* 251, 36 *L. J. M. C.* 33, 2 *Ry. & C. T. Cas.* 19.

A special act provided that another company should have the right to run its traffic over a part of the line, on payment of a fixed annual rent. The rent was much less than the actual value of the traffic passed over that part of the line by the lessee company. *Held*, that the latter company could not be rated for poor rate in respect of that traffic at a higher sum than the fixed rent. *Altrincham Union* v. *Cheshire Lines Committee*, 15 *Q. B. D.* 597, 5 *Ry. & C. T. Cas.* x.

A company constructed under the powers of its act a line which formed a connecting link between the lines of three other companies, and for some time retained possession of such line, taking tolls for the use of it by such other companies. Subsequently, by an agreement between the first-mentioned company, called the lessor, and the three other companies, called the lessees, which agreement was confirmed by, and was to have the same effect as if its provisions had been enacted in, an act of parliament, the line was leased to the lessees in perpetuity at an annual rent, and the lessees were empowered to use, and they did use, such line in connection with their respective systems without payment of tolls. The existence of the first-mentioned company was continued by the confirming act for certain purposes, such as the receipt of the yearly rent and its distribution among the shareholders, and there was a provision in the agreement which by necessary implication gave power to the lessees to let the line with the consent of the lessors under seal. *Held*, that, having regard to the provisions of the agreement and of the act confirming it, the ratable value of the line for the purposes of the poor rate was not to be ascertained as if it were an integral portion of the lines of the three companies using it, but was to be based upon the rent which a tenant from year to year might reasonably be expected to give for it as an independent line. *North & S. W. J. R. Co.* v. *Brentford Union Assessment Committee*, *L. R.* 18 *Q. B. D.* 740.—

DISTINGUISHING Queen *v.* Great Western R. Co., 15 Q. B. 379, 1085.

Mere running powers enjoyed by one company over the line of another do not constitute an occupation, so as to subject the holders of the privilege to ratability. *Midland R. Co.* v. *Badgworth*, 34 *L. J. M. C.* 25, 2 *Ry. & C. T. Cas.* 19.

374. Deduction for maintenance of railway. — In assessing rates against a railway, a company is entitled to a deduction from the ratable value on account of depreciation and expenses for repairs, and such deduction is not provided for by a deduction under the head of "working expenses." *Queen* v. *London, B. & S. C. R. Co.*, 15 *Q. B.* 313, 6 *Railw. Cas.* 440, 15 *Jur.* 372, 20 *L. J. M. C.* 124.

In assessing rates against a railway, the fact that the company has not incurred expense, nor laid by money to meet depreciation and repairs, does not disentitle it to the proper deduction on account thereof. *Queen* v. *London, B. & S. C. R. Co.*, 15 *Q. B.* 313, 6 *Railw. Cas.* 440, 15 *Jur.* 372, 20 *L. J. M. C.* 124.

Deductions ought to be allowed in respect of stations, which are ratable separately from the railway, and in respect of income tax paid by a railway company, so far as it relates to occupation. No deduction should be allowed in respect of depreciation of permanent way in addition to an allowance for maintenance of way, nor a percentage on the sum expended in forming the company, obtaining the act, and raising the capital. *Reg.* v. *Great Western R. Co.*, 15 *L. J. M. C.* 80, 2 *Ry. & C. T. Cas.* 17.

A deduction ought to be allowed in addition to annual allowances for the repairs of the permanent way and of the movable stock for their ultimate renewal and reproduction. Expenses, wherever arising locally, which are necessary for keeping the subject of the rate at the value which is the measure of the assessment, may be arrived at by a mileage division of the proportional part of such expenses to be assigned to the miles in any particular parish. *Reg.* v. *Great Western R. Co.*, 21 *L. J. M. C.* 84, 2 *Ry. & C. T. Cas.* 17.

Each parish is entitled to the benefit of the value which the land within it has acquired for the purposes of rating. The proper mode of making the deduction in respect of the maintenance of the railway, from the gross annual value, is not by following the mileage principle, but simply by taking the actual outlay in the parish; and this item is not to be varied by expenses under this head in other parishes along the same railway. *London & N. W. R. Co.* v. *King's Norton*, 2 *Ry. & C. T. Cas.* 19.

A railway passed through several parishes, in some of which were coal mines, which caused a larger expenditure in maintaining the permanent way; in other parishes through which it passed there were no coal mines. A certain parish had no coal mines in it. *Held*, that in assessing the ratable value of the railway in that parish, the proper deduction for expense of permanent way was the expense in the parish, regardless of the average cost along the whole line of railway. *London & N. W. R. Co.* v. *Harborne*, 34 *J. P.* 644, 2 *Ry. & C. T. Cas.* 20.

375. Deduction for repairs of rolling stock.—In estimating the amount of allowance for depreciation of rolling stock in assessing rates against a railway, the stock should not be valued at the beginning and end of each year and the difference deducted, but the proper method is to assume that the stock will last its natural life. *Great Eastern R. Co.* v. *Haughley, L. R.* 1 *Q. B.* 666, 12 *Jur. N. S.* 596, 35 *L. J. M. C.* 229, 14 *L. T.* 548, 14 *W. R.* 779.—FOLLOWED IN Reg. *v.* Llantrissant, L. R. 4 Q. B. 354, 38 L. J. M. C. 93, 20 L. T. 364, 17 W. R. 671.

A company made and repaired its own rolling stock and claimed to deduct trade profits on such repairs from the amount at which it was assessed for poor rates. *Held*, that it was not entitled to deduct any sum for profits in respect thereof. *London & N. W. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 240.

376. Deduction for floating capital.—In assessing rates against a railway, the question whether the company is entitled to a deduction for interest and tenant's profits upon floating capital, for the purpose of providing surplus stores, and paying wages, depends on whether, on the whole capital employed, a greater delay occurs in realizing the returns than is ordinarily incidental to the employment of capital. *Queen* v. *North Staffordshire R. Co.*, 7 *Jur. N. S.* 363, 30 *L. J. M. C.* 68, 3 *El. & El.* 392, 9 *W. R.* 235, 3 *L. T.* 554, 2 *Ry. & C. T. Cas.* 18.

377. Deduction of tenants' profits.—In assessing rates against a railway,

the company is entitled to a deduction on account of such appendages as turntables, weighing machines, furniture, etc., as are movable, and not permanently attached to the premises. *Queen* v. *North Staffordshire R. Co.*, 3 *El. & El.* 392, 7 *Jur. N. S.* 363, 30 *L. J. M. C.* 68, 9 *W. R.* 235, 3 *L. T.* 554, 2 *Ry. & C. T. Cas.* 18.

In assessing a company in respect of the portion of its line passing through a parish, and in respect of station, buildings, and sidings within the same, an allowance must be made for interest on capital and tenants' profits, calculated with reference to the actual value of the rolling stock at the time the rate is made. *Queen* v. *North Staffordshire R. Co.*, 3 *El. & El.* 392, 7 *Jur. N. S.* 363, 9 *W. R.* 235, 3 *L. T.* 554, 30 *L. J. M. C.* 68, 2 *Ry. & C. T. Cas.* 18.

On appeal against the amount at which a railway was assessed to the poor rate, it appeared that the line belonged to one company, but was worked by another company, who found all the rolling stock in consideration of receiving a percentage of the gross receipts. *Held*, that such percentage must be taken to represent the expense of the rolling stock to the hypothetical tenant, and that there would be no tenant's capital or profits thereon to provide for, but that for personal superintendence and the responsibility of becoming tenant at a heavy rent the tenant was entitled to a fair remuneration, which was fixed at five per cent. on the gross receipts. *Manchester, S. & L. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 53.

In order to obtain the cost of repairs of carriages and wagons, the company divided the actual cost by the number of train miles run on its own line; but it appearing that it also ran upon other lines—*held*, that the additional mileage should be taken into account, so far as it was ascertainable, for the purpose of arriving at a correct ratio of the cost of these repairs. *Manchester, S. & L. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 53.

In the ordinary case, however, of a company finding the rolling stock for its own railway, the tenant might be allowed twenty per cent. upon his tenant's capital for profits, depreciation of stock, and casualties; ten per cent. upon his stores, and five per cent. upon his floating capital; and he was also entitled to a deduction for renewal of way and works, as well as for maintenance of the same. *Manchester, S. & L. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 53.

A railway, in conducting a portion of its traffic, used the wagon stock of private owners and of other companies. It carried to the account of gross receipts the amount earned by means of such wagons, but the value of the wagons did not appear in the tenant's capital account of rolling stock, and, therefore, no profits thereon were allowed as a deduction under that head. The company claimed, however, under a separate head, a deduction of ten per cent. upon the value of these wagons, on the assessment of the railway to the poor rate, upon the ground that it represented the amount of trade done in them by the company upon which the profits should be deducted. *Held*, that the profits should be deducted, but as it appeared that the number of train miles run by owners' wagons was much less than the number run by those of other companies, five per cent. would be allowed upon the former, and ten per cent. upon the latter. *London & N. W. R. Co.* v. *Guardians of Poor*, 2 *Ry. & C. T. Cas.* 240.

378. Rating of branch lines, generally.—Rent paid for a railway is not necessarily a criterion of its ratable value. The profits derived on a main line by the occupation of a branch line may be considered in rating the branch, but not the local profits. *South Eastern R. Co.* v. *Dorking*, 3 *El. & Bl.* 491, 2 *C. L. R.* 633, 18 *Jur.* 672, 23 *L. J. M. C.* 84, 7 *Railw. Cas.* 877.

The ratable value of land in a parish may be increased by its producing a return to the occupiers out of the parish, as where a branch railway occupied by a company owning a main line into which it runs produces a profit by virtue of the traffic which it causes over such main line. *London & N. W. R. Co.* v. *Cannock*, 9 *L. T.* 325, 2 *Ry. & C. T. Cas.* 19.

379. —— where leased to main line.—In assessing to the poor rate of a parish a branch line of railway, which branch is leased to the owners of a main line into which it runs, the parish authorities are not entitled to take into consideration the value of the branch line as a feeder to other lines in different parishes. *Reg.* v. *Llantrissant*, *L. R.* 4 *Q. B.* 354, 38 *L. J. M. C.* 93, 2 *Ry. & C. T. Cas.* 19.

380. Quarter rating under Public Health Act.—Stations and warehouses do

not form a part of the railway within the proviso in 11 & 12 Vict. c. 63, § 88, and land used for these purposes is assessable at its full net annual value. The word "railway" in this connection means the line itself and lands used for supporting it. *South Wales R. Co.* v. *Swansea Local Board of Health*, 4 *El. & Bl.* 189, 1 *Jur. N. S.* 326, 24 *L. J. M. C.* 30.

A railway constructed without any act of parliament, but sold, enlarged, and used by act of parliament, is ratable in the full net annual value, and not as a railway constructed under the powers of an act of parliament. *North Eastern R. Co.* v. *Leadgate Local Board*, 18 *W. R.* 691, *L. R.* 5 *Q. B.* 157, 39 *L. J. M. C.* 65, 22 *L. T.* 62.

A railway constructed under an act of parliament for the transportation of traffic, and as accessory to a dock, but free to the public upon payment of certain tolls, although not used or intended for carrying passengers, is a railway within the meaning of 21 & 22 Vict. c. 98, § 55, providing that a railway constructed under the powers of any act of parliament for public conveyance shall be assessed in the proportion of one fourth part only of the net annual value thereof. *Queen* v. *Newport Dock Co.*, 9 *Jur. N. S.* 73, 31 *L. J. M. C.* 266, 6 *L. T.* 456.

Under 57 Geo. III. c. 29, a company required to build and keep a highway bridge over its railway with a brick wall at each side is liable to be assessed for the paving of the surface of such bridge, the side walls thereof coming under the description of "dead walls," within the meaning of the Paving Act. *Arnell* v. *London & N. W. R. Co.*, 12 *C. B.* 697.

Where statutes have granted to a company the privilege of being rated at only one fourth of its ratable value, and there has been no express revocation of this privilege, a borough rate calculated on the full ratable value of the railway is erroneous. *Walsall Tp. Overseers* v. *London & N. W. R. Co.*, *L. R.* 4 *App. Cas.* 467, 48 *L. J. M. C.* 166.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), § 211, subsec. 1 (b), "the occupier of any land * * * used only as a canal * * * or as a railway, constructed under the powers of any act of parliament, for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of the net annual value thereof." Appellant, under the powers given it by certain local acts of parliament, constructed a tramway communicating by points and switches with a railway in its possession which was worked by it in conjunction with the tramway, and which had been constructed under an act of parliament. *Held*, that the land occupied by the tramway was not "used only as a tramway" within the meaning of the act, and that appellant was not entitled to be rated in respect of it in the proportion of one fourth part only of its net annual value. *Swansea I. & T. Co.* v. *Swansea U. S. Authority*, [1892] 1 *Q. B.* 357.

381. Lighting and paving rates.—Where a farm is exempted by statute from the payment of paving rates, a part of such farm afterwards kept by a company is still exempt. *Todd* v. *London & S. W. R. Co.*, 7 *M. & G.* 336, 8 *Scott N. R.* 56.

Railway carriages and trucks are not liable to tolls under an act for paving and lighting a town which imposes tolls on all stage coaches and such public carriages carrying passengers for hire coming to and going from or out of the town, and also on all wains, wagons, carts, or other such carriages carrying goods for hire, and coming to or going from or out of the town. *Newmarket R. Co.* v. *Foster*, 2 *C. L. R.* 1617.

A line of railway is liable to be rated under a local lighting act making "all houses, buildings, erections, works, tenements, and hereditaments" liable to be rated, and excepting land. *Midland R. Co.* v. *Chesterfield Lighting Com'rs*, 1 *Jur. N. S.* 797. *Reg.* v. *Midland R. Co.*, 4 *El. & Bl.* 958.

Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), §§ 161, 229, 276, a company may be assessed in respect of the full ratable value of its property, consisting of land used and occupied as a railway, to defray the expense of lighting the streets of an urban sanitary district. *Lancashire & Y. R. Co.* v. *Assessment Com. of Bolton Union*, *L. R.* 15 *App. Cas.* 323; *affirming L. R.* 23 *Q. B. D.* 555.

By 3 & 4 Will. IV. c. 90, § 33, the owners and occupiers of houses, buildings, and property (other than land) ratable to the relief of the poor in any parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated for the purposes of this act (watching and lighting). *Held*, that a line of railway was "land" within the meaning of the section, and was therefore only ratable at the lower rate. *Queen* v. *Midland R. Co.*, *L. R.* 10 *Q. B.* 389, 2 *Ry. & C. T. Cas.* xvi.

382. Appeals from assessments.—A railway company has the right to appeal from a borough rate assessed against it, without seeking relief from the assessment committee in a case where it claims exemption from a certain part of the rate, and the committee cannot give relief in such cases. *Reg.* v. *London & N. W. R. Co.*, 46 *L. J. M. C.* 102.

A company had occupied a portion of a station, and in 1877 had agreed to a certain assessment. Prior to 1877 it transferred a considerable amount of its traffic to another station, giving up a part of its occupation at the former station to another company. From 1877 to 1887 it paid poor rates upon the agreed assessments; but it refused to pay a rate made June 24, 1887, on the ground that, having given up a portion of the premises occupied by it in 1877, the rate was bad, and a nullity. The company did not appeal against the rate or the assessment. An application to the stipendiary magistrate by the overseers for a distress warrant was refused. Upon an order *nisi* for a mandamus to the magistrate and the company for a distress warrant to issue being argued—*held*, that the order for mandamus must be made absolute, since the company continued to occupy a portion of the station, and the property rated fulfilled the description appearing upon the rate book. The rate was good on the face of it, and it was not for the magistrate to inquire whether part of it was or was not in respect of the premises then occupied by the company. The objection of the company being a matter of appeal, the rate unappealed against ought to be enforced. *Reg.* v. *Headlam & L. & N. W. R. Co.*, 57 *L. J. M. C.* 89, 6 *Ry. & C. T. Cas.* lxx.

383. Rating of tramways.—A tramway company formed under the Tramways Act, 1870, which lays down its tramway in a highway the soil of which is vested in the district board, is ratable to the poor in respect of its occupation of the road. *Pimlico, P. & G. S. Tramway Co.* v. *Greenwich Union*, *L. R.* 9 *Q. B.* 9, 43 *L. J. M. C.* 29.

A company owning tramways under private acts of parliament with which was incorporated the Tramways Act of 1870 is an occupier of the soil of the street so as to be ratable to the poor. *Pimlico, P. & G. S. Tramway Co.* v. *Greenwich Union*, 22 *W. R.* 87.

Where a tramway extends through two or more parishes, its ratable value in each parish should be calculated by dividing the receipts from each distinct service route in proportion to the lineal mileage of such route in each parish. *London Tramways Co.* v. *Lambeth Assessment Committee*, 31 *L. T.* 319.

A tramway beginning and ending in the same parish should be ratable upon the net receipts of the route. *London Tramways Co.* v. *Lambeth Assessment Committee*, 31 *L. T.* 319.

XII. TAXATION OF CANADIAN RAILROADS.

384. What taxable, and to whom.—By the true construction of Quebec Town Corporation General Clauses Act, 1876 (40 Vict. c. 60), §§ 323, 326, 327, no part of a railway is made taxable property, except the land as land occupied by the road, the bridges or other superstructures thereon being excluded. *St. John's* v. *Central Vt. R. Co.*, *L. R.* 14 *App. Cas.* 590.—DISTINGUISHING Great Western R. Co. *v.* Rouse, 15 U. C. Q. B. 168.

Under 16 Vict. c. 182, § 21, only the land occupied by a railway is subject to assessment, not the superstructure. *Great Western R. Co.* v. *Rouse*, 15 *U. C. Q. B.* 168.—APPROVED IN Central Vt. R. Co. *v.* St. John's, 14 Can. Sup. Ct. 288. DISTINGUISHED IN St. John's *v.* Central Vt. R. Co., L. R. 14 App. Cas. 590.

Under 16 Vict. c. 182, railway companies are to be assessed for their real estate as if they were residents. *London Tp.* v. *Great Western R. Co.*, 16 *U. C. Q. B.* 500.—DISAPPROVED IN Great Western R. Co. *v.* Rogers, 29 U. C. Q. B. 245.

Where the assessors illegally assess the superstructure of a railway as well as the land occupied by it, the company may defend an action as to the superstructure, although no appeal has been made to the court of revision, and although the whole was called land in the assessment. *London Tp.* v. *Great Western R. Co.*, 17 *U. C. Q. B.* 262.—APPROVED IN Central Vt. R. Co. *v.* St. John's, 14 Can. Sup. Ct. 288.

Land covered with the waters of a harbor is not taxable. *Buffalo & L. H. R. Co.* v. *Goderich*, 21 *U. C. Q. B.* 97.

385. Exemptions.—The Windsor and Annapolis railway is a provincial railway within the meaning of Rev. St. (3d Series) c. 45, § 16, relating to county assessments, and is exempt from assessment under the

act. The true test of exemption depends upon the fact whether the road is or is not a portion of the provincial railway. *Annapolis County* v. *Windsor & A. R. Co.*, 8 *Nov. Sc.* 397.

The railway of the International Coal company is not exempt from taxation under the provisions exempting provincial railways, rolling stock, and railway stations. *International Coal Co.* v. *Cape Breton County*, 24 *Nov. Sc.* 496.

The portion of the railway bridge built over the Richelieu river, and the railway track belonging to the Central Vermont railway company within the limits of the town of St. John's, are exempt from taxation under 40 Vict. c. 29 P. Q. §§ 326, 327, although no return had been made to the council by the company of the actual value of its real estate in the municipality; and a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the collection of the same. *Central Vt. R. Co.* v. *St. John's*, 14 *Can. Sup. Ct.* 288.—APPROVING Great Western R. Co. *v.* Rouse, 15 U. C. Q. B. 168; London *v.* Great Western R. Co., 17 U. C. Q. B. 262.

By charter the lands of a company in the northwest territories, until they are either sold or occupied, are exempt from dominion, provincial, or municipal taxation for twenty years after the grant thereof from the crown. *Held*: (1) that lands which the company has agreed to sell and as to which the conditions of sale have not been fulfilled are not lands "sold" under the charter; (2) that the exemption attached to lands allotted to the company before the patent was granted by the crown. *Cornwallis* v. *Canadian Pac. R. Co.*, 19 *Can. Sup. Ct.* 702.

Lands which were in the northwest territories when allotted to the company did not lose their exemption from taxation on becoming a part of the province of Manitoba. *Cornwallis* v. *Canadian Pac. R. Co.*, 19 *Can. Sup. Ct.* 702.

Lands owned by defendant were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, were exempted from taxation for ten years from January 1, 1883. In 1888 the limits of the then town of Windsor were, under the provisions of Ont. Rev. St. c. 184, § 22, extended so as to embrace the lands in question. *Held*, that assuming that the water rate was a species of taxation, the effect of section 54 was to put an end to the exemption. *Windsor Water Com'rs* v. *Canada Southern R. Co.*, 20 *Ont. App.* 388.—DISTINGUISHING Cornwallis *v.* Canadian Pac. R. Co., 19 Can. Sup. Ct. 702.

By statute the lands of a company were to be free from taxation for a certain period unless "sold or occupied." The company made an agreement for sale of certain of the lands upon certain conditions. The conditions not having been performed, the company canceled the agreement, as by its terms it was entitled to do. There never was any actual occupation of the land. *Held*, that the land had never been sold or occupied, and that it was, therefore, not subject to municipal taxation. *Canadian Pac. R. Co.* v. *Burnett*, 5 *Man.* 395.

The exemption from taxation of the property of railway companies in New Brunswick, contained in 33 Vict. c. 46, only applies to property and stock necessary to the proper working of the railway, and not to such property as a mill leased by the company. *Ex parte European & N. A. R. Co.*, 13 *New Brun.* 479.

The Fredericton and St. Mary's railway bridge company incorporated by Dominion Act 48 & 49 Vict. c. 26 is a railway company within the meaning of the act of assembly 33 Vict. c. 46, and is exempt from taxation under the provisions of the act. *Ex parte Fredericton & St. M. R. Bridge Co.*, 29 *New Brun.* 127.

386. Assessment.—Under the Act of 1868, c. 24, the Windsor and Annapolis railway company is liable to be assessed for the maintenance of the dyke protecting the marsh over which the track of its road passes owned by it, Rev. St. c. 21, § 16, applying only to county assessment; and recourse need not be had to the land itself under c. 40, § 15, as that section refers only to the original construction of the dyke where the owner has not consented.—*Brown* v. *Windsor & A. R. Co.*, 14 *Nov. Sc.* 430.

The court of revision confirmed the assessment of a lot of land occupied by a company at $1200 annual value, and assessed the station built upon it at $1500, and the county court judge being appealed to confirmed the value of the station, "subject to the question" whether it could be assessed in addition to the land, "and left for the determination of a higher court" whether after the valuation of the land had been

fixed in accordance with the Assessment Act, § 30, the building could be added. *Held*, that this was in effect a confirmation of the assessment, the reservation being inoperative, and that the court had no power to review the decision. *Toronto* v. *Great Western R. Co.*, 25 *U. C. Q. B.* 570.

The omission of the assessor to distinguish, in his notice to a railway company, between the value of the land occupied by the road and its other real property, as required by the act, does not avoid the assessment. *Great Western R. Co.* v. *Rogers*, 29 *U. C. Q. B.* 245.—DISAPPROVING London Tp. *v.* Great Western R. Co., 16 U. C. Q. B. 500. FOLLOWING Scragg *v.* London, 26 U. C. Q. B. 263; Allen *v.* Sharp, 2 Ex. 352; Pedley *v.* Davis, 10 C. B. N. S. 492.

Such an omission may be corrected on appeal by the court of revision and county court judge. *Great Western R. Co.* v. *Rogers*, 29 *U. C. Q. B.* 245.

387. Collection.—In avowing for a distress for taxes due upon land belonging to a company, it is unnecessary to allege that in the assessment the value of the land occupied by the railway was distinguished from that of its other real property, or that it had no other real property, or that the assessment was communicated to the company. Such objections should form the subject of a plea. *Great Western R. Co.* v. *Rogers*, 27 *U. C. Q. B.* 214.

388. Sale of lands for non-payment.—Under the Assessment Act of 1869 (32 Vict. c. 36), the lands of railways might be sold for the non-payment of taxes. *Smith* v. *Midland R. Co.*, 4 *Ont.* 494.—REVIEWING Wing *v.* Tottenham & H. J. R. Co., L. R. 3 Ch. 740.

389. Remedies for illegal taxation.—A company, by its contract with the crown, was entitled to a grant of certain lands upon completion of certain portions of the railroad, and these lands were exempted from taxation for twenty years, unless sooner sold or occupied. This contract was ratified by statute. Before the patent for the lands had been issued, a municipality, within which the lands in question lay, sold them for taxes. The company had performed its part of the contract, entitling it to a grant of said lands, before the sale was made. Shortly before the time for redemption expired, the company paid the taxes under protest to avoid tax deeds being issued, and brought an action to recover the money. *Held*: (1) that plaintiff was entitled to recover; (2) that plaintiff had an interest in the lands prior to the issuing of the patent; (3) that under the terms of the contract, the lands were exempt from taxation from the date of the contract until twenty years after the issue of the patent, unless sooner sold or occupied; (4) that the money was not paid voluntarily and might be recovered back. *Canadian Pac. R. Co.* v. *Cornwallis*, 7 *Man.* 1.—FOLLOWING Canadian Pac. R. Co. *v.* Burnett, 5 Man. 395.

Upon replevin to recover certain goods and chattels seized for taxes, plaintiff, a railroad, contended: (1) that its land was not assessed at the average value of land in the vicinity; (2) that no proper notice of the assessment was given; (3) that the roll was not completed within the proper time. Defendant justified under a letter written by plaintiff's solicitor in the following words: "In reply to yours of the 15th inst., addressed to the managing director of this company, I am directed to inform you that the only real property owned by the company, in the township of Maidstone, consists of the roadway of 106 acres, and 17 acres of extra or waste land. I have not the rate at which this land has hitherto been assessed, but I presume that the average value of land in the locality cannot exceed ten pounds per acre." Defendant also proved a notice of assessment. *Held*, that this letter did not fix ten pounds as the average value of the land, but only asserted that the value could not exceed that sum, and that the notice, under which plaintiff's land had been assessed at ten pounds per acre, while the average value of the land through which the railway went was one pound ten shillings, being served after the time for the revision of taxes had expired, was too late. *Great Western R. Co.* v. *Ferman*, 8 *U. C. C. P.* 221.

By agreement between plaintiffs and a company, plaintiffs were working the latter's railway with their own engines and cars, and defendant, as collector, seized the plaintiffs' car on such railway for taxes due by the company in respect of other land belonging to the company. *Held*, that such seizure was unauthorized, for the car when taken was in plaintiffs' possession and was their own property. *Great Western R. Co.* v. *Rogers*, 29 *U. C. Q. B.* 245.

390. School tax.—There is no power given by the School Acts to a board of

school trustees in a city or town to assess, levy, or collect a tax or school rate upon a railroad or other property, except that given to levy a small rate upon the parents or guardians of the children attending school. *Winnipeg School Trustees* v. *Canadian Pac. R. Co.*, 2 *Man.* 163.

391. Water rate.—Defendant company was the owner of vacant land in a city, abutting on streets in which mains and hydrants of plaintiffs had been placed. Defendant had a waterworks system of its own and did not use that of plaintiffs, though it could have done so had it wished. The commissioners imposed a water rate "for water supplied, or ready to be supplied," upon all lands in the city, based upon their assessed value, irrespective of the user or nonuser of water. *Held*, that this rate was, under 37 Vict. c. 79, §§ 11, 12, validly imposed. *Windsor Water Com'rs* v. *Canada Southern R. Co.*, 20 *Ont. App.* 388.

XIII. LICENSE TAXES.*

392. Alabama.—A city ordinance requiring every express company or railroad company doing business within the city, and whose business extends beyond the state, to pay an annual license tax of $500 is not in conflict with the Constitution of the United States or the Constitution of Alabama. Such a license tax is not an import or export duty, nor is it a regulation of commerce among the states, or between a state and a foreign country. *Osborne* v. *Mayor, etc., of Mobile*, 44 *Ala.* 493; *affirmed in* 16 *Wall.* (*U. S.*) 479.

The power of a state to levy taxes and to impose licenses extends to every species of property, and to all occupations within the state, except where the power is limited by the Constitution of the United States, or by the Constitution of the state. *Osborne* v. *Mayor, etc., of Mobile*, 44 *Ala.* 493; *affirmed in* 16 *Wall.* (*U. S.*) 479.

The power to levy taxes and impose license may be transferred to a municipal corporation, to be exercised within its limits. *Osborne* v. *Mayor, etc., of Mobile*, 44 *Ala.* 493; *affirmed in* 16 *Wall.* (*U. S.*) 479.

393. California.—Under the Revenue Act of 1861, §§ 74, 75 (St. 442, 443), Wells, Fargo & Co., as common carriers of gold dust, are compelled to pay the license tax fixed by those sections on each of their branch establishments in the different counties of the state, as well as upon the principal house in San Francisco. *People* v. *Wells*, 19 *Cal.* 293.

When the power to "license and regulate" occupations is conferred on a municipality, the whole charter and general legislation of the state must be considered in determining whether the power includes the power to tax occupations for revenue purposes. *San José* v. *San José & S. C. R. Co.*, 53 *Cal.* 475.

A franchise conferred by the legislature, granting the right to construct a railroad through streets of a city and to operate cars thereon, is not such a contract as to exempt the occupation from police regulations, or from a municipal license tax. *San José* v. *San José & S. C. R. Co.*, 53 *Cal.* 475.

The fact that the railroad extends and cars are run beyond the corporate limits does not exempt the occupation from taxation by the municipality. *San José* v. *San José & S. C. R. Co.*, 53 *Cal.* 475.

If a corporation carries on a business for which a license is required without taking out a license, it may be liable to a criminal prosecution, or held as agreeing to pay a penalty instead of the amount of the license, but it owes nothing for a license until one is taken out; and an action to recover the amount alleged to be due for the license cannot be maintained. *Santa Cruz* v. *Santa Cruz R. Co.*, 56 *Cal.* 143.—DISTINGUISHING Sacramento *v.* California Stage Co., 12 Cal. 134; San José *v.* San José & S. C. R. Co., 53 Cal. 475.—DISTINGUISHED IN Los Angeles *v.* Southern Pac. R. Co., 61 Cal. 59.

Under the County Government Act, § 25, subdivision 27, county supervisors have power to require a license tax to be paid by any person operating a steam railroad within the county. *Santa Clara County* v. *Southern Pac. R. Co.*, 66 *Cal.* 642.—NOT FOLLOWED IN San Benito County *v.* Southern Pac. R. Co., 37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827.

Where a company is chartered by the federal government, an ordinance requiring it to take out a license for the privilege of carrying persons and property in a county is void, as a tax on a federal franchise. *San*

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* License tax on foreign corporations, see note, 45 AM. & ENG. R. CAS. 8; 13 *Id.* 306.

When a municipal license tax on each company entering corporate limits is not a tax on interstate commerce, see 37 AM. & ENG. R. CAS. 378, *abstr.* See also INTERSTATE COMMERCE, **208-214.**

Benito County v. *Southern Pac. R. Co.*, 37 *Am. & Eng. R. Cas.* 374, 77 *Cal.* 518, 19 *Pac. Rep.* 827.—DISTINGUISHING Thomson *v.* Pacific R. Co., 9 Wall. (U. S.) 579; Union Pac. R. Co. *v.* Peniston, 18 Wall. 5.—FOLLOWING California *v.* Central Pac. R. Co., 127 U. S. 1.—NOT FOLLOWING Central Pac. R. Co. *v.* State Board of Equalization, 60 Cal. 35; Los Angeles *v.* Southern Pac. R. Co., 61 Cal. 59; Santa Clara County *v.* Southern Pac. R. Co., 66 Cal. 642.

394. Georgia. — The tax, called a license, imposed on "every railroad company that pulls over its road sleeping cars, of any person or corporation, upon which taxes are not paid," etc., "for pulling such cars in each of the years 1889 and 1890," by an act approved November 12, 1889, is not collectible by execution in whole or in part before the first of October next after the passage of the act, the language as to default and execution being that "if any railroad company shall fail to pay the license herein provided for, on or before the first day of October in each year, the comptroller-general shall issue execution against such defaulting company." It follows that, whether the tax be valid or invalid, there is no good reason for reversing the judgment granting an injunction to restrain the collection of such tax for the year 1889 by virtue of an execution issued by the comptroller-general on December 16, 1889, such execution having been issued prematurely. *Wright* v. *Central R. & B. Co.*, 85 *Ga.* 649, 11 *S. E. Rep.* 1031.

395. Kentucky.—The Act of March 2, 1860, requiring agents of foreign express companies to take out licenses before transacting business within the state, is not repealed, either expressly or by implication, by the Act of Feb. 20, 1864, which requires all express companies to pay as a tax six per cent. upon the net profits of the business done each year within the state. *Woodward* v. *Com.*, (*Ky.*) 35 *Am. & Eng. R. Cas.* 498, 7 *S. W. Rep.* 613.

The Act of March 2, 1860, requiring all agents of foreign express companies to procure a license before doing business as such agents, is not affected by the Act of March 2, 1870, requiring foreign express companies doing business within the state to pay certain fees each year upon renewing their license. *Woodward* v. *Com.*, (*Ky.*) 35 *Am. & Eng. R. Cas.* 498, 7 *S. W. Rep.* 613.

A state law imposing a license tax of $500 or $1000 per annum, according to the length of the line in the state, on foreign express companies doing business in the state, is void, as an attempt to regulate interstate commerce. Such license is a tax upon the business of such companies, and not upon their property. *Com.* v. *Smith*, (*Ky.*) 17 *S. W. Rep.* 187.—DISTINGUISHING Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851. — FOLLOWING Lyng *v.* Michigan, 135 U. S. 161, 10 Sup. Ct. Rep. 725.—QUOTING Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826; Leloup *v.* Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380.

396. Louisiana.—A contract between a municipal corporation and a company by which the latter pays a bonus for the franchise therein conferred by the city cannot be construed as conferring an immunity from the payment of a license on its business, in the absence of an express stipulation to that effect in the contract. *New Orleans* v. *Orleans R. Co.*, 42 *La. Ann.* 4, 7 *So. Rep.* 59.—DISTINGUISHING Gordon *v* Appeal Tax Court, 3 How. (U. S.) 133; Ohio State Bank *v.* Knoop, 16 How. 376; Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.) 436.

No exemption of a particular institution is to be implied from the payment of a bonus, as that would be to set up judicial implications against an express exercise of the taxing power. *New Orleans* v. *Orleans R. Co.*, 42 *La. Ann.* 4, 7 *So. Rep.* 59.—FOLLOWING New York & E. R. Co. *v.* Sabin, 26 Pa. St. 242.

397. Mississippi. — The fact that a company runs a car over its road containing goods suitable to the wants of its employés, and which are furnished to them in payment of their wages, no sales being made to other persons, and only to them in payment of their wages, does not make such a car a "trading car" within the meaning of the Code of 1880, § 584, which imposes a tax for the privilege of running a "trading car." A law imposing a privilege tax must be construed favorably to the citizen, and no occupation is to be taxed unless clearly within the provision of the law. *Vicksburg & M. R. Co.* v. *State*, 23 *Am. & Eng. R. Cas.* 729, 62 *Miss.* 105.

An individual delivered cotton to a company for shipment, and then transferred the bill of lading to a bank. The creditors of the shipper sued out an attachment, and caused the cotton to be seized. The company having failed to ship the cotton, the

bank brought an action for damages against it. The latter pleaded that the bank at the time of the transfer of the bill of lading was doing business without a sufficient privilege license, under "an act in relation to public revenue" in the Code of 1880, and was, therefore, precluded from maintaining its action by section 589, which provides that "all contracts made with any person who shall violate this act, in reference to the business carried on in disregard of this law, shall be null and void so far only as such person may base any claim upon them; and no suit shall be maintainable in favor of such person on any such contract." *Held*, that by the assignment of the bill of lading the bank acquired the title to the cotton; and the action being upon the contract made between the shipper and defendant, and not upon the contract between itself and the shipper, is maintainable. *People's Bank* v. *Alabama G. S. R. Co.*, 65 *Miss.* 365, 4 *So. Rep.* 115.

Under the statute a company paying what is called a "privilege tax" is exempt from all other state and county taxes on lands used in operating its road; and a sale of land for taxes on which are located a section house, turntable, and other improvements of the company is void. Whether such improvements are actually upon the land sold or not, if it is connected with the other part and with the operation of the road, it is exempt from further taxation after paying the privilege tax. *Vicksburg & M. R. Co.* v. *Bradley*, 66 *Miss.* 518, 6 *So. Rep.* 321. —DISTINGUISHED IN Lewis *v.* Vicksburg & M. R. Co., 67 Miss. 82, 6 So. Rep. 773.

398. Tennessee.—A railroad company which organizes an express company and carries on a regular express business as a part of the business of the railroad, under the management and control of its officers, and by its own agents, is subject to pay a privilege tax imposed by statute upon express companies. *Memphis & L. R. R. Co.* v. *State*, 13 *Am. & Eng. R. Cas.* 423, 9 *Lea* (*Tenn.*) 218, 42 *Am. Rep.* 673.

The Tennessee statute giving to the state the right to impose what is termed a privilege tax upon sleeping cars running through the state does not extend to counties, and such tax imposed by a county is illegal. *Gibson County* v. *Pullman Southern Car Co.*, 42 *Fed. Rep.* 572.

399. Wisconsin.—Under Rev. St., §§ 1211–1213, the amount of money to be paid for a license to operate a railroad is to be determined by the aggregate mileage of all the railroads operated by the company within the state during the preceding calendar year, and the aggregate amount of the gross earnings of such roads during that time. *State ex rel.* v. *McFetridge*, 8 *Am. & Eng. R. Cas.* 536, 56 *Wis.* 256, 14 *N. W. Rep.* 185.

Laws of 1883, ch. 353, providing that owners of palace, drawing-room, and sleeping cars shall annually return to the railroad commissioner a "statement of the gross earnings made by the use of such cars between points within the state," and shall pay a license fee of two per cent. of such earnings, requires a statement only of the earnings derived from the use of such cars in transporting passengers who both get on and off at points within the state. *State* v. *Pullman Palace Car Co.*, 64 *Wis.* 89, 23 *N. W. Rep.* 871.

Under the above statute, in determining to which class any railroad belongs, the number of miles of road operated and the gross earnings during the preceding calendar year only are to be considered, regardless of the length of time that the road was operated during the year. (Cassody, J., dissenting.) *State ex rel.* v. *McFetridge*, 64 *Wis.* 130, 24 *N. W. Rep.* 140.

The statement required is only of the earnings of railroads which the applicant is operating when the return is made, and for the privilege of operating which it is required to obtain the license. *State ex rel.* v. *McFetridge*, 64 *Wis.* 130, 24 *N. W. Rep.* 140.

When one company commences operating a road early in any given year, and the same was operated by another company during the preceding year, the earnings of the latter company thereon form the proper basis for computing the license fee to be paid by the company first mentioned. *State ex rel.* v. *McFetridge*, 64 *Wis.* 130, 24 *N. W. Rep.* 140.

Under the above statute spur tracks are included in the mileage. *State ex rel.* v. *McFetridge*, 64 *Wis.* 130, 24 *N. W. Rep.* 140.

The rental paid for a leased railroad is not to be deducted from the gross earnings upon which the license fee to be paid by the lessee is computed. *State ex rel.* v. *McFetridge*, 64 *Wis.* 130, 24 *N. W. Rep.* 140.

The amount received by a company for the use of its cars, in excess of the amount paid out by it for the use of the cars of

other companies, is a part of the gross earnings upon which the license fee is to be computed. *State ex rel.* v. *McFetridge*, 64 *Wis.* 130, 24 *N. W. Rep.* 140.

A statute granting lands to a company provided that it should at specified times "make a report of its gross earnings for the preceding year, and shall each year during the continuance of the exemption" pay to the state "a sum equal to five *per centum* of its gross earnings for the preceding year, which shall be in lieu of all other license fees exacted from said company," and also provided that the state treasurer should apportion the money so received among the several counties and pay over the same. *Held*, that the five *per centum* so received by the state treasurer was not in effect a tax upon the gross earnings of the line of the road for the preceding year, but was merely the license fee for the year in which it was paid, and that the counties had no claim to a proportion of the percentage paid by the company to the state treasurer in the year following that in which the exemption expired. *State ex rel.* v. *Harshaw*, 41 *Am. & Eng. R. Cas.* 685, 76 *Wis.* 230, 45 *N. W. Rep.* 308.

XIV. INCOME TAXES.*

400. In general — Constitutionality.—Since the approval of Ala. Revenue Act of December 31, 1868 (Pamph. Acts, p. 297), there has been no law in the state authorizing the assessment and collection of taxes on the income of railroad companies. *State* v. *Board of Revenue*, 73 *Ala.* 65.

The exaction by the state of one fifth of the passenger fare collected by a company over a certain branch of its road is not a capitation tax, or in any proper sense a tax upon the passenger for the right of transit, but a tax imposed upon the corporation with its consent, and therefore free from all constitutional objection. *State* v. *Baltimore & O. R. Co.*, 34 *Md.* 344. — EXPLAINING AND DISTINGUISHING Crandall *v.* State, 6 Wall. (U. S.) 35. QUOTING Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. 74; M'Cullough *v.* Maryland, 4 Wheat. (U. S.) 429.

Even if the one fifth of the passenger fare secured to the state under the provisions of Md. Act of 1832, ch. 175, and its supplements, were a capitation tax unconstitutionally imposed upon passengers for the right of transit, the company, having collected the money in pursuance of the statutory provisions, could not be allowed to retain it as against the state; and the same may be recovered by the state in an action of assumpsit for money had and received. *State* v. *Baltimore & O. R. Co.*, 34 *Md.* 344.— QUOTING Waters *v.* State, 1 Gill (Md.) 302; Tenant *v.* Elliott, 1 B. & P. 3.

401. Who taxable.—The income tax on corporate bonds or loans imposed by Pa. Act of June 30, 1885, is not a tax laid on the company nor on the bondholders as a body, but upon each resident bondholder as an individual. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.— QUOTED IN Com. *v.* Philadelphia, N. & N. Y. R. Co., 2 Pa. Dist. 731.

Engine drivers, porters, and laborers employed by a company, at either annual salaries or weekly wages amounting to £100 per year, are assessable under schedule D of 5 and 6 Vict. c. 35, 16 and 17 Vict. c. 34, and 23 Vict. c. 14; the company itself is not liable to be assessed in respect of such employés under schedule E of these statutes. *Attorney-General* v. *Lancashire & Y. R. Co.*, 2 *H. & C.* 792, 10 *Jur. N. S.* 705, 33 *L. J. Ex.* 163, 13 *W. R.* 8, 10 *L. T.* 95.

Schedule E of 5 and 6 Vict. c. 35, 16 and 17 Vict. c. 34, and 23 Vict. c. 14 extends only to offices and employments under corporations which are of a public nature. *Attorney General* v. *Lancashire & Y. R. Co.*, 2 *H. & C.* 792, 10 *Jur. N. S.* 705, 33 *L. J. Ex.* 163, 13 *W. R.* 8, 10 *L. T.* 95.

The income tax on salaries or wages of railway employés, such as engineers and laborers, cannot be attached in the hands of the company under 23 Vict. c. 14, § 6; such employés do not hold "public offices and employments of profit" within 5 and 6 Vict. 35, schedule E. *Attorney-General* v. *Lancashire & Y. R. Co.*, 10 *Jur. N. S.* 705, 10 *L. T.* 95, 2 *H. & C.* 792, 33 *L. J. Ex.* 163, 13 *W. R.* 8.

Persons in the employ of an intercolonial railway department at a certain place were divided into five classes: (1) members of the civil service of the dominion, under the Civil Service Act of 1882, who received a yearly salary, and contributed to the superannuation fund of the civil service; (2) persons who received a yearly salary, were not appointed to the civil service as provided

* See also REVENUE, 4–12.

by the act of 1882, but held an office created by a dominion statute, or were appointed by the governor-general under authority of a statute, and who did not contribute to the superannuation fund; (3) persons paid monthly, at a certain rate per year, who were liable to be dismissed at any time, and who were not appointed under the Civil Service Act, nor as mentioned in class 2, and did not contribute to the superannuation fund; (4) engine drivers and conductors, employed in running trains, and paid by the mileage run, who received their pay monthly, and were subject to dismissal at any time; (5) carpenters and other mechanics and workmen, who were paid monthly according to the time employed, and were subject to dismissal in the same manner as classes 3 and 4. *Held*, that the persons in each of these classes were exempt from assessment for municipal purposes on their incomes received from the government. *Coates* v. *Moncton*, 25 *New Brun.* 605.

The New Brunswick railway company is liable to be assessed in the city of St. John on the net income annually derived from the running of the railway. *Ex parte Cram*, 30 *New Brun.* 545.

402. —— and upon what.—After a company had expended money equal to eighty per cent. of its capital stock in improving its road, the directors passed a resolution declaring that each stockholder was entitled to eighty per cent. of his stock, to be paid out of the future earnings of the company, and certificates were issued accordingly. *Held*, that such certificates were dividends in scrip within the meaning of the Act of Congress of June 30, 1864, ch. 173, § 122, as amended in 1866, and were liable to pay an income tax during the years that the law was in force. *Bailey* v. *New York C. & H. R. R. Co.*, 13 *Am. & Eng. R. Cas.* 333, 106 *U. S.* 109, 1 *Sup. Ct. Rep.* 62.—FOLLOWING Bailey *v.* New York C. & H. R. R. Co., 22 Wall. (U. S.) 604.

Under the Internal Revenue Act of June 30, 1864, a non-resident alien holding bonds in a railroad corporation of the United States is not taxable. *Northern C. R. Co.* v. *Jackson*, 7 *Wall. (U. S.)* 262.

An English company constructing a railway in India, and receiving from the local Indian government an annuity therefor, is liable to be assessed to the income tax in respect of the whole amount of the annuity received by it, and is not entitled to any deduction in respect of a balance applied to the purposes of a sinking fund. *Nizam State R. Co.* v. *Wyatt*, *L. R.* 24 *Q. B. D.* 548. —QUOTING Blake *v.* Brazilian R. Co., Rep. of Tax Cas. part 27, p. 58.

403. Enforcement. — Where a state leases a railroad which it owns, with a provision in the contract as to what taxes shall be paid on the road, based on a certain per cent. of its net income, the state cannot, during the continuance of the lease, increase the tax rate. *State* v. *Western & A. R. Co.*, 66 *Ga.* 563.

The payment of this income tax covers also such property as may be necessary and proper for the use and enjoyment of the franchise secured by the lease to the company, whether it was received from the state or has been purchased since the lease began. Other property of the company would be subject to taxation as the property of individuals. *State* v. *Western & A. R. Co.*, 66 *Ga.* 563.

Proof as to what bonds were held by resident bondholders in one year is not proof as to the holding for a subsequent year, even though it be shown that the aggregate amount was fairly constant, and there is no authority in law for deducting the tax for one year from the holders for another year. *Com.* v. *Philadelphia & R. R. Co.*, 150 *Pa. St.* 312, 24 *Atl. Rep.* 612.

TAXES.

Duty of lessee to pay, see LEASES, ETC., **78.**
Liability of reorganized company for, see REORGANIZATION, **17.**
Payment of, by receiver, see RECEIVERS, **89.**
— — when makes possession adverse, see ADVERSE POSSESSION, **11.**

TAXPAYERS.

Assent of, to railway aid, see MUNICIPAL AND LOCAL AID, **100-107.**
Issuance of stock to, in railway aid cases, see MUNICIPAL AND LOCAL AID, **192.**
Right of, to sue to restrain issue of railway aid bonds, see MUNICIPAL AND LOCAL AID, **299, 300.**
Signature by, to petition in aid of railway, see MUNICIPAL AND LOCAL AID, **81-89.**
When entitled to stock, see MUNICIPAL AND LOCAL AID, **62.**

TAX RECEIVER.

Duties of, see TAXATION, **293.**

TAX TITLES.

Validity of, and rights of purchaser, see TAXATION, 329.

TEAMS.

Injuries to, at crossings, see CROSSINGS, INJURIES, ETC., AT.
Liability for colliding with, see STREET RAILWAYS, 473–475.
— of steam railroad for collisions with, in streets, see STREETS AND HIGHWAYS, 382.
Obstruction of track by, see STREET RAILWAYS, 210.

TELEGRAM.

Admissibility and effect of, as evidence, see EVIDENCE, 249.

TELEGRAPH AND TELEPHONE LINES.

Business of, when deemed interstate commerce, see INTERSTATE COMMERCE, 9.
Contributory negligence of employé struck by poles, see EMPLOYÉS, INJURIES TO, 361.
Disturbance of telephone system by trolley wires, see ELECTRIC RAILWAYS, 13.
Liability for injury to employé of telegraph companies, see EMPLOYÉS, INJURIES TO, 491.
License tax on foreign telegraph companies, see INTERSTATE COMMERCE, 213.
Negligence as to position of poles, question for jury, see EMPLOYÉS, INJURIES TO, 680.
Power of commissioners to fix charges, see RAILWAY COMMISSIONERS, 11.
Regulation of, see UNION PACIFIC R. CO., 8.
Taxation of, see TAXATION, 72.
Telegraph operators as fellow-servants with other employés, see FELLOW-SERVANTS, 424.
— wires, when deemed fixtures, see FIXTURES, 10.
Transportation of employés of, liability of carrier, see CARRIAGE OF PASSENGERS, 341.

1. Construction, and rights of adjoining owners.*—Trespass *quare clausum fregit* will lie by the owner of land abutting upon a public highway, in which he is also owner of the fee, against a telegraph company for entering upon the highway and erecting telegraph poles thereon without the consent of plaintiff. *Board of Trade Tel. Co.* v. *Barnett*, 107 *Ill.* 507.

Where the statute allows railroad companies to acquire a right of way not exceeding sixty feet in width, and a company enters upon land and constructs its road with the consent of the landowner, but without any conveyance or contract specifying the width of the right of way, the company acquires a right of way sixty feet wide; and it is competent for the company itself to erect on such right of way telegraph poles necessary to the proper maintenance of a telegraph line along the way, or to contract with another company for such erection. *Prather* v. *Western Union Tel. Co.*, 14 *Am. & Eng. R. Cas.* 1, 89 *Ind.* 501; *former appeal in* 52 *Ind.* 16.—EXPLAINED IN Indianapolis & V. R. Co. *v.* Reynolds, 116 Ind. 356, 19 N. E. Rep. 141.

A company may, for its own use in operating a road, construct a telegraph line over and along its right of way, and in so doing cut down, if necessary, trees standing upon its right of way, without subjecting itself to any additional claim to the original landowner for compensation. *Western Union Tel. Co.* v. *Rich*, 19 *Kan.* 517.

If a line of telegraph is built by a railroad company and another party, at their joint expense, and for their joint use, the latter is only responsible to the landowner for the damages caused by the additional burden, if there be any, cast upon the easement by its use of the telegraph line. *Western Union Tel. Co.* v. *Rich*, 19 *Kan.* 517.—DISTINGUISHING Hatch *v.* Cincinnati & I. R. Co., 18 Ohio St. 92; Little Miami & C. R. Co. *v.* Dayton, 23 Ohio St. 510; State *v.* Maine, 27 Conn. 641.—REVIEWED AND QUOTED IN American T. & T. Co. *v.* Pearce, 71 Md. 535.

Injunction should not be awarded to restrain a telegraph company from going on to plaintiff's land with a view of condemning a right of way, until a discovery be had of the company's incorporation and proceedings authorizing the condemnation. *Norfolk & W. R. Co.* v. *Postal Tel. Cable Co.*, 88 *Va.* 932, 14 *S. E. Rep.* 689.

2. Condemnation of railroad right of way for telegraph line.—Neither the acts of congress declaring railroads to be post routes, nor the Act of July 24, 1866, providing that telegraph companies may construct their lines over post roads, authorize a telegraph company to establish its lines over the right of way of a railroad

* Right of railroad company and of owner considered where telegraph line is erected on railroad right of way, see note, 7 L. R. A. 200.

company without making compensation therefor. *Atlantic & P. Tel. Co.* v. *Chicago, R. I. & P. R. Co.*, 6 *Biss.* (*U. S.*) 158.

In proceedings under Ala. Act of 1873, relating to telegraphs, by a telegraph company, to obtain the right to construct lines over the right of way of a railroad company, the railroad corporation cannot complain that another telegraph company, to whom it had granted the exclusive privilege over its right of way, was not made a party. Nor is it an available objection, on the part of the railroad company, that the petition initiating the proceedings does not show that there were owners in fee, apart from the railroad corporation, of the lands over which the easement is sought. *New Orleans, M. & T. R. Co.* v. *Southern & A. Tel. Co.*, 53 *Ala.* 211, 13 *Am. Ry. Rep.* 135.

It is within the power of the legislature to provide for the taking of the property of a railroad company for the use of a telegraph line, but such property cannot be taken without just compensation made. *Southwestern R. Co.* v. *Southern & A. Tel. Co.*, 46 *Ga.* 43.—DISTINGUISHED IN Mayor, etc., of Atlanta *v.* Central R. & B. Co., 53 Ga. 120.

An act which provides for the assessment by arbitrators of the damage sustained by a railroad by the erection of a telegraph line along its right of way, but gives no remedy for the enforcement of such award, nor makes any provision for an appeal so as to have the question of damage tried by a jury, is unconstitutional. *Southwestern R. Co.* v. *Southern & A. Tel. Co.*, 46 *Ga.* 43. —DISTINGUISHED IN Oliver *v.* Union Point & W. P. R. Co., 39 Am. & Eng. R. Cas. 107. 83 Ga. 257, 9 S. E. Rep. 1086.

A telegraph or telephone company is, with respect to its right to construct its lines over private property, just as much subject to the provision of Md. Const. art. 3, § 40, that forbids the taking of private property for public use without just compensation, as is a railroad company or any corporation clothed with the power of taking private property for public use; and the averment that such company is proceeding, or threatens to proceed, to construct its line of poles and wires on and over the complainant's land, without his leave or license, and without paying or tendering him compensation for the use of his lands, for this purpose, is sufficient to entitle him to an injunction. *American T. & T. Co.* v. *Pearce*, 71 *Md.* 535, 18 *Atl. Rep.* 910.

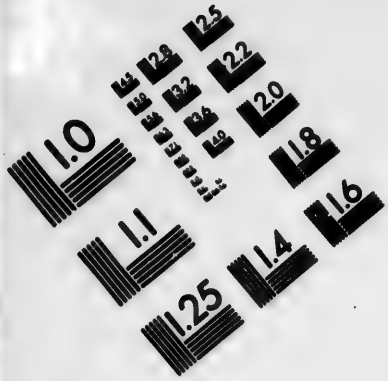
Where a telephone or telegraph line is constructed by some one over the right of way of a railroad company, or by the railroad company itself, in good faith, for its use and benefit in the operation of its road, and to facilitate its business, or it is reasonably necessary for that purpose, the landowners have no ground of complaint, such use of their land being within the scope of the original easement for which they have received compensation; but if the line be not constructed for such purpose, it will be a new easement, and put a new and additional burden upon the land, for which the owners will be entitled to compensation. *American T. & T. Co.* v. *Pearce*, 71 *Md.* 535, 18 *Atl. Rep.* 910.—REVIEWING AND QUOTING Western Union Tel. Co. *v.* Rich, 19 Kan. 517.

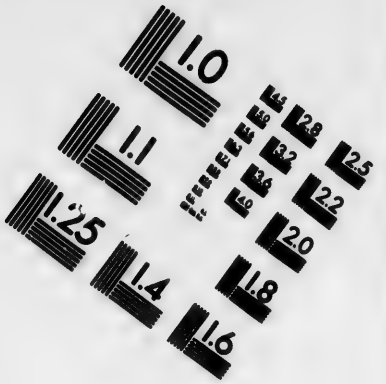
The Act of Congress of July 24, 1866 (U. S. Rev. St. § 5263), providing that telegraph companies shall have the right to construct, maintain, and operate lines of telegraph over any of the military or post roads of the United States, and the Act of Congress of June 8, 1872 (U. S. Rev. St. § 3964), declaring all the railroads in the country post roads, do not give to telegraph companies the right to construct their lines over the right of way of railroad companies without previously obtaining the consent of the owners of the right of way, or condemning the same for telegraph purposes, and making compensation therefor. *American T. & T. Co.* v. *Pearce*, 71 *Md.* 535, 18 *Atl. Rep.* 910. —QUOTING Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1.

Casting an additional burden by erecting a telegraph or telephone line over the right of way of a railroad company is just as much taking the land for public use as was the taking of it for the original easement, and courts of equity have jurisdiction to prevent it by injunction, until compensation is paid or tendered. *American T. & T. Co.* v. *Pearce*, 71 *Md.* 535, 18 *Atl. Rep.* 910.

Va. Code, § 1287, providing that telegraph companies may construct their lines "along and parallel to any of the railroads of the state," does not authorize the condemnation of a right of way by a telegraph company along and upon the right of way of a railroad company. *Postal Tel. Cable Co.* v. *Norfolk & W. R. Co.*, 88 *Va.* 920, 14 *S. E. Rep.* 689.

3. Contracts between telegraph companies and railroad companies, generally.—A contract between a railroad





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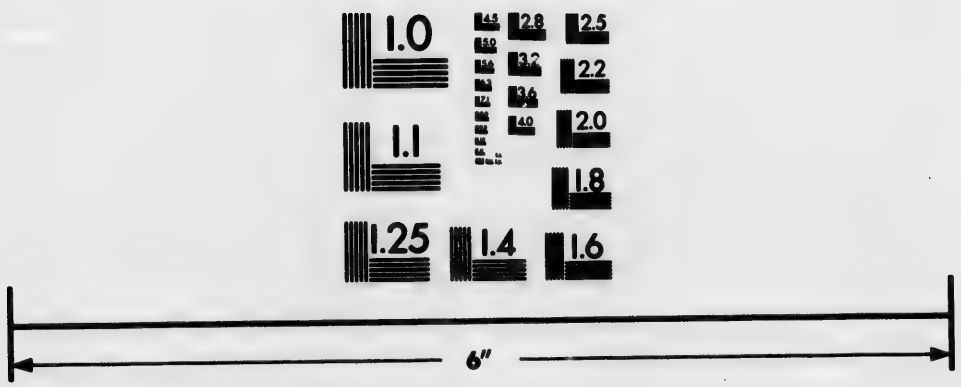

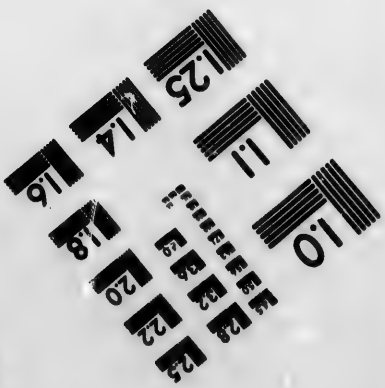

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company and a telegraph company to continue for twenty-five years was signed by the telegraph company, and the agent of the railroad company wrote a letter accepting it, except as to one matter, to which the telegraph company acceded; but the railroad company never formally signed the contract. *Held*, that the acceptance by the agent was a sufficient signing within the statute of frauds, and the terms of the contract being mutually carried out for over a year, it was taken out of the statute by part performance, and was binding on the railroad company. *Western Union Tel. Co.* v. *Chicago & P. R. Co* 86 *Ill.* 246, 17 *Am. Ry. Rep.* 407.

A railroad company made an agreement with a telegraph company to extend its line from Connellsville to Uniontown, Pennsylvania, on conditions that defendant should have the collections for messages taken at Uniontown to go to points on the company's line, to which arrangement plaintiff, in whose name the action was prosecuted, became a party, agreeing with the railroad company to erect and complete said extension in consideration of one half of the receipts thereof, no charge to be made for the railroad business. On the lease of said line to another telegraph company provision was made by agreement between defendant and said new company whereby defendant was to have the gross receipts of the Connellsville and Uniontown line. *Held*, that the plaintiff, having built the line as he agreed, was entitled, in pursuance of the aforesaid stipulations, to half of all the earnings of the telegraph line from Connellsville to Uniontown, including intermediate stations. *Pittsburgh & C. R. Co.* v. *Shaw* (*Pa.*), 36 *Am. & Eng. R. Cas.* 453, 14 *Atl. Rep.* 323.

An agreement of plaintiff to erect a telegraph along the line of defendant's railroad, in consideration of one half the receipts thereof, contained a privilege to the railroad of putting an additional wire upon the poles of plaintiff, to be used for the business of the railroad only, and upon the exercise of such privilege the contract for maintenance and working of the line on the part of the railroad company should cease. *Held*, that the use of such wire for commercial as well as railroad purposes entitled the plaintiff to damages based on the earnings of the line with the additional wire. *Pittsburgh & C. R. Co.* v. *Shaw*, (*Pa.*) 36 *Am. & Eng. R. Cas.* 453, 14 *Atl. Rep.* 323.

The defense that a contract on the part of a railroad company to maintain and operate a telegraph line is *ultra vires* is not available to the defendant in this action. *Pittsburgh & C. R. Co.* v. *Shaw*, (*Pa.*) 36 *Am. & Eng. R. Cas.* 453, 14 *Atl. Rep.* 323.

Where an act of congress authorizes a company to construct a railroad and telegraph line, a contract by the company, whereby it attempts to turn over the management and control of the telegraph line to a telegraph company, with power to fix rates thereon, is *ultra vires* and void. *Central Branch U. P. R. Co.* v. *Western Union Tel. Co.*, 1 *McCrary* (*U. S.*) 551, 3 *Fed. Rep.* 417.

In such case where the railroad company takes possession of the telegraph line, and at the same time institutes proceedings to have the contract declared null and void, the telegraph company cannot compel a restitution of the property pending the proceedings. *Central Branch U. P. R. Co.* v. *Western Union Tel. Co.*, 1 *McCrary* (*U. S.*) 551, 3 *Fed. Rep.* 417.—FOLLOWING Atlantic & P. Tel. Co. *v.* Union Pac. R. Co., 1 McCrary 541.

A court of equity, without determining the question of the validity of a contract under which a railroad company transferred its right to construct and operate a telegraph line along the line of the road (the right to make the contract having been conferred by statute), will enjoin its violation pending such determination, although the contract be one of which specific performance could not be decreed. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 1 *McCrary* (*U. S.*) 558, 3 *Fed. Rep.* 423.

A railroad company gave to a telegraph company the exclusive right to construct and operate a telegraph line along the line of its road for twenty-five years. Another company subsequently came into possession of the railroad by foreclosure, but ratified the contract with the telegraph company, and afterwards seized its line and cut off its connections. *Held*, upon a prayer for an injunction to restrain the railroad company from preventing the reconnection and use of the telegraph line, that although the clause of the contract giving the plaintiff an exclusive right might be void, or even should the whole contract be declared void upon the final hearing of the case, an injunction should issue to remain in force until the validity of the contract should be passed

upon, and an adjustment of accounts growing out of its execution in the past should be had. *Western Union Tel. Co.* v. *St. Joseph & W. R. Co.*, 1 *McCrary* (*U. S.*) 565, 3 *Fed. Rep.* 430.

Where a contract between a railroad company and a telegraph company for the erection of a telegraph line proves to be invalid, equity will not permit the railroad company, after the work is done, to take advantage of the contract and take the whole of the telegraph property. *Western Union Tel. Co.* v. *Burlington & S. W. R. Co.*, 3 *McCrary* (*U. S.*) 130, 11 *Fed. Rep.* 1.

Where a railroad company is required by its charter to construct a telegraph line, it cannot avoid a contract entered into with a telegraph company for the construction of the line, on the ground that it had not the capacity to make the contract, or that it was a usurpation of its functions. *Western Union Tel. Co.* v. *Kansas Pac. R. Co.*, 4 *Fed. Rep.* 284.

A stipulation in such contract that the railroad company would not transport men or materials to any other telegraph company at less than regular rates, and not to give to any other company permission to erect a telegraph line along the road, appears to be in opposition to the act of Congress of 1866 to aid in the construction of telegraph lines, and for that reason without effect; but such stipulation may be eliminated from the contract without impairing other provisions of it. *Western Union Tel. Co.* v. *Kansas Pac. R. Co.*, 4 *Fed. Rep.* 284.

4. Contracts granting exclusive rights.—A contract ceding to a telegraph company the exclusive right of operating and maintaining its lines over the right of way of a railroad company, even if otherwise valid, cannot debar the state, in the exercise of the right of eminent domain, from authorizing the establishment of another telegraph line over the same right of way. *New Orleans, M. & T. R. Co.* v. *Southern & A. Tel. Co.*, 53 *Ala.* 211, 13 *Am. Ry. Rep.* 135.

A railroad company already having a telegraph line granted to a telegraph company the privilege of placing another wire on the poles "for general telegraphic correspondence," and establishing stations at points along the line as it might think proper, but reserving to the railroad company all local through business, "it being understood and agreed between the parties" that the telegraph company should be entitled only to the business of sending such messages as might be received at any of its stations destined for stations on other connecting telegraph lines, or such messages as might be received from other lines. *Held*, that the right acquired by the telegraph company in the business, other than local business, was not exclusive, and the railroad company was not precluded from placing another wire on the poles either for its own use or for the use of a third party. *Marietta & C. R. Co.* v. *Western Union Tel. Co.*, 10 *Am. & Eng. R. Cas.* 387, 38 *Ohio St.* 24.

By the terms of a contract between a telegraph and a railroad company, approved by the governor of Georgia, the telegraph company was to put up its wires along the railroad, and allow the exclusive use of one wire to the railroad company, which was to pay the cost of putting up the same, said wire to run into all the offices of the telegraph company. Another company located the road under a lease from the state of Georgia, the state paying to the telegraph company the costs incurred for the wire set apart for the use of the railroad. *Held*, that the telegraph company owned said wire and could enjoin the second railroad company from using it in a manner inconsistent with the contract. *Western Union Tel. Co.* v. *Western & A. R. Co.*, 8 *Baxt.* (*Tenn.*) 54.

Since the Act of Congress of July 24, 1866 (Rev. St. § 5263), a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other telegraph companies which have accepted the provisions of said act of Congress, and whose lines would not disturb or materially obstruct the lines of the company to which the use has first been granted. *Western Union Tel. Co.* v. *American Union Tel. Co.*, 9 *Biss.* (*U. S.*) 72.—FOLLOWING Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 19.—FOLLOWED IN Western Union Tel. Co. *v.* National Tel. Co., 22 Blatchf. (U. S.) 108.

A telegraph company having a grant from a railroad of such exclusive right to construct a line along the right of way is entitled to an injunction against actual interference with its line, but not against such interruption of its business as results from mere competition by other companies constructing rival lines along said railroad. *Western Union Tel. Co.* v. *American Union Tel. Co.*, 9 *Biss.* (*U. S.*) 72.

A railroad company cannot grant to a telegraph company the exclusive right to establish a line over its right of way. *Western Union Tel. Co.* v. *National Tel. Co.*, 22 *Blatchf.* (*U. S.*) 108.—FOLLOWING Western Union Tel. Co. *v.* American Union Tel. Co., 9 Biss. 72; Western Union Tel. Co. *v.* Burlington & S. W. R. Co., 11 Fed. Rep. 1.

Under the laws of the United States all railroads are made post roads; therefore the Act of Congress of July 24, 1866, giving to telegraph companies a right of way over all post roads, is paramount over any agreement between a railroad company and a telegraph company whereby the latter is to have the sole use of the railroad line for its wires. *Western Union Tel. Co.* v. *Baltimore & O. Tel. Co.*, 19 *Fed. Rep.* 660.

Where a railroad company agrees with a telegraph company using its right of way that it will not permit the construction of other telegraph lines thereon, nor afford facilities to other telegraph companies, the telegraph company does not have such an exclusive interest in the railroad right of way for telegraph purposes as to entitle it to an injunction against the construction of another line on such right of way. *Pacific Postal Tel. Cable Co.* v. *Western Union Tel. Co.*, 50 *Am. & Eng. R. Cas.* 665, 50 *Fed. Rep.* 493.

A railroad company has no authority to grant the exclusive right to construct and maintain a telegraph line along its road to a single company; a contract granting such privilege is *ultra vires* and void. *Pacific Postal Tel. Cable Co.* v. *Western Union Tel. Co.*, 50 *Am. & Eng. R. Cas.* 665, 50 *Fed. Rep.* 493.

5. —— when void as against public policy.—The state of Georgia, being the sole owner of a railroad, entered into an agreement with a telegraph company that the latter should put up and set apart a wire for the exclusive use of the railroad, equip it with instruments, run the wire into all the offices along the railroad, and fix the terms upon which the officers of the road might receive and transmit messages from connecting lines. *Held*, that this did not amount to a sale of the wires and fixtures to the state, but only to a contract for the exclusive use thereof by the state. *Western Union Tel. Co.* v. *Western & A. R. Co.*, 91 *U. S.* 283.

And a lease of the railroad only conferred upon the lessee such rights as the state had in the contract. *Western Union Tel. Co.* v. *Western & A. R. Co.*, 91 *U. S.* 283.

A contract between a railroad company and a telegraph company that the former will allow no other telegraph company to construct a line along its road is not inoperative as against public policy. *Western Union Tel. Co.* v. *Atlantic & P. Tel. Co.*, 7 *Biss.* (*U. S.*) 367.

An agreement whereby a railroad company, "so far as it legally may," grants to a telegraph company an exclusive right of way along its line, and agrees not to furnish to any competing line any facilities which "it may lawfully withhold," will be interpreted as granting only such an easement as is necessary for the legitimate use of the telegraph company in constructing and operating its lines, because otherwise it would contravene the Act of Congress of July 24, 1866 (14 U. S. St. at L. 221). *Western Union Tel. Co.* v. *National Tel. Co.*, 22 *Blatchf.* (*U. S.*) 108.

The telegraph company will be protected, by injunction against the railroad company, in the possession of a line of telegraph which it has constructed. *Western Union Tel. Co.* v. *National Tel. Co.*, 22 *Blatchf.* (*U. S.*) 108.

A provision in a contract between a railroad company and a telegraph company that the "family, private, and social messages of the executive officers of the railroad shall be transmitted without charge" is immoral and against public policy, and taints the whole contract; and a court of equity will grant no relief under such contract. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 3 *Fed. Rep.* 1, 1 *McCrary* (*U. S.*) 418.—FOLLOWING Marshall *v.* Baltimore & O. R. Co., 16 How. (U. S.) 314; Atlantic & P. Tel. Co. *v.* Union Pac. R. Co., 1 Fed. Rep. 745.

Such contract also contained the stipulation that the business of the railroad company as well as "the family, private, and social messages of the executive officers" should be "transmitted without charge." The railroad company did not disaffirm the contract, but proceeded upon the execution of it for more than thirteen years. *Held*, that ordinarily such a contract would have become irrevocable, and such would be the rule if the free use of the telegraph had been limited to the officers who were concerned in making the contract; but as the provision extended to all officers of the company,

to those who came afterwards as well as to those who made the contract, it was kept alive, and might be rescinded after the lapse of thirteen years. *Western Union Tel. Co.* v. *Kansas Pac. R. Co.*, 4 *Fed. Rep.* 284. See also *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 3 *Fed. Rep.* 1, 1 *McCrary* (*U. S.*) 418.

And such rescission would not authorize either company to appropriate the property of the other acquired while the contract was in force, without paying for the same. *Western Union Tel. Co.* v. *Kansas Pac. R. Co.*, 4 *Fed. Rep.* 284.

A railroad company granted permission to a telegraph company to maintain a line along the railway as long as the grantee existed as a telegraph company. The corporate existence of the telegraph company was limited to a certain number of years. *Held*, that the contract expired with the expiration of the term for which the telegraph company was chartered, and the fact that it was reincorporated under another name would not affect the result. *Western Union Tel. Co.* v. *Baltimore & O. R. Co.*, 20 *Fed. Rep.* 572.

A contract between a railroad company and a telegraph company whereby each is to contribute in establishing a telegraph line along the railroad, the telegraph company to operate the line and to have the exclusive right for telegraphic purposes, so far as the railroad company can legally grant it, the latter agreeing to discourage competition, is not contrary to public policy as creating a monopoly by giving the telegraph company the exclusive use of the right of way, and as discouraging competition; and a court of equity will enjoin the placing or maintaining of other wires upon the poles under contract with the railroad company. *Western Union Tel. Co.* v. *Chicago & P. R. Co.*, 86 *Ill.* 246, 17 *Am. Ry. Rep.* 407.

The right of a telegraph company to maintain its wires along a railroad being dependent upon the true construction of an agreement, the railroad company will be restrained from removing the wires until after the right is adjudicated. *Atlantic & O. Tel. Co.* v. *Philadelphia, G. & N. R. Co.*, 8 *Phila.* (*Pa.*) 246.

6. —— or as in restraint of trade. —Contracts between railroad and telegraph companies, vesting in the latter the exclusive right to use or occupy the right of way of the former for the erection of telegraph poles, and other purposes in connection with their business of transmitting messages, etc., by telegraph, are void as being in general restraint of trade, and as tending to create monopolies, thus being against public policy. *Western Union Tel. Co.* v. *American Union Tel. Co.*, 65 *Ga.* 160.

Such a contract is void as being in restraint of trade, contrary to public policy, and in violation of the Act of Congress of July 24, 1866 (14 St. 221). *Western Union Tel. Co.* v. *Burlington & S. W. R. Co.*, 3 *McCrary* (*U. S.*, 30, 11 *Fed. Rep.* 1.—FOLLOWED IN Western Union Tel. Co. *v.* National Tel. Co., 22 Blatchf. (U. S.) 108.

After a railroad company had entered into an agreement with a telegraph company for the exclusive use of the right to construct and operate a telegraph line over the railroad, the property was sold in a foreclosure, and the purchasing company leased it to still another company, which gave to still another company running powers over a part of the road, and consented to the erection of another telegraph over the same road. *Held:* (1) that the original agreement was binding on the present owners of the road; (2) that the contract with the telegraph company was not void as against public policy, nor as being a contract in restraint of trade. *Canadian Pac. R. Co.* v. *Western Union Tel. Co.*, 17 *Can. Sup. Ct.* 151.

7. Liability for delay or non-delivery of telegrams.*—A telegraph company was formed by the officers of a railroad, the railroad company furnishing the entire capital stock. Plaintiff recovered a judgment against the telegraph company for a breach of contract. The property of the telegraph company was sold, the entire consideration going to the railroad company, thus leaving the telegraph company insolvent. *Held*, that the railroad company held the price of the telegraph property in trust, and that payment of plaintiff's judgment might be enforced in a court of equity. *Baltimore & O. Tel. Co.* v. *Interstate Tel. Co.*, 54 *Fed. Rep.* 50, 8 *U. S. App.* 340, 4 *C. C. A.* 184; *affirming* 51 *Fed. Rep.* 49.

The institution of suit is full compliance with a stipulation on a telegraph blank that any claim for damages shall be presented

* Law of the transmission of telegrams and the liability of telegraph companies, see note, 12 AM. & ENG. R. CAS. 104.

within sixty days. *Gulf, C. & S. F. R. Co.* v. *Levy*, (*Tex.*) 19 *Am. & Eng. R. Cas.* 151.

8. Rule as to repeating messages. — The failure of one who pays a telegraph company for its transmission to have a message repeated will not exempt the company from damages resulting from its failure through negligence to have the message delivered. And this, though the printed matter on the blank furnished by the company, and on which the message was written, contains a stipulation that the company will only be liable for the amount received for sending the message, if delay should occur in its delivery, in case the message is repeated. The rule is otherwise when the action against the company is for error committed in transmitting the message. *Gulf, C. & S. F. R. Co.* v. *Wilson*, 69 *Tex.* 739, 7 *S. W. Rep.* 653.

9. Damages recoverable, generally. — A railway company which owned and operated for hire a telegraph line received a message on Sunday to be transmitted to one living at a place where it maintained a telegraph office on its line. The message announced the death of the sender's wife and child, and was directed to his father, requesting his presence. *Held*, that if there was wilful or gross negligence in failing to deliver the message, the sender was entitled to recover against the company, over and above such sum as he paid for the transmission of the message, such an amount of exemplary damages as a jury might award under proper instructions. When nominal damage is shown in such a case, it is for the jury to measure the exemplary damage, and their verdict, if excessive, will be set aside. *Gulf, C. & S. F. R. Co.* v. *Levy*, 12 *Am. & Eng. R. Cas.* 90, 96, 59 *Tex.* 542, 46 *Am. Rep.* 269.—QUOTED IN Western Union Tel. Co. *v.* Wood, 57 Fed. Rep. 471.

A telegraph company which is guilty of gross negligence or total failure in delivering a message of a strictly private nature, announcing the death of a relative of the sender, and desiring aid and the like, cannot escape with mere nominal damages on account of the want of strict commercial value in the message. *Gulf, C. & S. F. R. Co.* v. *Levy*, 12 *Am. & Eng. R. Cas.* 90, 96, 59 *Tex.* 542, 46 *Am. Rep.* 269.— QUOTING Courtenay *v.* Earle, 10 C. B. 83.

In actions for failure to deliver a telegram, the rules governing are such as are applicable in cases where a contract is made under special circumstances known to the contracting parties, and from which special damage will result if the contract is not performed, and in such cases the parties are presumed to have contracted with reference to such circumstances and the damages which naturally flow from a non-performance of such contract. *Gulf, C. & S. F. R. Co.* v. *Levy*, 12 *Am. & Eng. R. Cas.* 90, 96, 59 *Tex.* 542, 46 *Am. Rep.* 269.—NOT FOLLOWED IN Crawson *v.* Western Union Tel. Co., 47 Fed. Rep. 544.

A father sued a railway company which owned and operated a telegraph line for negligence in failing to transmit a message sent to him by his son, informing him of the sudden death of the son's wife and child. Damage was claimed on account of mental anguish caused by his consequent inability to attend the funeral and minister to his son's comfort and necessities. *Held*, that the contract between the son and the company cannot be made the basis of a recovery by the father. The action could only be sustained, under the facts, by showing that plaintiff was injured in his person, property, or reputation by the negligence of the company. *Gulf, C. & S. F. R. Co.* v. *Levy*, 59 *Tex.* 563.

Negligence in a telegraph company, without regard to the degree of such negligence, will render such company liable for actual damage resulting from its failure to deliver a telegraph message. *Gulf, C. & S. F. R. Co.* v. *Wilson*, 69 *Tex.* 739, 7 *S. W. Rep.* 653.

10. Damages for mental anguish. — A telegraph company is liable in damages to the addressee for negligent failure to send and deliver a telegram addressed by a mother to her son, informing him of his father's dying condition, and summoning the son to the father's bedside, although the mother paid the toll for sending the telegram and the son, without receiving it, visited his father two days later, and reached him thirty-six hours before his death. *Newport News & M. V. R. Co.* v. *Griffin*, 92 *Tenn.* 694, 22 *S. W. Rep.* 737.—FOLLOWING Wadsworth *v.* Western Union Tel. Co., 86 Tenn. 695.

Damages should be awarded in such sum as will reasonably compensate for the grief, disappointment, or other injury to the feelings of the addressee caused by the company's default, taking into consideration, in mitigation of damages, the fact that the

son reached the father's bedside before his death. *Newport News & M. V. R. Co.* v. *Griffin*, 92 *Tenn.* 694, 22 *S. W. Rep.* 737.

A party is not entitled to recover damages for an injury to his feelings, or for mental anguish, occasioned by the non-delivery of a telegram, unless the non-delivery was occasioned by gross negligence. *Gulf, C. & S. F. R. Co.* v. *Levy*, (*Tex.*) 19 *Am. & Eng. R. Cas.* 151.—REVIEWING So Relle *v.* Western Union Tel. Co., 55 Tex. 310.

Plaintiff's wife and child having died, he sent a telegram to his father requesting aid. The telegram was transmitted correctly and promptly to the town where the plaintiff's father lived, and three attempts were made in the course of the day to deliver it at his store, which was, however, found closed. No inquiry was made for him by any one. *Held*, in suit brought by plaintiff for the mental anguish caused him by reason of the failure of his father to come to him, that there was no evidence of gross negligence, and therefore no right to recover. *Gulf, C. & S. F. R. Co.* v. *Levy*, (*Tex.*) 19 *Am. & Eng. R. Cas.* 151.

Action against a telegraph company for delay in transmitting the message "My child is very sick; come at once" addressed to a physician; by reason of the delay the physician came too late, and the child died, after much suffering. The testimony showed a condition of mental distress from the delay of the doctor to visit the child, i. e. mental anguish produced as the proximate result of the failure of the telegraph company to deliver the message according to the terms of the contract of sending it. Under the facts it was proper to instruct the jury that the defendant would be liable to plaintiff for its failure to use reasonable diligence to deliver the dispatch, in such sum as the jury might believe he should receive as compensation for mental suffering caused him by such failure. *Gulf, C. & S. F. R. Co.* v. *Richardson*, 79 *Tex.* 649, 15 *S. W. Rep.* 689.—REVIEWING Stuart *v.* Western Union Tel. Co., 66 Tex. 580.

11. Decisions under the English "Telegraph Acts."—Where a railway company, under an agreement by which it leases all its works to another company, parts with the beneficial interest in its telegraph line, it is not entitled to compensation under the Telegraph Acts, 31 & 32 Vict. c. 110. *Reg.* v. *Coleridge*, 45 *L. J. Q. B. D.* 649, 34 *L. T.* 752.

A railway company which, by agreement with a telegraph company placing its apparatus on the railway line, has a right to use one wire solely for railway messages, has no interest in the telegraph which will entitle it to require the postmaster-general to purchase it under the Telegraph Acts, 1868 and 1869. *Cowes & N. R. Co.* v. *Board of Trade*, 43 *L. J. Q. B.* 242, 22 *W. R.* 807.

Where an arbitrator, in determining the amount to be paid to a railway company by the postmaster-general under the Telegraph Act, 1868, § 9, subsec. 6, has awarded a lump sum and has made no allusion in his award to any yearly rent, the railway company is precluded from any further compensation for extra poles or wires which the postmaster-general may in the future require to be erected. *Reg.* v. *Metropolitan R. Co.*, 50 *L. T.* 6; *affirming* 48 *L. T.* 367.

12. Telephone companies.*—As against a street railroad, a telephone company duly organized has the right to erect its poles and string its wires in the street through which the railroad runs; and an injunction will lie in its favor to restrain any interference with or destruction of such right producing irreparable injury. *Hudson River Telep. Co.* v. *Watervliet T. & R. Co.*, 29 *N. Y. S. R.* 22, 8 *N. Y. Supp.* 497.

A temporary injunction will be granted, under N. Y. Code Civ. Proc. §§ 603, 604, subd. 1, on a complaint alleging that the defendant electric-railway company is about to erect poles and string wires for the purpose of propelling its cars by electricity, on lines in close proximity to and parallel with the plaintiff telephone company's wire, and upon its being shown that powerful currents of induction and conduction will thereby be produced which will interfere with and prevent the carrying on of plaintiff's business. *Hudson River Telep. Co.* v. *Watervliet T. & R. Co.*, 29 *N. Y. S. R.* 22, 8 *N. Y. Supp.* 497.

It is the duty of a telephone company using a public highway for its poles and wires so to construct and maintain its line as not to incommode the public use of the highway for purposes of travel or transportation, whether by ordinary vehicles, horse railways, or electric railways, lawfully used on the same. *Central Pa. Telep. Co.* v. *Wilkes-Barre & W. S. R. Co.*, 1 *Pa. Dist.* 628.

*See also ELECTRIC RAILWAYS.

TELLTALES.

Duty to employés as regards, see EMPLOYÉS, INJURIES TO, 58, 59.

TENANCY.

At will, see LEASES, ETC., 11.
From year to year, see LEASES, ETC., 10.

TENANTS IN COMMON.

As parties to condemnation proceedings, see EMINENT DOMAIN, 271.
Right of, to appeal in condemnation proceedings, see EMINENT DOMAIN, 878.
When entitled to land damages, see EMINENT DOMAIN, 429.

TENDER.

Necessity of, before suit, see CONTRACTS, 93.
Of amount due before applying for injunction, see TAXATION, 344.
— certificate before suing on stock subscription, see SUBSCRIPTIONS TO STOCK, 81.
— charges claimed by carrier before suing in trover, see TROVER, 12.
— compensation for land condemned, see EMINENT DOMAIN, 384–389.
— — — — taken, effect of, on right to costs, see EMINENT DOMAIN, 771.
— debenture for acceptance before suit, see DEBENTURES, 14.
— debentures for freight charges, see DEBENTURES, 9.
— fare, how pleaded, see EJECTION OF PASSENGERS, 83.
— — to prevent ejection of passenger, see EJECTION OF PASSENGERS, 47–51.
— government notes in payment of fare, see TICKETS AND FARES, 117.
— taxes, see TAXATION, 291.

1. When proper. — An action to recover the value of goods wrongfully delivered by a carrier is not an action to recover "damages for a casual or involuntary injury to property," and a tender is not warranted in such action by N. Y. Code Civ. Pro. § 731. *Clement* v. *New York C. & H. R. R. Co.*, 30 *N. Y. S. R.* 713, 9 *N. Y. Supp.* 601, 56 *Hun* 643.

2. What is a valid tender.—Where defendant offers to pay under protest the sum claimed, this is a good tender. *Scott* v. *Uxbridge & R. R. Co.*, *L. R.* 1 *C. P.* 596, 12 *Jur. N. S.* 602, 35 *L. J. C. P.* 293, 14 *W. R.* 893.

Goods were shipped to go part of the way by ocean steamer, and thence over a connecting railroad to the place of destination. On their arrival it appeared that a portion of the goods had been abstracted, and the railroad tendered their value, but this was refused, the consignees claiming also damage to the goods during the water voyage, which was contested. *Held*, that the items of damage and for loss of goods were severable, and the tender was proper and should have been accepted. *East Tenn., V. & G. R. Co.* v. *Wright*, 76 *Ga.* 532.

"An offer in writing to pay a particular sum of money is equivalent to the actual tender of the money" (Iowa Code, § 2105). But the statute simply dispenses with the actual production of the money. In other respects the rule of the common law prevails, which requires that a tender, to be good, must be unconditional. And so, where defendant made a written offer, in effect: "I am willing to pay you the named sum to avoid litigation; it is not due you, but I am willing to pay," it is not sufficient to make the offer equivalent to a tender. *Kuhns* v. *Chicago, M. & St. P. R. Co.*, 65 *Iowa* 528, 22 *N. W. Rep.* 661.

In tendering back money for the purpose of rescinding the arrangement under which it had been received, it is immaterial whether the bills tendered back are the identical ones received or not, since in law one dollar in money is the equivalent of any other dollar. *Michigan C. R. Co.* v. *Dunham*, 30 *Mich.* 128.

3. Proper time or stage of the action.—Defendant received from plaintiff a certain amount of money to be used in the promotion of a railroad, if the franchise of the company should be confirmed, and if not to be returned to plaintiff on demand. In an action to recover the money the defense was that the money was in payment of a subscription to the bonds of the company and was to go to a certain promoter of the enterprise, who was to furnish the bonds. It appeared that a certificate of a certain trust company had been sent to plaintiff, agreeing to deliver the bonds to him; but it did not appear that the certificate had any value. *Held*, that an offer to return the certificate made at the trial for the first time was sufficient. *Lewis* v. *Andrews*, 6 *N. Y. Supp.* 247, 24 *N. Y. S. R.* 1001; *affirmed in* 127 *N. Y.* 673, 3 *Silv. App.* 481, 38 *N. Y. S. R.* 808, 27 *N. E. Rep.* 1044.

4. The necessary amount.—A company, before suit brought, tendered to a party a sum less than his demand, in full satis-

faction, which was refused, and upon suit brought before a justice of the peace deposited the tender with the justice, to be paid to plaintiff on condition he accept it in full, which was again refused, and a trial had, resulting in a judgment for a larger sum than that tendered. After the judgment, the justice, on the advice of plaintiff's attorney, applied part of the deposit upon the costs, and paid the residue to plaintiff in part payment of the judgment, the latter not accepting the same in full satisfaction. *Held*, that a bill by the company to enjoin the collection of the balance of the judgment was properly dismissed. It was not held to be important to consider the question of authority, or want of authority, in the justice to make such application of the tender. *Chicago & E. I. R. Co.* v. *Kamman*, 119 *Ill.* 362, 10 *N. E. Rep.* 217; *affirming* 19 *Ill. App.* 640.

If a party tenders less than is due he does so at his peril, though he may honestly believe that the amount tendered was all that plaintiff was entitled to. *So held*, where a company defended a suit for killing a colt, on the ground that it had in good faith tendered what was believed to be the value of the colt, as far as could be ascertained by due inquiries in the neighborhood, but where the tender was less than the verdict of the jury. *Helphrey* v. *Chicago & R. I. R. Co.*, 29 *Iowa* 480.—FOLLOWING Brandt *v.* Chicago, R. I. & P. R. Co., 26 Iowa 114.

And such tender will not prevent the owner from recovering double the value of the stock under the statute. *Brandt* v. *Chicago, R. I. & P. R. Co.*, 26 *Iowa* 114.—FOLLOWED IN Helphrey *v.* Chicago & R. I. R. Co., 29 Iowa 480.

A tender to be good must be without conditions; and an offer of a sufficient sum in settlement of one claim is not a tender when it is made conditional upon the acceptance of an offer of an insufficient amount in settlement of another claim. *So held*, where a railroad company was sued for injuries to a mare and for killing a colt, and defended on the ground that it had tendered plaintiff $50 for the injury to the mare and $125 for killing the colt, but where the jury found that the colt was worth $125 and the injury to the mare was $70. *Shuck* v. *Chicago, R. I. & P. R. Co.*, 73 *Iowa*, 333, 35 *N. W. Rep.* 429.

5. Keeping the tender good.—Where certain submerged lands are granted by the state to a company in fee upon payment of a certain sum to the city within the limits of which the lands are situated, and the city refuses to receive the money upon its tender, failure to keep the tender good deprives the company of all rights acquired thereunder. *Illinois* v. *Illinois C. R. Co.*, 33 *Fed. Rep.* 730.

6. Payment into court.—A suit by a state against a company, to recover taxes, was pending in the supreme court of the United States, and the company tendered the amount of taxes, penalties, interest, and costs, which being refused, it deposited in bank. *Held*, on this being shown to the court, that the writ of error must be dismissed, under Cal. Civil Code, § 1500, providing that an obligation to pay money is extinguished by an offer to pay, if it be followed by immediate deposit in a reputable bank of the amount, in the name of the creditor. *California* v. *San Pablo & T. R. Co.*, 149 *U. S.* 308, 13 *Sup. Ct. Rep.* 876.—FOLLOWING San Mateo County *v.* Southern Pac. R. Co., 116 U. S. 138, 6 Sup. Ct. Rep. 317.

Under N. Y. Code Civ. Pro. § 731, in reference to tenders, in case of the refusal to accept when the money is brought into court, it belongs to plaintiff, and his title thereto cannot be disputed whatever may be the result of the action. The plaintiff in proceeding after the tender and deposit simply runs the risk of paying defendant's costs, if the recovery is less than the amount tendered, while defendant takes the risk of losing the amount tendered in the event that he succeeds in the action. *Taylor* v. *Brooklyn El. R. Co.*, 119 *N. Y.* 561, 23 *N. E. Rep.* 1106, 30 *N. Y. S. R.* 111; *affirming* 18 *Civ. Pro.* 72, 27 *N. Y. S. R.* 44, 7 *N. Y. Supp.* 625.

7. Effect of tender or payment into court.—Payment into court by a company, sued for injuries to a passenger, of a sum of money as damages, admits the contract to carry and the breach of the duty founded upon that contract, so as to dispense with proof of negligence. *Perren* v. *Monmouthshire R. & C. Co.*, 11 *C. B.* 855, 17 *Jur.* 532, 22 *L. J. C. P.* 162.

Payment of money into court in an action of tort, where the declaration is general and unspecific, admits a cause of action but not the particular cause of action sued for; but if the declaration is specific, the payment admits the alleged cause of action. *Perren* v. *Monmouthshire R. & C. Co.*, 11 *C. B.* 855, 17 *Jur.* 532, 22 *L. J. C. P.* 162.

A company is not entitled to distrain for tolls, where it demands a sum in gross, made up of two sums, one due for tolls, and the other not so due, and the party tenders the amount due for tolls as being all that is due; but such tender does not preclude the company from recovering the toll. *Field* v. *Newport, A. & H. R. Co.*, 3 *H. & N.* 409 27 *L. J. Ex.* 396.

Plaintiff while away from home received a telegram informing him of the sickness of his father, and paid to defendant company a certain amount to convey him by a special train to a certain point on its road where he could make connections with another road; but he afterwards refused to take the train unless the company would guarantee that it would deliver him at the place in time to make the connection with the train on the other road, whereupon the company tendered him back the amount paid by him which he declined. *Held*, that he could not recover interest on the sum paid, nor costs. *Wilcox* v. *Richmond & D. R. Co.*, 52 *Fed. Rep.* 264, 8 *U. S. App.* 118, 3 *C. C. A.* 73.

Tender of the sum assessed and awarded to a landowner in a proceeding to condemn a right of way duly made and continued, but refused, is the equivalent of actual payment of the award, in its effect on the right of the company to enter upon the land and construct its road. *Oliver* v. *Union Point & W. P. R. Co.*, 39 *Am. & Eng. R. Cas.* 107, 83 *Ga.* 257, 9 *S. E. Rep.* 1086.

A tender admits the liability or indebtedness to the amount of the sum tendered. *Frink* v. *Coe*, 4 *Greene* (*Iowa*) 555.

Evidence that a tender was made under a mistaken belief, by the party making it, that the sum tendered was due is admissible to rebut the inference that a debt was thereby admitted. *Ashuelot R. Co.* v. *Cheshire R. Co.*, 60 *N. H.* 356.

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I. TICKETS, GENERALLY.

1. *General Nature, Validity, and Effect.*

1. Not a contract, but a receipt, voucher, or token.*—A passenger ticket may be in such form as to give to it the nature of a receipt rather than a contract, its office being, in such case, mainly that of a token or voucher, to enable persons having charge of carriages or vessels of common carriers to recognize the persons who are entitled to be carried as passengers. *Louisville, N. A. & C. R. Co.* v. *Nicholai*, 4 *Ind. App.* 119, 30 *N. E. Rep.* 424.

A ticket for the transportation of a passenger is not a contract of itself; it is simply evidence of a contract. *Kansas City, St. J. & C. B. R. Co.* v. *Rodebaugh*, 34 *Am. & Eng. R. Cas.* 219, 38 *Kan.* 45, 15 *Pac. Rep.* 899.

A railroad ticket constitutes a contract between the carrier and the holder. *Sears* v. *Eastern R. Co.*, 14 *Allen* (*Mass.*) 433.

A public advertisement of the times when the trains run enters into and forms part of the contract entered into between a railroad and the holder of a ticket over its line. *Sears* v. *Eastern R. Co.*, 14 *Allen* (*Mass.*) 433.

The ticket given to a passenger, upon payment of his fare, is a receipt merely, and not a contract. *Logan* v. *Hannibal & St. J. R. Co.*, 12 *Am. & Eng. R. Cas.* 141, 77

* Tickets considered as mere receipt for passage, see note, 5 L. R. A. 818.

Mo. 663. *Lewis* v. *New York C. R. Co.*, 49 *Barb.* (*N. Y.*) 330. *Nevins* v. *Bay State Steamboat Co.*, 4 *Bosw.* (*N. Y.*) 225.

Tickets are vouchers that the fare has been paid. They do not constitute the contract with the passenger, although they may and often do have upon them some condition or limitation which enters into it and forms part of it. The contract is made up of the ticket and the rules and regulations established by the carrier, and is what is known in law as an entire contract. *Terry* v. *Flushing, N. S. & C. R. Co.*, 13 *Hun* (*N. Y.*) 359.

A railroad ticket is not evidence of the whole contract between the holder and the company, which must, so far as not expressed, be gathered from such rules of the company as are reasonable. *Dietrich* v. *Pennsylvania R. Co.*, 71 *Pa. St.* 432, 3 *Am. Ry. Rep.* 435.—APPROVED IN Oil Creek & A. R. R. Co. *v.* Clark, 72 Pa. St. 231. DISTINGUISHED IN Murdock *v.* Boston & A. R. Co., 21 Am. & Eng. R. Cas. 268, 137 Mass. 293, 50 Am. Rep. 307; Tarbell *v.* Northern C. R. Co., 24 Hun (N. Y.) 51. FOLLOWED IN McRae *v.* Wilmington & W. R. Co., 88 N. Car. 526.—*Lake Shore & M. S. R. Co.* v. *Rosenzweig*, 26 *Am. & Eng. R. Cas.* 489, 113 *Pa. St.* 519, 6 *Atl. Rep.* 545.

2. —— and the actual contract may be shown by parol.—Parol evidence of a conversation between one purchasing a ticket and the ticket seller, relating to stop-over privileges, is admissible as going to make up the contract of carriage and forming a part of it. *New York, L. E. & W. R. Co.* v. *Winter*, 52 *Am. & Eng. R. Cas.* 328, 143 *U. S.* 60, 12 *Sup. Ct. Rep.* 356.—QUOTED IN Mann Boudoir Car Co. *v.* Dupre, 54 Fed. Rep. 646, 4 C. C. A. 540.

A ticket does not ordinarily import a completed contract, and parol evidence may be introduced to show the elements of the contract which are not set forth in the ticket. *Peterson* v. *Chicago, R. I. & P. R. Co.*, 80 *Iowa* 92, 45 *N. W. Rep.* 573.

Passage tickets are generally to be regarded as tokens rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement. *Quimby* v. *Vanderbilt*, 17 *N. Y.* 306.—FOLLOWED IN Van Buskirk *v.* Roberts, 31 N. Y. 661.

3. Distinguished from bill of lading.—Where the shipper of property receives from the carrier a bill of lading containing limitations upon its common-law liability, such bill constitutes the contract of shipment, binding upon the shipper, and he cannot thereafter avoid the limitations by pleading ignorance of its contents; but the liability of the carrier for the safe carriage of a passenger and his baggage is not limited by a notice printed upon the face of the ticket, unless the passenger's attention is called to it, or unless the circumstances are such as to make the omission of the passenger to read the conditions negligence *per se*. Thus a distinction is made between a shipper of goods and a passenger. *Mauritz* v. *New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 286, 23 *Fed. Rep.* 765.

And there is ground for the above distinction. In one case the shipper is supposed to understand and know that according to commercial usage a bill of lading is essential to the regular and safe transportation of property as freight, and that of necessity it must constitute the contract of shipment in carriage. In the other case a ticket is ordinarily regarded as a mere voucher for the money paid, a token or evidence of the purchaser's right to be carried, or to have his baggage carried. *Mauritz* v. *New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 286, 23 *Fed. Rep.* 765.

4. —— and a negotiable instrument.—A ticket is a receipt or voucher, and has more the character of personal property than that of a negotiable instrument. *Frank* v. *Ingalls*, 21 *Am. & Eng. R. Cas.* 277, 41 *Ohio St.* 560.—QUOTING Cleveland, C. & C. R. Co. *v.* Bartram, 11 Ohio St. 457; Baltimore & O. R. Co. *v.* Campbell, 36 Ohio St. 647.

5. As evidence of contractual rights, generally—Right to ride in opposite direction.—Where a passenger deliberately enters a train, with knowledge that his ticket entitles him to be carried in the reverse direction from that in which he proposes to go, and with ample opportunity to procure another, the conductor may refuse to honor such ticket, and has the right to collect fare. *Godfrey* v. *Ohio & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 8, 116 *Ind.* 30, 15 *West. Rep.* 533, 18 *N. E. Rep.* 61.—DISTINGUISHING Lake Erie & W. R. Co. *v.* Fix, 88 Ind. 381.

A ticket issued entitling the holder to ride from A to B does not entitle him to ride from B to A, where there is no special contract to that effect; and this is so though the holder has been permitted so to ride on

similar tickets, and a conductor had given it as his opinion that the holder was entitled to ride in that way. *Keeley* v. *Boston & M. R. Co.*, 67 *Me.* 163, 16 *Am. Ry. Rep.* 339.

The sale of a ticket to a passenger is an undertaking that due care for his safety shall be used during the whole course of his journey over that and other roads, both in the management of the trains and the construction and maintenance of the lines in a condition fit for his passage over them; and this liability is not changed by leases and agreements between the companies having connecting lines, apportioning the charges, expenses, and fares between them, of which the passenger had no notice. *Little* v. *Dusenberry*, 25 *Am. & Eng. R. Cas.* 632, 46 *N. J. L.* 614.

Where one purchases a ticket for passage to a station, in the absence of express stipulations he becomes entitled to be carried over the railroad to that station in a reasonable time and manner, agreeably to the reasonable rules and regulations of the corporation. *Johnson* v. *Concord R. Corp.*, 46 *N. H.* 213.—DISTINGUISHING State *v.* Overton, 24 N. J. L. 435; Cheney *v.* Boston & M. R. Co, 11 Metc. (Mass.) 121; Farmers' & M. Bank *v.* Champlain Transp. Co., 23 Vt. 211.

The sale of a ticket before the arrival of a train, or when it is at the station, does not give to the purchaser a specific right to take that particular train, so that it must be held long enough for him to go upon it. The ticket gives no right to delay the train, but simply a right to take any train bound to the passenger's destination which stops at that station, provided he presents himself in time; and upon the passenger is imposed the duty of presenting himself in time or waiting for a succeeding train. *Paulitsch* v. *New York C. & H. R. R. Co.*, 76 *Am. & Eng. R. Cas.* 162, 102 *N. Y.* 280, 6 *N. E. Rep.* 577, 1 *N. Y. S. R.* 656; *reversing* 18 *J. & S.* 241.

The possession of a ticket is *prima facie* evidence that the holder has paid the regular price for it, and of his right, at some time, to be transported from the starting point to the place of destination as indicated thereon, on some passenger train; and if the ticket is not mutilated, the presumption is that it has never been used, and it is evidence of the agreement or undertaking of the company to transport him to the place named, on its passenger trains, for a consideration paid. *Pier* v. *Finch*, 24 *Barb.* (*N. Y.*) 514.

6. Conclusiveness of ticket.* — Between the conductor and a passenger, as to the right of the latter to travel, the ticket purchased must be conclusive evidence, and the passenger must produce it when called upon, as evidence to the right to the seat he claims. *Chicago & N. W. R. Co.* v. *Bannerman*, 15 *Ill. App.* 100. *Frederick* v. *Marquette, H. & O. R. Co.*, 37 *Mich.* 342.

Plaintiff purchased in good faith of defendant's agent a genuine ticket, which the agent had a right to sell and receive pay for, covering the distance between two stations, and was informed by the agent that it was good, and entitled him to a ride between said two stations. *Held*, that plaintiff had a right to rely upon the agent's statements, and that the ticket was the evidence agreed upon by the parties by which defendant should thereafter recognize the rights of plaintiff in the contract thus made with the agent, and was conclusive upon the subject. *Hufford* v. *Grand Rapids & I. R. Co.*, 64 *Mich.* 631, 31 *N. W. Rep.* 544. — DISTINGUISHED IN Heffron *v.* Detroit City R. Co., 92 Mich. 406; Mahoney *v.* Detroit St. R. Co., 93 Mich. 612. REVIEWED IN Peabody *v.* Oregon R. & N. Co., 21 Oreg. 121.

The face of a ticket is conclusive evidence to the conductor of the terms of the contract between the passenger and the company. If the ticket is defective and the passenger is ejected from a train, he must rely upon his action against the company for the negligent mistake of the ticket agent. *Pouilin* v. *Canadian Pac. R. Co.*, 52 *Am. & Eng. R. Cas.* 188, 52 *Fed. Rep.* 197, 6 *U. S. App.* 298, 3 *C. C. A.* 23.—FOLLOWING New York, L. E. & W. R. Co. *v.* Bennett, 50 Fed. Rep. 496, 1 C. C. A. 544.

7. Interpretation of particular words. — The words "good on passenger trains only" on a ticket do not amount to an agreement that all passenger trains will stop at the station designated on the ticket. And in an action by the passenger, against the company, to recover damages for carrying him past his destination named on such

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*Conclusiveness of ticket as to passenger's rights and conductor's duties. Effect of refusal of agent to countersign return ticket, see 52 AM. & ENG. R. CAS. 196, *abstr.*

Conclusiveness of tickets as between passengers and conductors, see note, 46 AM. REP. 483.

ticket, the complaint should aver that the train on which he was so carried was one which, under the regulations of the company, should have stopped at that station. *Ohio & M. R. Co.* v. *Swarthout*, 67 *Ind.* 567. —FOLLOWING Ohio & M. R. Co. *v.* Hatton, 60 Ind. 12.

If the words "good upon one train only" are printed upon a ticket the holder is not entitled to change from one train to another after the passage is begun. *Cheney* v. *Boston & M. R. Co.*, 11 *Metc.* (*Mass.*) 121.

Where a ticket is issued with a notice upon it that it is "good for one day only," in the absence of a statutory regulation to the contrary the ticket can be used only on that day. *State* v. *Campbell*, 32 *N. J. L.* 309. *Boston & L. R. Co.* v. *Proctor*, 1 *Allen* (*Mass.*) 267. *Johnson* v. *Concord R. Corp.*, 46 *N. H.* 213. *Shedd* v. *Troy & B. R. Co.*, 40 *Vt.* 88.

A condition in a ticket as to traveling "*via* direct line" was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others. *Dancey* v. *Grand Trunk R. Co.*, 52 *Am. & Eng. R. Cas.* 181, 19 *Ont. App.* 664.—NOT FOLLOWING Hall *v.* Memphis & C. R. Co., 15 Fed. Rep. 57, 9 Fed. Rep. 585; Pennsylvania R. Co. *v.* Connell, 112 Ill. 295.

8. Mistakes in tickets—Defective tickets.*—Plaintiff entered a ticket office and paid for a ticket to a designated place. The ticket as issued was somewhat complicated, the point of departure and destination being indicated by punching certain stations marked on its face, as well as the direction in which it was to be used. After plaintiff was on the train it was discovered that it was punched for a station in the wrong direction. *Held*, that the failure to receive a proper ticket was not his fault and the company had no right to eject him on that ground. *Georgia R. Co.* v. *Olds*, 77 *Ga.* 673.

If a ticket be so defaced by the act or negligence of a passenger as to make the date illegible, a gateman has the right to refuse to honor it, and to refuse to allow him to pass to the train, and for such refusal no action will lie. *Northern C. R. Co.* v. *O'Conner*, 52 *Am. & Eng. R. Cas.* 176, 76 *Md.* 207, 16 *L. R. A.* 449, 24 *Atl. Rep.* 449.

If a ticket be so blurred or defaced at the time it is delivered to a passenger by the ticket agent, and it is presented at the gate in the same condition as when he got it, and the gateman refuses to allow him to pass, the passenger himself, being without fault, is under no obligation to get the indorsement of the ticket receiver, and for such wrongful refusal by the gateman the defendant is liable. *Northern C. R. Co.* v. *O'Conner*, 52 *Am. & Eng. R. Cas.* 176, 76 *Md.* 207, 16 *L. R. A.* 449, 24 *Atl. Rep.* 449.

To hold that a passenger who has bought a ticket, and in good faith presents it to the gateman in the same condition as when he got it from the ticket agent, is obliged to go to the receiver's office and get his indorsement, because its genuineness has been questioned by the gateman, would not only subject him to great inconvenience, but in many cases it would be impossible to get such indorsement in time to take the train. *Northern C. R. Co.* v. *O'Conner*, 52 *Am. & Eng. R. Cas.* 176, 76 *Md.* 207, 16 *L. R. A.* 449, 24 *Atl. Rep.* 449.

Where a passenger has purchased a ticket and a conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him a wrong ticket, so that he is compelled to relinquish his seat or pay fare a second time, he has a right of action against the company for breach of contract, and not of an action to recover damages for being ejected from the train. *Frederick* v. *Marquette, H. & O. R. Co.*, 37 *Mich.* 342.—DISTINGUISHED IN Lake Erie & W. R. Co. *v.* Fix, 11 Am. & Eng. R. Cas. 109, 88 Ind. 381, 45 Am. Rep. 464; Philadelphia, W. & B. R. Co. *v.* Rice, 26 Am. & Eng. R. Cas. 264, 64 Md. 63; Murdock *v.* Boston & A. R. Co., 21 Am. & Eng. R. Cas. 268, 137 Mass. 293, 50 Am. Rep. 307. FOLLOWED IN New York, L. E. & W. R. Co. *v.* Bennett, 50 Fed. Rep. 496, 6 U. S. App. 1, 1 C. C. A. 544; Hufford *v.* Grand Rapids & I. R. Co., 18 Am. & Eng. R. Cas. 336, 53 Mich. 118; Heffron *v.* Detroit City R. Co., 92 Mich. 406. QUOTED IN Mahoney *v.* Detroit St. R. Co., 93 Mich. 612; McKay *v.* Ohio River R. Co., 34 W. Va. 65. REVIEWED IN Peabody *v.* Oregon R. & N. Co., 21 Oreg. 121; Louisville, N. & G. S. R. Co. *v.* Fleming, 14 Lea (Tenn.) 128.

A passenger without a ticket cannot be treated by the conductor as a trespasser, if he is upon the train by mistake of the serv-

* Expulsion of passenger for defect in his ticket not discoverable by him by inspection, see note, 21 AM. & ENG. R. CAS. 275.

ants of the railway, or if there is a mistake in the ticket given to him calling for a route different from that contracted for with the ticket agent. If the passenger contracts for passage to a given point, and pays for carriage, he has the right to stand upon his contract as really made with the ticket agent. If the carrier by mistake fails to deliver what the passenger purchased, or fails to furnish him with a ticket evidencing his rights secured by the contract really entered into, it must correct such mistake and grant to him the privilege and right actually purchased. *Gulf, C. & S. F. R. Co.* v. *Rather*, 3 *Tex. Civ. App.* 72, 21 *S. W. Rep.* 951.—QUOTING International & G. N. R. Co. *v.* Gilbert, 64 Tex. 540.

9. Good for what trains.*—A carrier may charge a passenger for the actual distance he is carried if he is on the wrong train by mistake. *Columbus, C. & I. C. R. Co.* v. *Powell*, 40 *Ind.* 37.—REVIEWED IN Lake Erie & W. R. Co. *v.* Mays, 4 Ind. App. 413.

A road from S. to A. was used by both defendant and another company, each operating its own trains. Plaintiff purchased a ticket from S. to A. which was good on a train of either company, and entered at S. a train of the associate company which ran only to M., a point intermediate between S. and A. The conductor of this train accepted his ticket in payment of his fare from S. to M., punched it, and returned it to him. *Held*, that plaintiff had no right on this ticket to resume his journey to A. on one of defendant's trains. *Wyman* v. *Northern Pac. R. Co.*, 22 *Am. & Eng. R. Cas.* 402, 34 *Minn.* 210, 25 *N. W. Rep.* 349.

A company may prescribe the train upon which a ticket, issued for a special consideration, shall be good. *Thorp* v. *Concord R. Co.*, 61 *Vt.* 378, 17 *Atl. Rep.* 791.

10. —— and for what stations.—When a company has sold a ticket to a particular station it has no right to refuse to stop its train there, and is liable for such refusal. And a ticket from one designated station to another is good for any intermediate station at which, by the regulations of the company, trains regularly stop. *Richmond, F. & P. R. Co.* v. *Ashby*, 79 *Va.* 130.

11. Rights of holder of fraudulently procured ticket.—When the possession of a ticket which entitles the holder to one first-class passage between points named therein has been fraudulently obtained from the company, a person purchasing such ticket from the holder thereof, although for value and without notice of equities, acquires no title therein. *Frank* v. *Ingalls*, 21 *Am. & Eng. R. Cas.* 277, 41 *Ohio St.* 560.—QUOTING Cleveland, C. & C. R. Co. *v.* Bartram, 11 Ohio St. 457; Baltimore & O. R. Co. *v.* Campbell, 36 Ohio St. 647.

12. Lost tickets.*—A passenger who loses or mislays his ticket after entering the cars has no right to supply its place by offering testimony that he actually bought the ticket and lost it, and the conductor or other employé whose duty it is to take up the ticket, under a rule which gives him no discretion, cannot be required to hear testimony on the subject, or to determine its weight at the peril of the company. *Louisville, N. & G. S. R. Co.* v. *Fleming*, 18 *Am. & Eng. R. Cas.* 347, 14 *Lea* (*Tenn.*) 128.

There is no distinction, so far as it affects the relative rights of the parties, whether a ticket be lost or mislaid by a passenger before or after going upon the train. *Louisville, N. & G. S. R. Co.* v. *Fleming*, 18 *Am. & Eng. R. Cas.* 347, 14 *Lea* (*Tenn.*) 128.

A passenger who has paid his fare and has lost his ticket cannot be ejected from the train upon his failure to produce his ticket for inspection by the conductor, there being upon the ticket no condition requiring its production, and no contract for its production having been entered into. That is not a refusal to pay his fare under 51 Vict. c. 29, § 248 (D). *Beaver* v. *Grand Trunk R. Co.*, 58 *Am. & Eng. R. Cas.* 42, 20 *Ont. App.* 476; *reversed in* 59 *Am. & Eng. R. Cas.* 673, 22 *Can. Sup. Ct.* 498.

13. Statutes regulating the issuance, taking up, and redemption.—Ind. Act of March 9, 1875 (1 Rev. St. 1876, p. 259), "regulating the issuing and taking up of tickets and coupons of tickets by common carriers," is in the nature of a police regulation, is valid, and is not in conflict with the Constitution of either the United States or the state. *Fry* v. *State*, 63 *Ind.* 552.—QUOTING Hannibal & St. J. R.

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* Tickets for passenger trains; regulations, see note, 34 AM. & ENG. R. CAS. 267.

* See also EJECTION OF PASSENGERS, **20.**
Right of passenger who has lost ticket to travel, see note, 5 L. R. A. 819.

Co. *v.* Husen, 95 U. S. 465; Patterson *v.* Kentucky, 97 U. S. 501.

Such statute does not impair the obligations of contracts, nor does it grant to any one privileges or immunities denied to others. *Fry* v. *State*, 63 *Ind.* 552.

Nor does it violate the Constitution of the United States, art. 1, § 8, which confers upon congress the power to regulate commerce among the states. *Fry* v. *State*, 63 *Ind.* 552.

Under Pa. Act of May 6, 1863 (P. L. 582), requiring railroads, steamboats, and other public conveyances to redeem the unused portion of a ticket "at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used," and the amendatory Act of April 10, 1872 (P. L. 51), providing that the company shall "pay for such unused portion of ticket the difference between the actual fare to point used, and the amount paid for such ticket," the actual fare to the point used is not to be computed at the reduced rate contained in the ticket, but at full fare. *Smith* v. *Philadelphia & R. R. Co.*, 1 *Pa. Dist.* 322.

2. *Conditions, Limitations, and Stipulations.**

14. When binding on passenger.— On the issue whether the buyer of a ticket had notice of a rule restricting holders of tickets to passage on special trains before he undertook to pass by it on a regular train, evidence is admissible that at the time of buying it he inquired of the seller whether he could pass on that train by it, and was answered that he could—although the seller was not an agent of the corporation. *Maroney* v. *Old Colony & N. R. Co.*, 106 *Mass.* 153, 7 *Am. Ry. Rep.* 427.

The rule that, in the absence of fraud, concealment, or improper practice, the legal presumption is that stipulations contained in a common carrier's receipt for freight, limiting his common-law liability, were known and assented to by the person receiving it, applies to the carriers of passengers with their baggage. *Steers* v. *Liverpool, N. Y. & P. Steamship Co.*, 57 *N. Y.* 1.—APPLYING Cochran *v.* Dinsmore, 49 N. Y. 249. FOLLOWING Belger *v.* Dinsmore, 51 N. Y. 166. RECONCILING Blossom *v.* Dodd, 43 N. Y. 264. — DISTINGUISHED IN Magnin *v.* Dinsmore, 56 N. Y. 168. FOLLOWED IN Westcott *v.* Fargo, 61 N. Y. 542; Dana *v.* New York C. & H. R. R. Co., 50 How. Pr. (N. Y.) 428. QUOTED IN Kirst *v.* Milwaukee, L. S. & W. R. Co., 46 Wis. 489. REVIEWED IN Rice *v.* Illinois C. R. Co., 22 Ill. App. 643.

15. —— where he has no actual knowledge thereof. — When a passenger ticket is free from anything calculated to mislead or deceive the person buying it, and professes to and does set out a special contract between the carrier and passenger, so legibly and plainly that it will be carelessness on the part of the latter to overlook it, there can be no good reason why such a "contract ticket" should not be held as conclusive upon the passenger as bills of lading or the receipts of the common carrier are upon the shipper or bailor of goods. In such case, the passenger cannot be heard to say that he did not read the special contract contained in his ticket. He is expected to read it, and if he has the opportunity to read it and fails to do so, he is nevertheless bound by its stipulations. *Louisville, N. A. & C. R. Co.* v. *Nicholai*, 4 *Ind. App.* 119, 30 *N. E. Rep.* 424.

Although a passenger traveling by a freight train is unaware of a condition in his ticket relieving the company from any liability for injuries in any way arising from the fact that a passenger coach is attached to a freight train, he is bound by such condition and the company is exempt from liability for any accident within its scope. *Johnson* v. *Great Southern & W. R. Co.*, 9 *Ir. C. L.* 708, 3 *Ry. & C. T. Cas.* xiv.

Outside the cover of a paper book of coupons forming a ticket, issued to plaintiff, was printed the name of the railway, the words, "Cheap return ticket, L. to P. and back, second class," and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of defendant to

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* See also LIMITATION OF LIABILITY.

Admission of evidence to show condition on which ticket was issued, see note, 23 AM. & ENG. R. CAS. 679.

As to how far passenger is bound by terms and conditions on ticket, see notes, 5 L. R. A. 819; 58 AM. & ENG. R. CAS. 60, *abstr.*

Duty of passenger to acquaint himself with conditions of ticket and whether train stops at his destination, see note, 50 AM. REP. 527.

its own trains. Plaintiff, having been injured while traveling in a French train, sued defendant, who set up the condition. Plaintiff had not read and did not know of it. *Held*, that the whole book was the contract accepted by plaintiff, and he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for defendant. *Burke* v. *South Eastern R. Co.*, 5 *C. P. D.* 1, 49 *L. J. C. P.* 107, 3 *Ry. & C. T. Cas.* xv.

16. —— passenger's acceptance and signature.—A passenger who assents to the contract contained in a ticket by accepting and signing it is bound by the conditions expressed in it, whether he knew what they were or not, and evidence as to the time when he first knew the conditions is inadmissible in an action for breach of the contract of carriage. *Boylan* v. *Hot Springs R. Co.*, 40 *Am. & Eng. R. Cas.* 666, 132 *U. S.* 146, 10 *Sup. Ct. Rep.* 50.

Where a passenger signs his name to a contract printed on a ticket, in the absence of fraud, mistake, or misrepresentation it must be assumed that he read the contract and assented to it, though it is printed in small type, and the passenger acted somewhat hurriedly. *Bethea* v. *Northeastern R. Co.*, 26 *So. Car.* 91, 1 *S. E. Rep.* 372.

17. When not binding on passenger.—Where a passenger is unable to read the language in which a ticket is printed, and no explanation is made by the agent selling it, he is not bound by special terms and conditions printed thereon. *Mauritz* v. *New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 286, 23 *Fed. Rep.* 765.

If any attempt at imposition or deception appears, or any device be resorted to calculated to mislead the passenger or shipper, or to keep from his notice any matter of the printed or written indorsements on the receipt or ticket which are intended to affect the liability of the carrier, they will not avail the latter if they have been overlooked by the former. *Louisville, N. A. & C. R. Co.* v. *Nicholai*, 4 *Ind. App.* 119, 30 *N. E. Rep.* 424.

Where a limitation is inserted in a ticket, that the company will only be liable for a certain amount in case of loss of baggage, the limitation is not binding on the passenger unless he agrees to it with full knowledge; and where the ticket is printed with a blank space for the passenger's signature, but he is not requested to sign it, and does not do so, there is no completed contract, and the limitation is not binding on him. *Kansas City, St. J. & C. B. R. Co.* v. *Rodebaugh*, 34 *Am. & Eng. R. Cas.* 219, 38 *Kan.* 45, 15 *Pac. Rep.* 899.

The purchaser of a ticket does not, by his mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them. *Kent* v. *Baltimore & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 125, 45 *Ohio St.* 284, 10 *West. Rep.* 457, 12 *N. E. Rep.* 798.—FOLLOWING Baltimore & O. R. Co. *v.* Campbell, 36 Ohio St. 647; Davidson *v.* Graham, 2 Ohio St. 135; Jones *v.* Voorhees, 10 Ohio 145; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212; Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97; Malone *v.* Boston & W. R. Co., 12 Gray (Mass.) 388; Camden & A. R. Co. *v.* Baldauf, 16 Pa. St. 67.

18. Burden on carrier to show knowledge of passenger. — Where a ticket is issued with a memorandum thereon limiting the liability of the railroad, the burden is on the company to prove that the passenger knew of such limitation and assented thereto. *Baltimore & O. R. Co.* v. *Harris*, 12 *Wall.* (*U. S.*) 65, 1 *Am. Ry. Rep.* 559.

19. Limiting carrier's liability to its own line and trains. — Where a company is chartered in one state, but is subsequently authorized to extend its road through other states, with substantially the same rights, so that no new corporation is created, the liability of the company is not changed by a condition on a ticket that "responsibility for safety of persons or loss of baggage on each portion of the route is confined to the proprietors of that portion alone." *Baltimore & O. R. Co.* v. *Harris*, 12 *Wall.* (*U. S.*) 65, 1 *Am. Ry. Rep.* 559.—APPLIED IN Atlantic & P. Tel. Co. *v.* Baltimore & O. R. Co., 14 J. & S. (N. Y.) 377. APPROVED IN Williams *v.* Missouri, K. & T. R. Co., 3 Dill. (U. S.) 267. DISTINGUISHED IN Graham *v.* Boston, H. & E. R. Co., 14 Fed. Rep. 753. EXPLAINED IN Wilkinson *v.* Delaware, L. & W. R. Co., 20 Am. & Eng. R. Cas. 597, 22 Fed. Rep. 353. FOLLOWED IN Graham *v.* Boston, H. & E. R. Co., 118 U. S. 161; Wilmer *v.* Atlanta & R. A. L. R. Co., 2 Woods (U. S.) 447; Callahan *v.* Louisville & N. R. Co., 11 Fed. Rep. 536; Baltimore & O. R. Co. *v.* Cary, 28 Ohio St. 208. QUOTED IN St. Louis, A. & T. H. R. Co. *v.* Indianapolis & St. L. R.

Co., 9 Biss. (U. S.) 144; Burger *v.* Grand Rapids & I. R. Co., 20 Am. & Eng. R. Cas. 607, 22 Fed. Rep. 561; Hay *v.* Alexandria & W. R. Co., 4 Hughes (U. S.) 331; McCabe *v.* Illinois C. R. Co., 4 McCrary (U. S.) 492, 13 Fed. Rep. 827; Pacific R. Co. *v.* Missouri Pac. R. Co., 5 McCrary 373; Wilmer *v.* Atlanta & R. A. L. R. Co., 2 Woods 409; State ex rel. *v.* Milwaukee, L. S. & W. R. Co., 45 Wis. 579. REVIEWED IN Missouri, K. & T. R. Co. *v.* Texas & St. L. R. Co., 4 Woods 360, 10 Fed. Rep. 497; Blackburn *v.* Selma, M. & M. R. Co., 2 Flipp. (U. S.) 525; Copeland *v.* Memphis & C. R. Co., 3 Woods 651; Morgan *v.* East Tenn. & V. R. Co., 4 Woods 523; Baltimore & O. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431.

Where a company sells tickets beyond its own line, to establish its liability beyond its own line it must appear that it contracted as principal for the entire distance, or had some interest in, or control over, the transportation beyond its line. Otherwise a provision on a ticket that the selling company is only liable for injuries on its own route will limit the liability accordingly. *Kerrigan* v. *Southern Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 28, 81 *Cal.* 248, 22 *Pac. Rep.* 677.

The rule is well settled that the liability of a carrier by contract can be limited to its own line; but when a company undertakes to sell an excursion ticket to be used within a certain time, it must see that the time agreed upon is reasonable, from the standpoint of the then existing circumstances and conditions, and that the passenger, by the exercise of reasonable diligence, may complete his journey within the time agreed upon. If such time be reasonable, the company selling such ticket with liability limited to its own line will not be liable for delay by other lines on the route, and can insist upon the terms of the ticket when presented after the time specified therein. *Gulf, C. & S. F. R. Co.* v. *Wright*, 2 *Tex. Civ. App.* 463, 21 *S. W. Rep.* 399.

20. Liability for delay or "other cause."—In the common stipulation on tickets, that the company shall not be liable for delay in the starting or arrival of trains arising from accident or other cause, the words "other cause" mean "other cause in the nature of accident," and not "any cause whatever." *Buckmaster* v. *Great Eastern R. Co.*, 23 *L. T.* 471, 3 *Ry. & C. T. Cas.* xxiii.

A passenger taking a ticket expressed to be "issued subject to the regulations in the time bill," which disclaimed liability for unpunctuality, cannot recover. *M'Cartan* v. *North Eastern R. Co.*, 54 *L. J. Q. B.* 441, 5 *Ry. & C. T. Cas.* ix.

21. Amount of liability for baggage.—An excursion ticket limited liability for loss of passenger's baggage to $100. The road receiving the baggage being liable, the restriction as to liability in the contract as to value was illegal. *International & G. N. R. Co.* v. *Folts*, 3 *Tex. Civ. App.* 644, 22 *S. W. Rep.* 541.

3. *Purchase of Tickets.*

22. Rules requiring purchase, generally.*—Carriers of passengers may lawfully require those seeking to be carried to purchase tickets when convenient facilities to that end are afforded, to exhibit them to the person designated by the carrier for that purpose, and to surrender them, after securing their seats, when required by the person in charge. Such requirements are reasonable ones to protect the carrier against imposition and the fraud of its employés. *Pullman Palace Car Co.* v. *Reed*, 75 *Ill.* 125. —DISTINGUISHED IN Louisville, N. & G. S. R. Co. *v.* Fleming, 14 Lea (Tenn.) 128.

The rule of railroad companies requiring a ticket or full fare from passengers is a reasonable one, and necessary in order to enable them to transact their business. *St. Louis & C. R. Co.* v. *Carroll*, 13 *Ill. App.* 585.

A company may establish and enforce a regulation requiring a person desiring passage to procure, and to exhibit to its employés, before entering its cars, a ticket entitling him to such passage. *Pittsburgh, C. & St. L. R. Co.* v. *Vandyne*, [illegible] *Ind.* 576, 18 *Am. Ry. Rep.* 454.

A carrier may run an excursion train at reduced rates, and require passengers to purchase tickets as a condition upon which they obtain the benefit of such rates, and it may enforce such rule against all who by their own fault fail to comply with it. *Chicago, St. L. & P. R. Co.* v. *Graham*, 3 *Ind. App.* 28, 29 *N. E. Rep.* 170.

A carrier may demand prepayment of fare, but if it does not, it must be presumed to

* Duty of company to sell. Liability for incorrect information furnished by officials, see 41 AM. & ENG. R. CAS. 35, *abstr.*

Reasonableness of rule requiring passengers to purchase tickets and exhibit them, see note, 41 AM. DEC. 473.

rely upon its lien on the passenger's baggage, or his integrity and responsibility. *Hurt* v. *Southern R. Co.*, 40 *Miss.* 391.

For its own convenience and that of the public, a company may make reasonable rules and regulations for the management of its business and the conduct of its passengers. It may prescribe as a rule and require all persons before taking passage on its passenger trains to procure tickets to enable them to ride, and in default thereof to pay an additional sum, when it has furnished proper conveniences and facilities to travelers for procuring tickets. *Poole* v. *Northern Pac. R. Co.*, 16 *Oreg.* 261, 19 *Pac. Rep.* 107.

23. —— by passengers riding on freight trains.* — Railroad companies have a right to make reasonable regulations for their business, but in adopting such regulations regard must be had to the convenience and interests of the public. A company may forbid the transportation of freight and passengers on the same trains, or may require passengers on freight trains to procure tickets in advance; but reasonable facilities for procuring tickets at or about train time must be afforded, according to the established usage of railroads. It is not reasonable to provide that passengers may travel on freight trains, but afford them no opportunity to procure tickets, except at such hours as would make it more expeditious to travel by regular passenger trains. *Evans* v. *Memphis & C. R. Co.*, 56 *Ala.* 246, 18 *Am. Ry. Rep.* 350. — RECONCILED IN Jones v. Wabash, St. L. & P. R. Co., 17 Mo. App. 158.

It is not an unreasonable rule for a company to require that persons desiring to ride on freight trains shall procure tickets sold expressly for such trains. *Illinois C. R. Co.* v. *Nelson*, 59 *Ill.* 110, 11 *Am. Ry. Rep.* 148.

A company has a right to adopt a regulation that all persons who travel on freight trains shall procure tickets before entering the cars; but such a regulation imposes upon the company the duty of having the ticket office open a sufficient length of time before the departure of the train to enable passengers to procure tickets. *St. Louis & S. E. R. Co.* v. *Myrtle*, 51 *Ind.* 566.—RECONCILED IN Jones *v.* Wabash, St. L. & P. R. Co., 17 Mo. App. 158.

Notwithstanding such regulation, if a person desiring to take passage upon a freight train endeavors to procure a ticket, but is unable to do so in consequence of the absence of the agent, he has a right to travel on such train by paying or offering to pay the usual fare. *St. Louis & S. E. R. Co.* v. *Myrtle*, 51 *Ind.* 566.—QUOTED IN Brown *v.* Kansas City, Ft. S. & G. R. Co., 38 Kan. 634, 16 Pac. Rep. 942. *Brown* v. *Kansas City, Ft. S. & G. R. Co.*, 38 *Kan.* 634, 16 *Pac. Rep.* 942.—QUOTING St. Louis & S. E. R. Co. *v.* Myrtle, 51 Ind. 574.

Proof of a single instance of fare having been accepted by a conductor of a freight train, in violation of a rule requiring persons riding on such trains to purchase tickets, will not justify a person in disregarding the rule, if previous notice thereof has been given by posters in the station building. *Southern Kan. R. Co.* v. *Hinsdale*, 34 *Am. & Eng. R. Cas.* 256, 38 *Kan.* 507, 16 *Pac. Rep.* 937.

But the evidence of four witnesses that they had on a number of occasions taken passage on freight trains without first procuring tickets, and that they had paid on the trains, is competent as tending to show that no rule was in force requiring the purchase of a ticket before entering the train. *Brown* v. *Kansas City, Ft. S. & G. R. Co.*, 38 *Kan.* 634, 16 *Pac. Rep.* 942.

A carrier has a right to make such reasonable rules and regulations as will tend to the better protection of its patrons and to the greater convenience of itself; and the rule that requires passengers to procure tickets before taking passage upon freight trains is a reasonable regulation. *Brown* v. *Kansas City, Ft. S. & G. R. Co.*, 38 *Kan.* 634, 16 *Pac. Rep.* 942.

A passenger is not supposed to know of a regulation that passengers on freight trains must procure tickets before starting; and if he gets on the train in ignorance of such regulation, he is not a trespasser until he is informed thereof. *Brown* v. *Kansas City, Ft. S. & G. R. Co.*, 38 *Kan.* 634, 16 *Pac. Rep.* 942.

24. Who may sell.—The contract created between a company and a purchaser of a ticket, and the rights and liabilities of the

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* See also CARRIAGE OF PASSENGERS, **43-50.**

Reasonable rules that company may make, such as prohibiting passengers from riding on freight cars, requiring purchase of tickets before entering train, keeping ticket office open at certain hours, etc., see note, 5 L. R. A. 817.

parties, are the same whether the ticket was purchased at one of the company's stations, or at a station of a contiguous railroad, or of any other authorized agent of the company. *Schopman* v. *Boston & W. R. Corp.*, 9 *Cush.* (*Mass.*) 24.

An agent authorized to sell passenger tickets, and stamp and deliver the same upon receiving pay therefor, cannot bind his company by stamping and delivering such tickets without the knowledge or consent of its proper officers to a third person, to be sold by him, and to be paid for when sold. *Frank* v. *Ingalls*, 21 *Am. & Eng. R. Cas.* 277, 41 *Ohio St.* 560.

25. Delivery.—It is the duty of a ticket agent to exercise reasonable care in delivering a ticket to a purchaser, and if the latter after applying for his ticket and putting down money for it were called away, it would be no delivery to put the ticket on the counter in his absence, if it did not in fact come to his possession. *Quigley* v. *Central Pac. R. Co.*, 5 *Sawy.* (*U. S.*) 107.

26. Facilities for purchase — No discrimination.* — Railroad companies carrying passengers on freight trains cannot make arbitrary discriminations, and therefore, while they may reasonably require that all persons desiring to be thus carried shall first procure tickets, they must afford reasonable facilities to that end, so that all may have a like opportunity to procure them. *Arnold* v. *Illinois C. R. Co.*, 83 *Ill.* 273.

Railroad companies have no right to discriminate between persons, and sell tickets to some and refuse others. *Indianapolis, P. & C. R. Co.* v. *Rinard*, 46 *Ind.* 293, 6 *Am. Ry. Rep.* 328.—APPROVED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432.

While a company has the right to require extra fare from one who pays on the train, it is bound to have an agent at the station to sell tickets; failing in this, a passenger required to pay extra fare on the train may recover it back by suit, or, if ejected, may recover damages. *Forsee* v. *Alabama G. S. R. Co.*, 63 *Miss.* 66.

27. Duty to keep ticket office open.†—Railroad companies are required to keep open their offices for the sale of tickets for a reasonable time before the departure of each train, up to the time fixed by its published rules for its departure, but not up to the time of actual departure. They are required to furnish a convenient and accessible place for the sale of tickets, and to afford to the public a reasonable opportunity to purchase them. *St. Louis, A. & T. H. R. Co.* v. *South*, 43 *Ill.* 176.—LIMITING Chicago, B. & Q. R. Co. *v.* Parks, 18 Ill. 460; St. Louis, A. & C. R. Co. *v.* Dalby, 19 Ill. 364.—APPROVED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432.

The condition attached to the right to collect extra fare on a train, that the company shall give to persons desiring to travel on its trains a reasonable opportunity to purchase tickets, does not require it to keep its ticket office open within such time, before the departure of the train, that a person cannot procure a ticket and get upon the train before it begins to move. Evidence *held* not to sustain the verdict. *State* v. *Hungerford*, 34 *Am. & Eng. R. Cas.* 265, 39 *Minn.* 6, 38 *N. W. Rep.* 628.

A provision in a charter authorizing the company "to fix, regulate, and receive the tolls and charges by them to be received for the transportation of property or persons" empowers the company to fix two rates of fares, discriminating against persons who pay to the conductor, and in favor of those who buy tickets; but the company is not bound to keep its ticket offices open at any particular time, and the fact that an office is closed, preventing a passenger from procuring a ticket, will not entitle him to be carried for the amount for which a ticket would have been sold. *Bordeaux* v. *Erie R. Co.*, 8 *Hun* (*N. Y.*) 579.—APPROVING Crocker *v.* New London, W. & P. R. Co., 24 Conn. 249. DISTINGUISHING Porter *v.* New York C. R. Co., 34 Barb. (N. Y.) 353; Nellis *v.* New York C. R. Co., 30 N. Y. 505; Chase *v.* New York C. R. Co., 26 N. Y. 523. REVIEWING Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103.—DISAPPROVED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432.

28. —— for a reasonable time.*— Under the law and rules prescribed by the

* Company has no right to discriminate between persons in selling tickets, see note, 5 L. R. A. 818.

† Duty of railroad company to keep ticket office open prior to departure of trains, see 52 AM. & ENG. R. CAS. 223, *abstr.*

* What is a reasonable time for procuring tickets before departure of trains, see note, 27 AM. & ENG. R. CAS. 101.

railroad commission of Georgia, it is the duty of companies to keep their ticket offices open for the sale of tickets for a reasonable time before the departure of trains from all stations, provided that offices at way stations may be closed one minute before the arrival of trains; and it is the duty of passengers to use proper diligence in supplying themselves with tickets before getting upon the trains. *Central R. & B. Co.* v. *Strickland*, 52 *Am. & Eng. R. Cas.* 216, 90 *Ga.* 562, 16 *S. E. Rep.* 352.

And they are required to keep their offices open for the sale of tickets for a reasonable time before the departure of each train and up to the published time for its departure, but not up to the time of actual departure. *Chicago, R. I. & P. R. Co.* v. *Brisbane*, 24 *Ill. App.* 463. *St. Louis, A. & C. R. Co.* v. *Dalby*, 19 *Ill.* 352.

Where a company adopts a rule prohibiting passengers from being carried on its trains without tickets, it must open the ticket office a reasonable time in advance of the hour fixed for the departure of the train. Should it fail to do so, a person desiring to take passage will have the right to enter a car and be carried to his place of destination, on payment of the regular fare to the conductor. *Illinois C. R. Co.* v. *Johnson*, 67 *Ill.* 312.—FOLLOWED IN Illinois C. R. Co. *v.* Cunningham, 67 Ill. 316.

A company has the power to make and enforce a rule or regulation requiring persons desiring to ride upon its freight trains to provide themselves with tickets; but in all such cases the company must furnish convenient facilities to the public for the purchase of tickets, by keeping open the ticket office a reasonable time in advance of the hour fixed by its time-table for the departure of trains. *Southern Kan. R. Co.* v. *Hinsdale*, 34 *Am. & Eng. R. Cas.* 256, 38 *Kan.* 507, 16 *Pac. Rep.* 937.

Where a company makes a rule requiring passengers to purchase tickets before entering cars, it must keep its ticket office open a reasonable time to allow them to do so. *Brown* v. *Kansas City, Ft. S. & G. R. Co.*, 38 *Kan.* 634, 16 *Pac. Rep.* 942.

What is a reasonable time to keep the ticket office open for the purchase of tickets is a question for the jury. *Du Laurans* v. *St. Paul & P. R. Co.*, 15 *Minn.* 49 (*Gil.* 29).

The failure of a company to allow passengers a reasonable time, after the opening of a ticket office, for the purchase of tickets and boarding the cars, is negligence. *Gulf, C. & S. F. R. Co.* v. *Fox*, (*Tex.*) 33 *Am. & Eng. R. Cas.* 543, 6 *S. W. Rep.* 569.

29. —— for half hour prior to departure.—Kan. Gen. St. 1889, par. 1325, imposes the duty upon companies of keeping ticket offices open with an agent ready upon call to sell tickets, thirty minutes prior to the departure of trains, before conductors are authorized to collect excess fare from passengers who have entered the cars without such tickets. *Atchison, T. & S. F. R. Co.* v. *Hogue*, 50 *Kan.* 40, 31 *Pac. Rep.* 698.

By the general laws of Texas (18 Leg. 70), companies are required to keep open their ticket offices for one half hour before the departure of trains, and are allowed to collect extra fare from those who fail to purchase tickets at offices thus kept open. Plaintiff arrived at defendants' station within the half hour before the regular time for the departure of the train and found the ticket office closed. The train on this day was about an hour late. The office was not kept open for thirty minutes before the train actually left and he entered the cars without a ticket. Upon his refusal to pay the extra fare demanded of passengers not provided with tickets, he was ejected by the conductor. *Held*, that the company had no authority to demand this extra fare when it failed to observe the statute, even though the passenger did not apply for his ticket during the specified time, and if it eject one thus refusing to pay the extra fare it is liable. *Missouri Pac. R. Co.* v. *McClanahan*, 27 *Am. & Eng. R. Cas.* 82, 66 *Tex.* 530, 1 *S. W. Rep.* 576.—REVIEWED IN Fordyce *v.* Manuel, 82 Tex. 527.

Sayles's Tex. Civ. St. art. 4258, § 91, is not complied with by the mere keeping open of the ticket office for half an hour prior to the departure of the train. There must be in the office an agent to furnish and sell tickets to persons desiring to buy. *Fordyce* v. *Manuel*, 82 *Tex.* 527, 18 *S. W. Rep.* 657.—REVIEWING Missouri Pac. R. Co. *v.* McClanahan, 66 Tex. 530.

Unless such agent is kept at the ticket office, and if a passenger, after applying at the office and not being able to get a ticket, enters a car, he cannot be charged in excess of three cents a mile. The conductor has no right to exact more, and to put the passenger off the train for refusing to pay more is unlawful. *Fordyce* v. *Manuel*, 82 *Tex.* 527, 18 *S. W. Rep.* 657.

30. Terms varied or modified by ticket agent.—The presumption is that a ticket agent at a way station has no authority to change or modify contracts between the company and through passengers, and the *onus* of rebutting this presumption rests on the plaintiff. *McClure* v. *Philadelphia, W. & B. R. Co.*, 34 *Md.* 532. — DISTINGUISHED IN Murdock *v.* Boston & A. R. Co., 21 Am. & Eng. R. Cas. 268, 137 Mass. 293, 50 Am. Rep. 307.

Authority in an agent to vary the terms of a ticket by verbal contract will not be presumed. *Boice* v. *Hudson River R. Co.*, 61 *Barb.* (*N. Y.*) 611.

A conversation between the holder of a ticket and the ticket agent, subsequent to the time it is purchased and paid for, in respect to its validity, though sufficient in form to make a contract, is without consideration, and is *nudum pactum;* and there is no binding contract that will make the ticket good on a day subsequent to its date, especially when the amount of the fare has een legally increased in the intermediate time. *Boice* v. *Hudson River R. Co.*, 61 *Barb.* (*N. Y.*) 611.

31. —— by gatekeeper. — In the absence of proof that the gatekeeper had authority to vary the terms of contracts for the company, the passenger cannot get rid of the conditions of his contract by showing that he relied on the actual or implied direction to take the train, given either through the belief of the gatekeeper that the ticket was good for the train, or through his negligence, ignorance, or mistake. *Johnson* v. *Philadelphia, W. & B. R. Co.*, 18 *Am. & Eng. R. Cas.* 304, 63 *Md.* 106.

32. No opportunity to purchase ticket.—A company is not bound to keep a ticket office open each and every minute up to the time it may lawfully close the same, provided a reasonable opportunity is afforded all persons desiring tickets to obtain them; nor is a passenger bound to wait at a ticket office an unreasonable time for the appearance of the agent to sell him a ticket, or to call again and again at the office to procure one, provided he endeavors, in good faith and due diligence, to do so before the time for closing the office arrives. In each case it is a question for the jury whether or not the parties, respectively, performed the corresponding duties devolving upon them, and it is not the province of the court to decide what particular facts will constitute negligence or diligence by either party, and thus to restrict the jury in the exercise of their duty in this respect. *Central R. & B. Co.* v. *Strickland*, 52 *Am. & Eng. R. Cas.* 216, 90 *Ga.* 562, 16 *S. E. Rep.* 352.

If a passenger has not been afforded a reasonable opportunity to purchase a ticket at a station where his journey began, he is not bound to leave the train at a station *en route* and purchase a ticket back to the station whence he started and another to his destination. If he is rightly on the train without a ticket, it is his right to complete his intended journey by paying the ticket rate for his fare. *Central R. & B. Co.* v. *Strickland*, 52 *Am. & Eng. R. Cas.* 216, 90 *Ga.* 562, 16 *S. E. Rep.* 352.

Where a passenger applies for a ticket and it is not furnished, but a certificate is given him by the agent to the effect that the tickets are "all out," which he shows to the conductor, the fact may be shown by the evidence of the station agent, and the certificate should be evidence to the conductor that the passenger was not in fault in failing to have a ticket. *St. Louis, A. & C. R. Co.* v. *Dalby*, 19 *Ill.* 353.

If a passenger, through the fault of the carrier, is unable to procure a ticket, in compliance with the carrier's rule requiring all who desire to secure excursion rates to purchase tickets before entering the train, he may take passage on the train and upon the tender of the excursion ticket fare he will be entitled to all the rights and privileges that a ticket would afford him. *Chicago, St. L. & P. R. Co.* v. *Graham*, 3 *Ind. App.* 28, 29 *N. E. Rep.* 170.

4. *Production, Surrender, and Taking Up.*

33. Rule requiring production.*— The holders of annual tickets are as much bound to produce them as ordinary passengers, under a by-law providing that "each passenger booking his place will be furnished with a ticket, which he is to show and deliver up when required, to the guard." *Woodard* v. *Eastern Counties R. Co.*, 7 *Jur. N. S.* 971, 30 *L. J. M. C.* 126, 9 *W. R.* 660, 4 *L. T.* 336.

A company, in order to enforce a by-law as to the production of tickets, must bring itself strictly within the terms of such by-

* Passenger may be compelled to exhibit ticket, see note, 16 AM. & ENG. R. CAS. 379.

Duty of passengers to exhibit and surrender tickets when requested, see note, 5 L. R. A. 818.

law. *Jennings* v. *Great Northern R. Co.*, 35 *L. J. Q. B.* 15, 12 *Jur. N. S.* 331, *L. R.* 1 *Q. B.* 7, 44 *W. R.* 28, 13 *L. T.* 231.

A rule requiring the production of a ticket as evidence of the right of a passenger to ride is reasonable, and one with which the traveling public is familiar. *Van Dusan* v. *Grand Trunk R. Co.*, 97 *Mich.* 430, 56 *N. W. Rep.* 848.

A regulation requiring passengers to exhibit their tickets when requested to do so by the conductor, or be removed from the cars, is a reasonable and lawful rule; and upon a refusal to comply with such request it is immaterial whether or not the conductor has before seen the passenger's ticket or knows that he has purchased one. *Hibbard* v. *New York & E. R. Co.*, 15 *N. Y.* 455.—DISTINGUISHED IN Hardy *v.* New York C. & H. R. R. Co., 34 N. Y. S. R. 902, 58 Hun 607, mem., 12 N. Y. Supp. 55. FOLLOWED IN Townsend *v.* New York C. & H. R. R. Co., 56 N. Y. 295; Pease *v.* Delaware, L. & W. R. Co., 26 Am. & Eng. R. Cas. 185, 101 N. Y. 367, 54 Am. Rep. 699. QUOTED IN Weaver *v.* Rome, W. & O. R. Co., 3 T. & C. (N. Y.) 270. REVIEWED IN Louisville, N. & G. S. R. Co. *v.* Fleming, 14 Lea (Tenn.) 128.—*Chicago & A. R. Co.* v. *Willard*, 31 *Ill. App.* 435.

A passenger who has paid his fare and has lost his ticket cannot be ejected from the train upon his failure to produce his ticket for inspection by the conductor, there being upon the ticket no condition requiring its production, and no contract for its production having been entered into. That is not a refusal to pay his fare under 51 Vict. c. 29, § 248 (D). (Osler, J.A., dissenting.) *Beaver* v. *Grand Trunk R. Co.*, 58 *Am. & Eng. R. Cas.* 42, 20 *Ont. App.* 476.—DISTINGUISHING Fulton *v.* Grand Trunk R. Co., 17 U. C. Q. B. 428. QUOTING Butler *v.* Manchester, S. & L. R. Co., 33 Am. & Eng. R. Cas. 551, 21 Q. B. D. 207. REVIEWING Jennings *v.* Great Northern R. Co., L. R. 1 Q. B. 7.

34. Rule, how waived.—A company which allows servants to enter a train without showing tickets, upon an assurance from their master that he has their tickets, is estopped from pleading, as a defense from an action by the master for afterwards expelling the servants, a by-law providing that passengers shall not enter trains without tickets, which they must show when required. *Jennings* v. *Great Northern R. Co.*, 35 *L. J. Q. B.* 15, 12 *Jur. N. S.* 331, *L. R.* 1 *Q. B.* 7, 44 *W. R.* 28, 13 *L. T.* 231.

35. Reasonable time to produce.*—In case the passenger has mislaid his ticket he is entitled to a reasonable time in which to find it, and such reasonable time as a general rule is the time required for the train to run from one station to another. *Chicago & A. R. Co.* v. *Willard*, 31 *Ill. App.* 435.

The conductor of a train cannot be required to search the pockets of an infirm passenger for his ticket, and, of course, if he consents to search a particular pocket at the request of the passenger, he is not bound to search further, it being the duty of the passenger to produce and deliver his own ticket on demand. *Louisville, N. & G. S. R. Co.* v. *Fleming*, 18 *Am. & Eng. R. Cas.* 347, 14 *Lea* (*Tenn.*) 128.

The conductor of a passenger train is bound to wait a reasonable time after a request for a passenger's ticket to enable him to produce it; and what is a reasonable time therefor is a question for the jury. *International & G. N. R. Co.* v. *Wilkes*, 34 *Am. & Eng. R. Cas.* 331, 68 *Tex.* 617, 5 *S. W. Rep.* 491.

36. Exhibition before entering train.—A company has the right to make police regulations for the government and control of its business in connection with its depots, among the regulations being one that the gatekeeper at a depot shall not permit any passengers to go through the gate except those entitled by their tickets to go upon a particular train. *Watkins* v. *Pennsylvania R. Co.*, 52 *Am. & Eng. R. Cas.* 159, 21 D. C. 1.

It is competent for a company to establish a rule requiring passengers to produce tickets before entering the cars, and it may direct the brakemen to require observance of the rule, and they may execute it in a reasonable manner without consulting the conductor. *Chicago, B. & Q. R. Co.* v. *Boger*, 1 *Ill. App.* 472.

A railroad may, for its protection, require passengers to exhibit their tickets to the gateman in passing to the train, and the latter may, in the exercise of his judgment, refuse to allow any one to pass through the gate on a defaced ticket. But the company is responsible for the wrongful and injurious exercise of judgment on the part of its

* Ejection for failing to exhibit, see notes, 34 AM. & ENG. R. CAS. 338; 33 *Id.* 556; 18 *Id.* 345.

agents. *Northern C. R. Co.* v. *O'Conner*, 52 *Am. & Eng. R. Cas.* 176, 76 *Md.* 207, 16 *L. R. A.* 449, 24 *Atl. Rep.* 449.

The exhibition of his ticket by the passenger, upon entering the train, to the employé in attendance for that purpose, will give to him no other or different rights than if he had not exhibited it. *Louisville, N. & G. S. R. Co.* v. *Fleming*, 18 *Am. & Eng. R. Cas.* 347, 14 *Lea* (*Tenn.*) 128.

A rule adopted by a company requiring conductors to station their brakemen and porters on the depot platforms and to allow no one to get aboard without a ticket or pass is a reasonable regulation, and is not in conflict with the Texas Act of April 10, 1883, § 9, nor is it in any way affected by said act, nor in conflict with any law of the state. *International & G. N. R. Co.* v. *Goldstein*, 2 *Tex. App.* (*Civ. Cas.*) 206.

37. Surrender of ticket.—A rule requiring passengers to surrender their tickets to the conductor when called for is a reasonable one, and may be enforced. *Illinois C. R. Co.* v. *Whittemore*, 43 *Ill.* 420.

Where the facts are undisputed the reasonableness of a regulation requiring passengers to surrender their tickets after passing the last station before reaching their place of destination, without receiving a check or other evidence of their right to ride, is a question of law, and it is error to submit it to the jury as a question of fact. *Vedder* v. *Fellows*, 20 *N. Y.* 126.

It seems that such a regulation is reasonable and valid, but the question was not passed upon by the whole court. *Vedder* v. *Fellows*, 20 *N. Y.* 126.

Where a passenger leaves the train without paying the fare or surrendering his ticket on demand, he is liable to an action for the amount of the fare. *Northern R. Co.* v. *Page*, 22 *Barb.* (*N. Y.*) 130.

A passenger who holds a ticket cannot maintain an action against the carrier for failing to carry him on his ticket, where he declines to surrender it and voluntarily pays his fare to the conductor. *Bethea* v. *Northeastern R. Co.*, 26 *So. Car.* 91, 1 *S. E. Rep.* 372.

38. —— before seat is furnished.—A passenger who exhibits a ticket and demands a seat has a right to have the demand complied with prior to the surrender of the ticket, as it constitutes the best evidence of his contract with the company for a safe and comfortable transportation. *Davis* v. *Kansas City, St. J. & C. B. R. Co.*, 53 *Mo.* 317, 12 *Am. Ry. Rep.* 463.

But the passenger must rely on the contract as evidenced by the ticket, and if there be a non-compliance with its terms, he must abandon the contract and quit the train as soon as a suitable opportunity offers. He cannot ride to an intermediate point where a seat is furnished him, and insist on paying his fare from there on and refuse to surrender his ticket; and if he is ejected from the train he cannot maintain an action for a breach of the contract as evidenced by his ticket. It might be otherwise if he declared on a new contract to carry him from the place where a seat is furnished. *Davis* v. *Kansas City, St. J. & C. B. R. Co.*, 53 *Mo.* 317, 12 *Am. Ry. Rep.* 463.

39. Taking up—Non-transferable tickets.*—Where a non-transferable ticket contains a condition that, upon the failure of the holder to comply with the agreement, either of the companies over whose road it is sold may refuse to accept it, a conductor has no right to take it up, but may merely refuse it. If it is taken up the measure of damages is the value of the ticket. *Post* v. *Chicago & N. W. R. Co.*, 9 *Am. & Eng. R. Cas.* 345, 14 *Neb.* 110, 15 *N. W. Rep.* 225, 45 *Am. Rep.* 100.

A passenger rode to an intermediate point on a ticket which was canceled for the whole route. He voluntarily left the train at the intermediate point, and subsequently offered the ticket for passage for the rest of the journey, but the conductor took it up, refused to allow him to ride, and compelled him to leave the train. *Held*, that plaintiff might have retained the ticket; that the conductor waived all right to retain it by denying plaintiff's right to ride thereon. *Vankirk* v. *Pennsylvania R. Co.*, 76 *Pa. St.* 66.

A ticket conditioned that if presented by any one except the original holder it shall be void is valid. *Drummond* v. *Southern Pac. Co.*, 7 *Utah* 118, 25 *Pac. Rep.* 733.

The fact that the ticket is not signed by the original purchaser makes no difference, since the purchaser, in accepting a ticket, where the contract is set out in full, accepts the terms of the contract and is bound by them. *Drummond* v. *Southern Pac. Co.*, 7 *Utah* 118, 25 *Pac. Rep.* 733.

The conductor had a right to take up the ticket presented by a person other than the

* See also *post*, 59.

original purchaser, and plaintiff could not have been damaged, because the ticket was returned to him. *Drummond* v. *Southern Pac. Co.*, 7 *Utah* 118, 25 *Pac. Rep.* 733.

A contract under which a ticket was purchased, providing that it should be forfeited if presented by any person other than the original purchaser, is violated by the taking up of the ticket from such purchaser by the conductor, who refused to accept means of identification offered, and insisted that the holder was in wrongful possession thereof, and by the ratification of his acts by the general passenger agent of the road, to whom all the circumstances of the case were reported. *Norfolk & W. R. Co.* v. *Anderson*, 58 *Am. & Eng. R. Cas.* 53, 90 *Va.* 1, 17 *S. E. Rep.* 757

5. *Stop-over Privileges.*

40. Right to stop over on ordinary tickets.*—If a passenger's ticket is silent as to the privilege of stopping over at an intermediate point, but nevertheless he stops, he cannot afterwards resume the journey on the same ticket. *Drew* v. *Central Pac. R. Co.*, 51 *Cal.* 425, 12 *Am. Ry. Rep.* 222.

By leaving the train before he has arrived at the point to which his ticket entitles him to ride, a passenger voluntarily terminates his contract with the company to carry him to such point. *Drew* v. *Central Pac. R. Co.*, 51 *Cal.* 425, 12 *Am. Ry. Rep.* 222.

In the absence of any agreement to the contrary, the purchaser of a ticket is only entitled to one continuous passage upon it. When he has selected his train and commenced his journey, he has no right to leave at an intermediate point without the carrier's assent, and afterwards demand that the contract be completed on another train. *Wyman* v. *Northern Pac. R. Co.*, 22 *Am. & Eng. R. Cas.* 402, 34 *Minn.* 210, 25 *N. W. Rep.* 349.

If a company sells to a passenger a ticket to go over the road by a through train, such passenger has no right, without the assent of the company, to stop at a way station, and demand, by virtue of his ticket, or conductor's check given in lieu thereof, a continuation of his passage over the residue of the road. *State* v. *Overton*, 24 *N. J. L.* 435.—DISTINGUISHED IN Johnson *v.* Concord R. Corp., 46 N. H. 213.

A ticket purporting by a statement on its face to be from one station named to another station named does not import a right to make the journey between the stations by different trains. Such ticket imports only a single continuous trip. *Oil Creek & A. R. R. Co.* v. *Clark*, 72 *Pa. St.* 231, 6 *Am. Ry. Rep.* 476. — APPROVING Dietrich *v.* Pennsylvania R. Co., 71 Pa. St. 432.—DISTINGUISHED IN Tarbell *v.* Northern C. R. Co., 24 Hun (N. Y.) 51.

The contract for the transportation of a passenger is an entirety, and if he stops off at an intermediate station without a stop-over privilege he thereby loses the right to be carried over the remainder of the journey. *Stone* v. *Chicago & N. W. R. Co.*, 47 *Iowa* 82, 17 *Am. Ry. Rep.* 461.—RECONCILING Palmer *v.* Charlotte, C. & A. R. Co., 3 So. Car. 580.

41. On special tickets.*—Plaintiff bought a round-trip excursion ticket, and on the return trip stopped off at an intermediate point, and offered the ticket for passage on a train the next day. A regulation of the company provided that stop-over checks should not be given on excursion tickets. *Held*, that the conductor had the right to remove plaintiff from the train, and he could not recover damages, if no unnecessary violence was used. All he could demand under his contract was a continuous passage each way. *Terry* v. *Flushing, N. S. & C. R. Co.*, 13 *Hun* (*N. Y.*) 359.—DISTINGUISHED IN Ward *v.* New York C. & H. R. R. Co., 56 Hun 268, 30 N. Y. S. R. 604, 9 N. Y. Supp. 377.

A "drover's ticket," sold at half the regular price, and good only in the drover's hands, for one seat between points, and limited to "March 11 to 16," did not entitle the drover to a "stop-over," and if he did stop, he could not recover for being ejected from a second train. *Dietrich* v. *Pennsylvania R. Co.*, 71 *Pa. St.* 432, 3 *Am. Ry. Rep.* 435.

Where a passenger buys a ticket with the condition printed on it "good for this day and train only," and he has notice that it is sold for less than two tickets, aggregating the same distance, would cost, he has no right to ride to an intermediate point, and

* Passenger's right to stop over, see note, 18 AM. & ENG. R. CAS. 308.

* Rules limiting time in which ticket is to be used and as to "stop-overs," see note, 41 AM. DEC. 479.

then insist on riding on another train on the same ticket, although the condition was not brought to his attention until the ticket was refused. *Shedd* v. *Troy & B. R. Co.*, 40 *Vt.* 88.

Where a company sells a ticket marked good for twenty days from date, it is bound to convey the passenger in one continuous journey, giving to him the option of taking any passenger train from the point of commencement, and if that train does not go the whole distance, to be conveyed over the residue of the journey in some other train, the whole journey to be completed within the twenty days; but it does not give to the passenger the right to stop at any or every intermediate station. *Craig* v. *Great Western R. Co.*, 24 *U. C. Q. B.* 504.

42. On limited tickets.*—A company is not bound to carry a purchaser of a limited ticket except where such passenger pursues the journey continuously. *Walker* v. *Wabash, St. L. & P. R. Co.*, 16 *Am. & Eng. R. Cas.* 380, 15 *Mo. App.* 333.

The holder of such a ticket is not, after beginning the journey, entitled to stop off at an intermediate point and subsequently resume the journey. *Walker* v. *Wabash, St. L. & P. R. Co.*, 16 *Am. & Eng. R. Cas.* 380, 15 *Mo. App.* 333.

The holder of a ticket for continuous passage and limited, and the limit expiring, cannot take a train that cannot give him such passage, and leave such train at some intermediate point, and again enter and have passage on another train that can take him to his destination, even though the latter train may have been the one he should have taken. *Gulf, C. & S. F. R. Co.* v. *Henry*, 52 *Am. & Eng. R. Cas.* 230, 84 *Tex.* 678, 19 *S. W. Rep.* 870.

43. On through tickets.†—Where a through ticket is bought marked "good for this trip only," and is sold for less than two or more tickets, aggregating the same distance, would cost, the passenger is not entitled to stop at an intermediate point and then complete the passage on another train without paying additional fare. *Cheney* v. *Boston & M. R. Co.*, 11 *Metc.* (*Mass.*) 121.—DISTINGUISHED IN Murdock *v.* Boston & A. R. Co., 21 Am. & Eng. R. Cas. 268, 137 Mass. 293, 50 Am. Rep. 307; Johnson *v.* Concord R. Corp., 46 N. H. 213. REVIEWED IN Northern R. Co. *v.* Page, 22 Barb. (N. Y.) 130; Barker *v.* Coflin, 31 Barb. 556.

Where a passenger purchases a through ticket with coupons attached for different parts of the trip, with a condition that the coupons will be forfeited if detached, he is only entitled to a continuous passage on each road without the right to stop at intermediate points; but if he had a right to stop it would be lost by voluntarily or negligently detaching the coupons. *Hamilton* v. *New York C. R. Co.*, 51 *N. Y.* 100, 4 *Am. Ry. Rep.* 423.—DISTINGUISHED IN Hardy *v.* New York C. & H. R. R. Co., 34 N. Y. S. R. 902, 58 Hun 607, 12 N. Y. Supp. 55. REVIEWED IN Waldele *v.* New York C. & H. R. R. Co., 19 Am. & Eng. R. Cas. 400, 95 N. Y. 274.

44. —— over connecting lines.*—A purchaser of a limited ticket over several connecting lines is not bound to make a continuous journey over all, but is bound to make it continuous over the part of the route covered by each coupon of the ticket, and over the last portion within the time limited. *Little Rock & Ft. S. R. Co.* v. *Dean*, 21 *Am. & Eng. R. Cas.* 279, 43 *Ark.* 529, 51 *Am. Rep.* 584.—REVIEWED IN Nichols *v.* Southern Pac. Co., 52 Am. & Eng. R. Cas. 205, 23 Oreg. 123, 31 Pac. Rep. 296.—*Auerback* v. *New York C. & H. R. R. Co.*, 89 *N. Y.* 281.

In such case where the ticket expires on Sunday, and no train is run over the portion of the trip covered by the last coupon, the passenger is entitled to ride on the following day. The company cannot defeat his right to travel by not running a train; and where he is ejected for a lack of money to pay his fare, the humiliation of being put off the train and the inconvenience of reaching his destination are elements of damage to be considered. *Little Rock & Ft. S. R. Co.* v. *Dean*, 21 *Am. & Eng. R. Cas.* 279, 43 *Ark.* 529, 51 *Am. Rep.* 584.

A passenger holding a through ticket over connecting railways has no right to leave a train at a way station and afterwards enter another train and proceed to his original destination without procuring another

* Attempting to travel on stop-over checks after the time limited on their face has expired, see 44 AM. & ENG. R. CAS. 395, *abstr.*

† Reasonableness of rule that passenger shall not stop over unless authorized, as evidenced by ticket, see note, 45 AM. DEC. 192.

* Coupon tickets. Right to stop over at *termini* of connecting lines, see note, 21 AM. & ENG. R. CAS. 282.

ticket or paying fare. *McClure* v. *Philadelphia, W. & B. R. Co.*, 34 *Md.* 532.

A through ticket, with coupons attached for the different roads, constitutes a contract entire as to each connecting line, but severable as between the different lines; so where a passenger enters upon any one of the connecting lines he has no stop-over privileges on that line, but may stop over at the end of the line, before resuming the ride on the next connecting line. *Nichols* v. *Southern Pac. Co.*, 52 *Am. & Eng. R. Cas.* 205, 23 *Oreg.* 123, 31 *Pac. Rep.* 296, 18 *L. R. A.* 55.—APPROVING Little Rock & Ft. S. R. Co. *v.* Dean, 43 Ark. 530. EXPLAINING Walker *v.* Wabash, St. L. & P. R. Co., 15 Mo. App. 333. QUOTING Churchill *v.* Chicago & A. R. Co., 67 Ill. 393.

45. In case of accident, misfortune, or fault of carrier. — As a general rule, when a passenger who holds a ticket from one point to another selects his train and enters upon his journey, he has no right to leave the train at a way station, and afterwards enter another, and proceed to his destination without procuring an additional ticket or paying his fare from the way station. If, however, the company is not prosecuting the journey in a reasonable time and in a reasonable manner, as the passenger has the right to demand that it shall do, then he may leave the train which he selected and continue his journey upon another, under the original contract, and without paying an additional fare. *Wilsey* v. *Louisville & N. R. Co.*, 26 *Am. & Eng. R. Cas.* 258, 83 *Ky.* 511.

The train upon which appellant was a passenger was stopped about dark by a wreck. Being informed that the train would be delayed several hours, perhaps all night, and that no one could tell when it would be ready to proceed, appellant, who was sick, informed the conductor of that fact and asked for a stop-over ticket, which was denied him. He then left the train, spent the night at a hotel, and took another train next day. The conductor upon this train refused to accept the conductor's check, which appellant had received in lieu of his ticket the day before, and also refused to accept ticket fare which appellant offered to pay, and demanded as conductor's fare more than he was entitled under the rules of the company to demand. Appellant refusing to comply with this demand, the conductor ejected him. *Held*, that appellant had the right, under his original contract, to stop over and take another train without paying additional fare. Moreover, the conductor's demand, being for more than he was entitled, in any event, to demand, was illegal, and appellant's refusal to comply gave to the company no right to put him off the train. *Wilsey* v. *Louisville & N. R. Co.*, 26 *Am. & Eng. R. Cas.* 258, 83 *Ky.* 511.—QUOTING Dietrich *v.* Pennsylvania R. Co., 71 Pa. St. 432.

Cases may arise in which by accident, misfortune, fault of the carrier, or the misconduct of the employés of a carrier of passengers, continuous transit may be interrupted without fault on part of the passenger, and in such cases the passenger may be entitled to resume his journey, and to be transported as though no interruption had occurred. *Gulf, C. & S. F. R. Co.* v. *Henry*, 52 *Am. & Eng. R. Cas.* 230, 84 *Tex.* 678, 19 *S. W. Rep.* 870.

46. Leaving train and subsequently seeking to continue journey.—Plaintiff purchased an unconditional ticket, and after it had been taken up on the train, stopped off at an intermediate station without the conductor's consent, leaving his baggage on the train which went to the end of the journey. The next day plaintiff got on a train but refused to pay fare. The conductor allowed him to remain on the train, but refused to deliver his baggage until he should pay the additional fare. *Held*, that so long as the baggage remained in the carrier's possession, the carrier had a lien upon it for the extra fare. *Roberts* v. *Koehler*, 30 *Fed. Rep.* 94.

Plaintiff was riding by virtue of a ticket that did not give him the right to discontinue the passage. Having stopped at an intermediate point, and having entered another train, he claimed the right to continue his journey on such ticket, under permission given by a conductor of the first train. Refusing to pay his fare, he was put off, it appearing that only train agents had the power to modify the force of such tickets. *Held*, that such expulsion was justifiable, although, at the trial, plaintiff testified that it was, in point of fact, a train agent and not a conductor who had given him the privilege claimed. *Petrie* v. *Pennsylvania R. Co.*, 1 *Am. & Eng. R. Cas.* 258, 42 *N. J. L.* 449. — DISTINGUISHED IN Murdock *v.* Boston & A. R. Co., 21 Am. & Eng. R. Cas. 268, 137 Mass. 293, 50 Am. Rep. 307.

Where a person purchases a ticket and takes his passage upon a railroad train, and after the train starts upon the road gives up his ticket to the conductor, he cannot, at an intermediate station, by virtue of his subsisting contract, leave such train during the reasonable performance of the contract, and claim a seat upon another train. *Cleveland, C. & C. R. Co.* v. *Bartram*, 11 *Ohio St.* 457. — FOLLOWED IN Hatten *v.* Railroad Co., 13 Am. & Eng. R. Cas. 53, 39 Ohio St. 375. QUOTED IN Frank *v.* Ingalls, 21 Am. & Eng. R. Cas. 277, 41 Ohio St. 560.

In the absence of any agreement, or of a rule or regulation to the contrary, the obligation created by a sale of a ticket is for one continuous passage, and if the passenger voluntarily leaves the train at an intermediate station while the carrier is engaged in the performance of its contract, he thereby releases it from further performance, and has no right to demand such performance on another train, or at another time. *Hatten* v. *Railroad Co.*, 13 *Am. & Eng. R. Cas.* 53, 39 *Ohio St.* 375. — FOLLOWING Cleveland, C. & C. R. Co. *v.* Bartram, 11 Ohio St. 457.

47. Effect of usage and habit.— Testimony to the effect that plaintiff had been permitted at other times to stop over at intervening stations, and to ride upon subsequent trains with the same ticket and without stop-over checks, was held inadmissible. *Stone* v. *Chicago & N. W. R. Co.*, 47 *Iowa* 82, 17 *Am. Ry. Rep.* 461.

Plaintiff purchased a ticket from Chicago to Boston via the Concord railroad, and voluntarily stopped at a way station on that road for nearly four months. *Held*, that under a regulation of the company that tickets entitled the holder to a passage only on the day of their date, or as near to it as possible, he was not afterwards entitled to passage to Boston, although there had been a usage allowing passengers to stop over, and plaintiff received no notice from his ticket or otherwise of the new regulation. *Johnson* v. *Concord R. Corp.*, 46 *N. H.* 213.

The fact that one conductor allowed a passenger a stop-over on a through ticket, on a part of the route, did not entitle him to it on another part of the road, with a different conductor. *Dietrich* v. *Pennsylvania R. Co.*, 71 *Pa. St.* 432, 3 *Am. Ry. Rep.* 435. — FOLLOWED IN Pouilin *v.* Canadian Pac. R. Co., 52 Am. & Eng. R. Cas. 188, 52 Fed. Rep. 197, 6 U. S. App. 298, 3 C. C. A. 23. QUOTED IN Wilsey *v.* Louisville & N. R. Co., 26 Am. & Eng. R. Cas. 258, 83 Ky. 511.

48. Right to stop over by express contract.— (1) *Duty to purchase stop-over ticket.*—Railroads may prescribe, as a regulation, that passengers shall not stop off and then complete the trip, for which they may have paid, without obtaining stop-over tickets. *Breen* v. *Texas & P. R. Co.*, 50 *Tex.* 43.

(2) *Rights under stop-over tickets.*—Railroads are not bound to give stop-over tickets, and when they do so it is upon the terms agreed upon by the parties, neither having the right to disregard them when given and accepted. And when a passenger accepts a stop-over ticket marked "good for thirty days only" he is bound by the terms imposed, and to make the ticket available must use it within the time prescribed. *Churchill* v. *Chicago & A. R. Co.*, 67 *Ill.* 390, 3 *Am. Ry. Rep.* 430.

Where a passenger is traveling on a through ticket with stop-over privileges, and has stopped off on a conductor's check good for ten days, after the expiration of that time the company has a right to eject the passenger if he attempts to ride without paying fare, though the time limited by the ticket has not expired. *Kelsey* v. *Michigan C. R. Co.*, 28 *Hun* (*N. Y.*) 460.—CRITICISED IN Ward *v.* New York C. & H. R. R. Co., 56 Hun 268, 30 N. Y. S. R. 604, 9 N. Y. Supp. 377.

A first-class passenger ticket read "good to stop off at all points." *Held*, that this justified the passenger in stopping off at a station short of his destination, and subsequently, within the life of his ticket, taking another train to his destination, and though, on his presentation to the conductor of his ticket with notice of his intention to stop over, the conductor took it up, and gave no check or token in lieu thereof, the passenger's rights will not be prejudiced, and the same conductor, with knowledge of all the facts, will not be justified in ejecting him from the train on his subsequent resumption of his journey; nor is it incumbent on the passenger in such case to pay the additional fare and sue for its recovery, but he may sue for damages for the wrongful expulsion. *Cherry* v. *Kansas City, Ft. S. & M. R. Co.*, 52 *Mo. App.* 499.

(3) *Agreement with agent.* — Where a passenger gets off at an intermediate station

on the assurance of the train agent that he may resume the journey on the next train upon the same ticket, the company is bound thereby, and cannot deny the authority of the agent to give such an assurance. *Tarbell* v. *Northern C. R. Co.*, 24 *Hun* (*N. Y.*) 51.—DISTINGUISHING Dietrich *v.* Pennsylvania R. Co., 71 Pa. St. 432; Oil Creek & A. R. R. Co. *v.* Clark, 72 Pa. St. 231.

In such case the agent was in control of the train; he was the officer of whom passengers should inquire as to what they might do in respect to the journey according to the rules of the company; and it was within the scope of his apparent authority to tell plaintiff what would be the effect of his getting off the train. *Tarbell* v. *Northern C. R. Co.*, 24 *Hun* (*N. Y.*) 51.

49. Conductor's stop-over check. —Passengers are not presumed to know the rules and regulations of a company, made for the guidance of conductors and other employés, relating to stop-over privileges and other internal affairs of the company; and unless a passenger has actual knowledge thereof, or there is notice printed on his ticket that a stop-over check is necessary, he is entitled to rely upon the representations of the ticket agent as to what is necessary. *New York, L. E. & W. R. Co.* v. *Winters*, 52 *Am. & Eng. R. Cas.* 328, 143 *U. S.* 60, 12 *Sup. Ct. Rep.* 356.—REVIEWING Hufford *v.* Grand Rapids & I. R. Co., 64 Mich. 631.—DISTINGUISHED IN Mahoney *v.* Detroit St. R. Co., 93 Mich. 612.

A regulation of a company by which one who has paid his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor and present it to the conductor of the train on which he seeks to complete his journey as evidence of his right to do so without further payment is a reasonable regulation. *Yorton* v. *Milwaukee, L. S. & W. R. Co.*, 6 *Am. & Eng. R. Cas.* 322, 54 *Wis.* 234, 41 *Am. Rep.* 23, 11 *N. W. Rep.* 482.

If the passenger, in such a case, asks the proper conductor for a stop-over ticket, and through the conductor's fault receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train at some usual stopping place, using no unnecessary force; and such ejection will be no ground of recovery against the company, though such company will be liable to the passenger for the fault of the first conductor. *Yorton* v. *Milwaukee, L. S. & W. R. Co.*, 6 *Am. & Eng. R. Cas.* 322, 54 *Wis.* 234, 41 *Am. Rep.* 23, 11 *N. W. Rep.* 482.—DISTINGUISHING Toledo, W. & W. R. Co. *v.* McDonough, 53 Ind. 289; Burnham *v.* Grand Trunk R. Co., 63 Me. 298; Palmer *v.* Charlotte, C. & A. R. Co., 3 So. Car. 580; Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25; English *v.* Delaware & H. Canal Co., 66 N. Y. 454. REVIEWING Townsend *v.* New York C. & H. R. R. Co., 56 N. Y. 295. —DISTINGUISHED IN Murdock *v.* Boston & A. R. Co., 21 Am. & Eng. R. Cas. 268, 137 Mass. 293, 50 Am. Rep. 307; Philadelphia, W. & B. R. Co. *v.* Rice, 26 Am. & Eng. R. Cas. 264, 64 Md. 63. REVIEWED IN Chicago & N. W. R. Co. *v.* Bannerman, 15 Ill. App. 100; Peabody *v.* Oregon R. & N. Co., 21 Oreg. 121.

A passenger who, through the negligence of one conductor, is not furnished with a stop-over ticket to which he is entitled, and who, on attempting to resume his journey after a stop, is required by a second conductor to pay additional fare or leave the train, may elect to leave the train, and in that case may recover from the railroad company, not merely the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained by him as the direct and natural consequence of the fault of the first conductor. *Yorton* v. *Milwaukee, L. S. & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 332, 62 *Wis.* 367, 21 *N. W. Rep.* 516, 23 *N. W. Rep.* 401.

50. Conductor's stop-over indorsement. — If a passenger chooses to stop over, it is not unreasonable to require him to procure his ticket to be so indorsed as to make it a voucher to the conductor having charge of a subsequent train. *Beebe* v. *Ayres*, 28 *Barb.* (*N. Y.*) 275.

A rule of a company required conductors so to indorse tickets if a passenger desired to stop off at an intermediate point. Plaintiff, a passenger, asked a conductor so to indorse his ticket, but was told that it was not necessary, and stopped off. He got on a later train and rode to another station and again stopped off, without applying to the conductor to have his ticket indorsed. On attempting to resume his journey on another train his ticket was refused. *Held*, that the privilege granted by the first con-

ductor to stop off without having his ticket indorsed did not extend to other times, and after stopping off once he became subject to the company's rule and should have had his ticket indorsed. *Denny* v. *New York C. & H. R. R. Co.*, 5 *Daly* (*N. Y.*) 50.

51. By statute.—Maine St. 1871, ch. 223, which declares that the holder of a ticket shall have the right to stop over at any station along the line of the road, and that his ticket shall be good for a passage for six years from the time it is first used, applies only to transportation within the state, and consequently does not apply to a ticket from a point within the state to a point in Canada, while the ticket is being used beyond the limits of the state. *Carpenter* v. *Grand Trunk R. Co.*, 3 *Am. & Eng. R. Cas.* 432, 72 *Me.* 388, 39 *Am. Rep.* 340.—FOLLOWED IN Lafarier *v.* Grand Trunk R. Co., 84 Me. 286.

While such a ticket is being used in New Hampshire, Vermont, or Canada, the rights of the passenger will be governed and controlled by the laws of those places and not by the laws of Maine, but in the absence of proof to the contrary, the laws of those places will be presumed to be the same as the common law of Maine, and not the same as the statute above cited. *Carpenter* v. *Grand Trunk R. Co.*, 3 *Am. & Eng. R. Cas.* 432, 72 *Me.* 388, 39 *Am. Rep.* 340.

II. PARTICULAR KINDS OF TICKETS.

1. *In General.*

52. First-class tickets.—A ticket entitling the purchaser to transportation in first-class coaches between the points indicated thereon gives him a right to have his luggage, not exceeding the quantity specified in the ticket, transported at the same time free of charge; but it does not give him a right to travel in a baggage, express, or freight car, or to transport, either in his own charge or that of the railroad, any merchandise or property not included in the term "luggage." *Pfister* v. *Central Pac. R. Co.*, 70 *Cal.* 169, 11 *Pac. Rep.* 686.

53. Second-class tickets. — Plaintiff was traveling on a through second-class ticket, which provided that "no agent or employé has power to modify this contract in any particular." *Held*, that no ticket agent or baggage master, where the passenger changed from one line to another, had authority to direct him to enter a train upon which first-class tickets only were accepted. *New York, L. E. & W. R. Co.* v. *Bennett*, 50 *Fed. Rep.* 496, 6 *U. S. App.* 95, 1 *C. C. A.* 544.—FOLLOWED IN Pouilin *v.* Canadian Pac. R. Co., 52 Am. & Eng. R. Cas. 188, 52 Fed. Rep. 197, 6 U. S. App. 298, 3 C. C. A. 23.

And as between the conductor of the train and plaintiff, the ticket is conclusive evidence of the right to travel, and the conductor has no right to accept a second-class ticket on a first-class train. *New York, L. E. & W. R. Co.* v. *Bennett*, 50 *Fed. Rep.* 496, 6 *U. S. App.* 95, 1 *C. C. A.* 544.—FOLLOWING Frederick *v.* Marquette, H. & O. R. Co., 37 Mich. 342; Hufford *v.* Grand Rapids & I. R. Co., 53 Mich. 118, 18 N. W. Rep. 580; Mosher *v.* St. Louis, I. M. & S. R. Co., 127 U. S. 390, 8 Sup. Ct. Rep. 1324; Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 Sup. Ct. Rep. 50.

One who has applied for and purchased a second-class ticket, and has used such tickets before, is bound by its terms, whether he has read them or not. *New York, L. E. & W. R. Co.* v. *Bennett*, 50 *Fed. Rep.* 496, 6 *U. S. App.* 95, 1 *C. C. A.* 544. — FOLLOWING Boylan *v.* Hot Springs R. Co., 132 U. S. 150, 10 Sup. Ct. Rep. 50; Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. Rep. 665.

And the fact that the train on which plaintiff had just traveled had failed to connect with an outgoing train on the next road does not impose upon the latter any obligation to transport the passenger on a first-class train when he holds a second-class ticket. *New York, L. E. & W. R. Co.* v. *Bennett*, 50 *Fed. Rep.* 496, 6 *U. S. App.* 95, 1 *C. C. A.* 544.

If a ticket agent by mistake or otherwise issues to an intending passenger second-class, instead of first-class, tickets, such passenger is entitled to recover damages for being moved from a first-class into a second-class car and compelled to travel therein, notwithstanding the fact that the conductor offered to allow him to remain in the first-class car provided he paid the extra charge applicable thereto; nor is his right of action affected by the company's rule that the conductor can only look to the ticket and cannot inquire whether a passenger is entitled to a passage other than that appearing upon the ticket. *St. Louis, A. & T. R. Co.* v. *Mackie*, 37 *Am. & Eng. R. Cas.* 94, 71 *Tex.* 491, 1 *L. R. A.* 667, 9 *S. W. Rep.* 451.

54. Third-class tickets. — It is no ground of complaint that a company work-

ing a main line refuses to grant third-class return tickets to the branch line, if it appears that no such tickets are issued to other branches similarly situated. *Caterham R. Co.* v. *London, B. & S. C. R. Co.*, 1 *C. B. N. S.* 410, 26 *L. J. C. P.* 161, 1 *Ry. & C. T. Cas.* 32.

55. Half-fare tickets. — By virtue of Ind. Act of March 9, 1875, § 8 (1 Rev. St. 1876, p. 259), regulating the issuing of railroad tickets and coupons, all special tickets are exempted from the operation of said act, whether they are half-fare or excursion tickets, or special in any other respect. *State* v. *Fry*, 6 *Am. & Eng. R. Cas.* 340, 81 *Ind.* 7.

A rule of a company forbidding conductors to pass any one holding a half-fare ticket, unless the passenger should carry a permit from the proper officer thus to travel, is a reasonable rule. *Goetz* v. *Hannibal & St. J. R. Co.*, 50 *Mo.* 472, 3 *Am. Ry. Rep.* 427.

56. Land-exploring tickets. — Defendant company, owning lands for sale, was in the habit of issuing non-transferable tickets at reduced rates, known as land-exploring tickets. Plaintiff, a resident of the state, was in another state and bought one of these tickets for a round trip and used it one way, but it was refused on the return trip and he was ejected. *Held*, that a resident of the state, if he made no misrepresentations in purchasing the ticket, could use it, but no one else could. *Gregory* v. *Burlington & M. R. R. Co.*, 1 *Am. & Eng. R. Cas.* 270, 10 *Neb.* 250, 4 *N. W. Rep.* 1025.

Even if plaintiff had made false representations (of which there is no proof) in the purchase of the ticket, this would only have rendered the contract voidable, not void; and if the company desired to avoid the contract after the ticket had been used one way, it must tender back the excess of the fare paid for the round trip above the regular fare one way. *Gregory* v. *Burlington & M. R. R. Co.*, 1 *Am. & Eng. R. Cas.* 270, 10 *Neb.* 250, 4 *N. W. Rep.* 1025.

In such case the possession of the ticket was *prima facie* evidence of ownership, and the failure of plaintiff to sign his name on the ticket did not invalidate it, in the absence of evidence that he had been requested to do so, as such signature is only a mode of identifying the purchaser. *Gregory* v. *Burlington & M. R. R. Co.*, 1 *Am. & Eng. R. Cas.* 270, 10 *Neb.* 250, 4 *N. W. Rep.* 1025.

The agent at the terminus refused to stamp such ticket, placing his refusal upon the fact that the contract expressed on the ticket had not been signed, and not upon the fact that plaintiff was not authorized to purchase it; but there was no proof that plaintiff had any knowledge of the rules of the company requiring him to sign it, and if there was any fault in its not being signed it was that of the agent who sold the ticket. *Held*, that plaintiff was entitled to a verdict for one half of the cost of the ticket, and to such damages as he might have sustained by reason of being ejected from the train. *Gregory* v. *Burlington & M. R. R. Co.*, 1 *Am. & Eng. R. Cas.* 270, 10 *Neb.* 250, 4 *N. W. Rep.* 1025.—DISTINGUISHED IN Way *v.* Chicago, R. I. & P. R. Co., 64 Iowa 48, 52 Am. Rep. 431.

57. Season tickets. — The fact that one student is required to pay the regular price for a season ticket is not a violation of a statute which requires every railroad to give to all persons reasonable and equal terms, where there is no evidence that the price charged was unreasonable, though it appears that the president of the company permitted certain other students to buy like tickets for half fare. *Spofford* v. *Boston & M. R. Co.*, 128 *Mass.* 326.

Plaintiff bought a season ticket containing these conditions: "This ticket is not transferable, nor will any allowance be made to the within named in case it may not be used for the whole term for which it was issued. It is subject to inspection at any time by the conductor; a refusal to comply will necessitate collection of full fare each time. It is good only for a continuous passage between the points named. If lost or mislaid it will not be replaced by the company. The holder will please return when renewing." Plaintiff lost the ticket, refused to pay fare, and was ejected from a train. *Held*, that he was bound to know the conditions, and the law would presume that he did know them. Such conditions were lawful and reasonable, and he was rightfully ejected. *Cresson* v. *Philadelphia & R. R. Co.*, 11 *Phila.* (*Pa.*) 597.

The court will not grant an injunction compelling a company to issue season tickets between a certain place and London on the same terms as it issues them between another place and London, upon a mere suggestion that the granting of the latter (the distance being considerably greater) at

a much lower rate than the former is an undue and unreasonable preference. *Jones* v. *Eastern Counties R. Co.*, 3 *C. B. N. S.* 718, 1 *Ry. & C. T. Cas.* 45.

Where a passenger's season ticket is issued upon condition that if it is not delivered up on the day after it expires a deposit of ten shillings shall be forfeited, such condition must be strictly performed, and a passenger cannot claim the deposit by delivering up the ticket within a few days after it expires. *Cooper* v. *London, B. & S. C. R. Co., L. R.* 4 *Ex. D.* 88, 48 *L. J. Ex. D.* 434, 40 *L. T.* 324, 27 *W. R.* 474, 3 *Ry. & C. T. Cas.* xxii.

58. Transferable tickets.—An ordinary coupon ticket issued for a passage over different lines, where it contains nothing on its face to the contrary, is transferable, even though it may be issued at a reduced rate. *Nichols* v. *Southern Pac. Co.*, 52 *Am. & Eng. R. Cas.* 205, 23 *Oreg.* 123, 31 *Pac. Rep.* 296, 18 *L. R. A.* 55.—APPROVING Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 47 N. W. Rep. 312. DISTINGUISHING Drummond *v.* Southern Pac. Co., 7 Utah 118, 25 Pac. Rep. 733; Cody *v.* Central Pac. R. Co., 4 Sawy. (U. S.) 115; Granier *v.* Louisiana Western R. Co., 42 La. Ann. 880, 8 So. Rep. 614.

A subsequent purchaser of a coupon ticket that is not made on its face non-transferable, nor for a continuous passage, is entitled to ride thereon the same as the original purchaser; and if he be ejected from a train on presenting such a ticket, he may recover damages from the company. *Nichols* v. *Southern Pac. Co.*, 52 *Am. & Eng. R. Cas.* 205, 23 *Oreg.* 123, 31 *Pac. Rep.* 296, 18 *L. R. A.* 55.

59. Non-transferable tickets.*—If a person in good faith presents a commutation ticket which was issued to another and is not transferable, and his claim to be carried thereon is recognized, and he is carried as a passenger, he is entitled to the rights of a passenger, i. e., to be carried safely, and to have a secure place to stop and leave the road. *Robostelli* v. *New York, N. H. & H. R. Co.*, 34 *Am. & Eng. R. Cas.* 515, 33 *Fed. Rep.* 796. But compare *Louisville, N. A. & C. R. Co.* v. *Thompson*, 27 *Am. & Eng. R. Cas.* 88, 107 *Ind.* 442, 57 *Am. Rep.* 120, 8 *N. E. Rep.* 18, 9 *N. E. Rep.* 357.—DISTINGUISHING Toledo, W. & W. R. Co. *v.* Beggs, 85 Ill. 80; Union Pac. R. Co. *v.* Nichols, 8 Kan. 505; Houston & T. C. R. Co. *v.* Moore, 49 Tex. 31; Eaton *v.* Delaware, L. & W. R. Co., 57 N. Y. 382; Great Northern R. Co. *v.* Harrison, 10 Ex. 376; Austin *v.* Great Western R. Co., L. R. 2 Q. B. 442.

A passenger who purchases a through ticket marked "not transferable cannot ride on it part of the way, and then sell the ticket to another passenger so as to entitle him to ride the rest of the way, though he offers to ride on the same train. *Cody* v. *Central Pac. R. Co.*, 4 *Sawy.* (*U. S.*) 114.

A contract on a ticket that if it is presented by any other person than the original holder it shall be void, and the conductor shall take it up and collect full fare, is valid. *Drummond* v. *Southern Pac. Co.*, 7 *Utah* 118, 25 *Pac. Rep.* 733.

An unauthorized agent of another road than defendant's assured the purchaser of a ticket already used for part of a trip, and conditioned to be void if presented by any other person than the original purchaser, that the ticket would be honored, and gave to the purchaser a letter to the conductors of defendant's road, and the purchaser, relying upon these representations, bought the ticket and attempted to ride upon it. *Held*, that defendant company was in no way bound by the representations. *Drummond* v. *Southern Pac. Co.*, 7 *Utah* 118, 25 *Pac. Rep.* 733.

60. Conductors' checks. — A conductor on a passenger train is under no legal obligation to give to a passenger a check on taking up a ticket, nor to punch the ticket and allow the passenger to hold it until all intermediate points are passed. *Chicago, B. & Q. R. Co.* v. *Griffin*, 68 *Ill.* 499.

The purchaser of a "train check," issued to another person upon a limited ticket and expressed to be good only for a continuous passage, is not entitled subsequently to pursue the journey begun by the purchaser of the ticket, though the check be offered for passage within the time limited thereon. *Walker* v. *Wabash, St. L. & P. R. Co.*, 16 *Am. & Eng. R. Cas.* 380, 15 *Mo. App.* 333.—RECONCILED IN Nichols *v.* Southern Pac. Co., 52 Am. & Eng. R. Cas. 205, 23 Oreg. 123, 31 Pac. Rep. 296.

Where a passenger holds a through ticket he has no right, without the consent of the

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* See also *ante*, **39.**

Assignability of railroad tickets, see note, 18 L. R. A. 55.

Ejecting passengers. Non-transferable tickets. Measure of damages. Contributory negligence, see 37 AM. & ENG. R. CAS. 125, *abstr.*

company, to stop at an intermediate station and demand by virtue of his ticket, or a conductor's check given him in lieu thereof, a continuation of his passage on another train. Notice by the company that conductors' checks are not transferable from one train to another is not a by-law of the corporation, but a mere regulation, the validity of which depends upon whether it is reasonable. *State* v. *Overton*, 24 *N. J. L.* 435.

A custom of a company for conductors to take up tickets and give checks in place of them to passengers soon after their entrance into the cars is reasonable, especially where a passenger buys his ticket with knowledge of the custom. *Northern R. Co* v. *Page*, 22 *Barb.* (*N. Y.*) 130.

Plaintiff was traveling on a through ticket with coupons for the different roads, but with two coupons for the different divisions of defendant's road. On entering defendant's road the conductor detached both coupons and gave to plaintiff a conductor's check, which according to the rules of the company was good only for that trip. Plaintiff stopped at the end of the division over night, and offered his check the next day for passage over the next division, but it was refused and he was ejected. *Held*, that the ejection was wrongful, and the company was liable. *Palmer* v. *Charlotte, C. & A. R. Co.*, 3 *So. Car.* 580.

Plaintiff's rights grew out of the terms of his contract, giving to him the privilege of stopping at the end of the first division. He did not owe to the company the duty of giving notice of his intention to stop, or of making inquiries as to the force and effect of the conductor's check; and if he failed to give such notice or make such inquiries he was not guilty of negligence. *Palmer* v. *Charlotte, C. & A. R. Co.*, 3 *So. Car.* 580.

The individual check of a conductor upon one train, given to a passenger on taking up his ticket, is not evidence of a right to be carried on another train, in charge of another conductor. *Breen* v. *Texas & P. R. Co.*, 50 *Tex.* 43.

2. *Commutation Tickets.*

61. Duty of carrier to sell. — Although a company is not obliged to sell commutation tickets, if it undertakes to do so it must sell them to all alike. Misconduct on the part of a passenger in refusing to pay his fare when he had left his commutation ticket at home by mistake does not justify a refusal to sell a commutation ticket to such passenger. *State ex rel.* v. *Delaware, L. & W. R. Co.*, 23 *Am. & Eng. R. Cas.* 470, 48 *N. J. L.* 55, 2 *Atl. Rep.* 803. —QUOTING Messenger *v.* Pennsylvania R. Co., 36 N. J. L. 407. REFERRING TO Ransome *v.* Eastern Counties R. Co., 1 C. B. N. S. 437, 4 C. B. N. S. 135; Chaterham R. Co. *v.* London, B. & S. C. R. Co., 1 C. B. N. S. 410; Baxendale *v.* Great Western R. Co., 5 C. B. N. S. 309, 336; Garton *v.* Great Western R. Co., 5 C. B. N. S. 669; Nicholson *v.* Great Western R. Co., 5 C. B. N. S. 366; Garton *v.* Bristol & E. R. Co., 6 C. B. N. S. 639; Baxendale *v.* Eastern Counties R. Co., 4 C. B. N. S. 63, Evershed *v.* London & N. W. R. Co., L. R 2 Q. B. D. 254; Crouch *v.* London & N. W. R. Co., 2 C. & K. 789; Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505.

62. Commuter must exhibit ticket. —A company has the right to require commuters to show their tickets, and in default to exact the fare without liability to repay it. *Bennett* v. *Railroad Co.*, 7 *Phila.* (*Pa.*) 11.

63. Who may ride on.—(1) *Partner.* —A person claimed the right to travel on a train, as a passenger holding a commutation ticket issued by the agent of the company, on the alleged ground that he was one of the members of a partnership named on the face of the ticket. *Held*, that he must show the conductor that his name appears indorsed thereon in compliance with the conditions specified in the contract on the reverse of the ticket. *Granier* v. *Louisiana Western R. Co.*, 42 *La. Ann.* 880, 8 *So. Rep.* 614.

In case the conductor should decline to recognize his right thus to use the commutation ticket and should eject him, and damages are claimed therefor, the legal obligation is imposed on the claimant to establish by a clear preponderance of proof, if denied, that there existed such a partnership at the time, and that he was one of its members. *Granier* v. *Louisiana Western R. Co.*, 42 *La. Ann.* 880, 8 *So. Rep.* 614.

(2) *On family ticket.*—A family commutation ticket which, on its face, purports to be for the exclusive use of a man and his family, authorizes a son, who is residing with the father as a member of his family, to ride upon the road, notwithstanding he may be over twenty-one years of age; but where the father was told at the time he

purchased the ticket that a rule of the company excluded children over age, such rule became part of the contract, and the son could not ride. *Chicago & N. W. R. Co.* v. *Chisholm*, 79 *Ill.* 584.

64. Refusal to honor and taking up. — Plaintiff held a commutation ticket which contained a condition that it should be used only by the holder, and that if found in the hands of any one else it would be forfeited and taken up. Plaintiff presented it, when it was taken up by the conductor, who claimed that it had been used by other persons, which was denied by plaintiff. *Held*, that it was properly taken up if before that time it had been used by any other persons with plaintiff's connivance; and if so the company's agent had afterwards the right to take it up even in the hands of the person to whom it was issued. *Freidenrich* v. *Baltimore & O. R. Co.*, 2 *Am. & Eng. R. Cas.* 280, 53 *Md.* 201.

Plaintiff asked the court to instruct the jury that he was entitled to recover, if the jury should find that the ticket was taken from his possession and he was ejected, and should further find that he did not loan, sell, or in any manner transfer the ticket to any other person, or knowingly permit any other person to use the ticket before that time, which instruction the court gave, but added, "and shall find that said ticket was not used by any other person than the plaintiff, through the negligence or want of due care on the part of the plaintiff." Plaintiff claimed that this addition to the instruction was error. *Held*, that, as there was no question of negligence made by the proof, the addition was unnecessary, but as it could not have prejudiced the jury, it was not sufficient ground for reversal. *Freidenrich* v. *Baltimore & O. R. Co.*, 2 *Am. & Eng. R. Cas.* 280, 53 *Md.* 201.

65. Payment of regular fare by commuter.—A person purchasing a commutation ticket, and giving a receipt, on which was a note that the ticket should be shown to the conductors when required, and no duplicate ticket would be issued, and upon which ticket it was printed that the ticket was held subject to the regulations prescribed in the receipt, is bound by his contract; and if by casualty his ticket has been lost, so that he cannot produce it when required, the company may exact of him the regular fare. *Ripley* v. *New Jersey R. & T. Co.*, 31 *N. J. L.* 388.

66. Lost or misplaced tickets.— Plaintiff held a commutation ticket which contained a condition that he should have no claim for a rebate on account of the non-use of the ticket from any cause. For a time the company had been in the habit of giving a rebate if persons holding such tickets failed to have them and had to pay full rates, but it had discontinued the practice some three weeks before and had so notified the commission. Plaintiff attempted to ride without his ticket and had to pay full fare. *Held*, that he was not entitled to a rebate, though he supposed that the former custom was still in vogue. *Sidman* v. *Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 766, 3 *Int. Com. Com.* 512.

And in such case it was not unjust discrimination for the conductor to collect twenty-five cents extra, where that regulation was made a part of the company's schedule and so filed with the commission. *Sidman* v. *Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 766, 3 *Int. Com. Com.* 512.

Plaintiff purchased such ticket on the 13th day of June, and it showed on its face that it was good for three months only from the 1st day of June. *Held*, that he was not entitled to recover anything for the thirteen days of the quarter elapsing before he purchased the ticket. *Sidman* v. *Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 766, 3 *Int. Com. Com.* 512.

Conditions upon which a ticket is issued, and printed thereon, are considered in the nature of a contract in writing. Admission of evidence to the effect that at the time of the purchase of the ticket it was orally agreed to issue a duplicate in case of its loss violates the familiar rule that an instrument in writing may not be added to by proof of a contemporaneous oral understanding and that the writing, if not ambiguous, except in cases of fraud, accident, surprise, or mistake, is conclusive of what the parties have agreed. *Simis* v. *New York, L. E. & W. R. Co.*, 48 *N. Y. S. R.* 687, 20 *N. Y. Supp.* 639, 1 *Misc.* 179.

Evidence of a custom is admissible only when its office is to remove an ambiguity or to clear up some obscurity, and is, therefore, incompetent when offered to show that defendant had frequently issued duplicate tickets in lieu of lost ones, or had agreed to do more than the language of the contract, expressed or by implication, required. *Simis* v. *New York, L. E. & W. R. Co.*, 48

N. Y. S. R. 687, 20 *N. Y. Supp.* 639, 1 *Misc.* 179.

3. *Coupons and Coupon Tickets.*

67. Generally. — Where a passenger's ticket is issued in the form of a paper book containing coupons, the whole book constitutes the contract with the company and the passenger is bound by a condition on the inside, although he had not read and did not know it. *Burke* v. *South Eastern R. Co.*, *L. R.* 5 *C. P. D.* 1, 49 *L. J. C. P. D.* 107, 41 *L. T.* 554, 28 *W. R.* 306, 44 *J. P.* 283. —CONSIDERED IN Watkins *v.* Rymill, L. R. 10 Q. B. D. 178, 52 L. J. Q. B. 121, 48 L. T. 426, 31 W. R. 337, 47 J. P. 357.

Where a coupon ticket has been sold calling for passage over several distinct lines of railroad, the rights of the passenger, and the duty and responsibility of the several companies over whose roads the passenger is entitled to passage, are the same as if he had purchased a ticket at the office of each company constituting the through line. *Pennsylvania R. Co.* v. *Connell*, 18 *Am. & Eng. R. Cas.* 339, 112 *Ill.* 295, 54 *Am. Rep.* 238.

The managers of an excursion from Wilmington, N. Car., to Washington, D. C., contracted with defendant company for a train at a certain sum, and after advertising the time sold card tickets at $6.50 for the round trip. After the departure of the train, and when it had proceeded a few miles, defendant's conductor passed through the cars and took up the card tickets, and in lieu thereof gave coupon tickets in order that the connecting roads might hold vouchers to obtain their *pro rata* share of the excursion money, in settling with defendant. *Held*, that this did not change the original contract with the managers. *McRae* v. *Wilmington & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 316, 88 *N. Car.* 526, 43 *Am. Rep.* 745.

The terms of the contract, contained in the coupon ticket, did not confer the right upon plaintiff excursionist to return on a regular train, even at an earlier day than that advertised for the excursion, without paying regular fare. *McRae* v. *Wilmington & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 316, 88 *N. Car.* 526, 43 *Am. Rep.* 745.

In a suit by plaintiff against the company to recover damages for an assault by the conductor, who attempted to put him off a regular train unless the fare was paid, plaintiff testified among other things that he supposed he had the right to return on any train after the delivery of the coupon ticket, but was compelled to pay additional fare for such privilege. *Held*, error in the court to charge the jury that they might consider the understanding and agreement of the parties in determining the character of such ticket, there being no evidence of any agreement between plaintiff and defendant. *McRae* v. *Wilmington & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 316, 88 *N. Car.* 526, 43 *Am. Rep.* 745.

68. Detachment of coupons. — Where an excursion ticket having two coupons is conditioned that if detached they shall be void, the acceptance by the conductor of one of the coupons from the passenger who presents both is a waiver of such condition, notwithstanding that by mistake the conductor takes the returning instead of the going coupon. *Pennsylvania Co.* v. *Bray*, 125 *Ind.* 229, 25 *N. E. Rep.* 439.

A passenger offered detached coupons for his fare, and was arrested for fraudulently evading payment. *Held*, in an action for false imprisonment, that evidence that he had frequently seen the conductor accept similar coupons was admissible. *Marshall* v. *Boston & A. R. Co.*, 31 *Am. & Eng. R. Cas.* 18, 145 *Mass.* 164.

Conditions in a coupon-ticket book that the coupons are to be detached in conductor's presence, and to be accepted for passage only when accompanied by the ticket, are not waived by sometimes allowing passengers to pay their fares with coupons without showing their books. *Boston & M. R. Co.* v. *Chipman*, 34 *Am. & Eng. R. Cas.* 336, 146 *Mass.* 107, 5 *N. Eng. Rep.* 572, 14 *N. E. Rep.* 940.

A passenger holding a commutation coupon ticket which provides that the coupons shall be void if detached by any one other than the conductor, and that the ticket shall be shown to the conductor on each trip, who shall detach the coupons for the number of miles to be traveled, technically violates the contract by detaching the coupons himself; but if while detaching them his attention is called by the conductor to the fact that it is his duty to detach them, the passenger should at once desist, and hand the ticket and coupons to the conductor, in which event it would be the duty of the latter, if he saw the coupons

detached or could readily ascertain by inspection that they had been detached from the ticket, to accept them; but he is not bound to accept the coupons without seeing the ticket. *Louisville, N. & G. S. R. Co.* v. *Harris*, 16 *Am. & Eng. R. Cas.* 374, 9 *Lea* (*Tenn.*) 180.

In such case if the passenger should refuse to deliver the ticket to the conductor on demand, and insist upon making payment of his fare with coupons which he himself had detached, it would be a violation of the contract for which he might be put off the train, with such force as might be necessary; and he could not regain the right to ride by tendering his fare, while being ejected, but in a rude, boisterous, or insulting manner. *Louisville, N. & G. S. R. Co.* v. *Harris*, 16 *Am. & Eng. R. Cas.* 374, 9 *Lea* (*Tenn.*) 180.

A regulation printed upon the back of a book of commutation tickets and signed by the passenger requiring conductors alone to detach coupons is reasonable, and is part of the contract between the company and the passenger. If the latter refuses to permit the conductor to detach the coupons and insists upon doing it himself, he may be put off the train. *Norfolk & W. R. Co.* v. *Wysor*, 26 *Am. & Eng. R. Cas.* 234, 82 *Va.* 250. *Boston & M. R. Co.* v. *Chipman*, 34 *Am. & Eng. R. Cas.* 336, 146 *Mass.* 107, 5 *N. Eng. Rep.* 572, 14 *N. E. Rep.* 940.

A round-trip ticket, punctured for separation into two parts, and having on the "going" part the words "Not good for passage," and, on a line therewith, on the "returning" part the words "if detached," is nevertheless good for passage where the parts have become separated by accident, if both parts are in good faith presented to the conductor on the outward trip. *Wightman* v. *Chicago & N. W. R. Co.*, 73 *Wis.* 169, 2 *L. R. A.* 185, 40 *N. W. Rep.* 689.

4. *Round-trip and Excursion Tickets.*

a. In General.

69. Carrier's duty to offer for sale —Rights of holder.—The right of a passenger to be carried upon a tourist's or round-trip ticket depends upon the written contract signed by him thereon, and not upon representations made by an officer of the company. *Mosher* v. *St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 339, 127 *U. S.* 390, 8 *Sup. Ct. Rep.* 1324; *affirming* 21 *Am. & Eng. R. Cas.* 283, 23 *Fed. Rep.* 326.

Upon complaint by workmen residing in K. district, that cheap return tickets by the workmen's train from W. were only available for the terminal station at B. street, and that although workmen could book by these trains for the intermediate stations, they were charged the full ordinary fares, the company contended that the number of workmen's tickets issued and used daily on this line was already as great as was consistent with its safe working, and that the trains would be overcrowded if it had to convey workmen, not only to and from B. street, but to and from other stations as well. *Held*, by the commissioners, that there was no sufficient reason why the cheap workmen's tickets should not be as available for workmen alighting at the intermediate stations as for workmen going to the terminus. *In re Inquiry under Cheap Trains Act*, 6 *Ry. & C. T. Cas.* 19.

70. Duty to honor and liability for refusal.—If the purchaser of a round-trip ticket, after paying for and receiving it, performs all the stipulations of the contract on his part, or offers to do so in proper time and manner, the company is bound to recognize and honor the ticket when and wherever duly presented, notwithstanding any mistake or omission by its agents in signing or stamping the same. *Head* v. *Georgia Pac. R. Co.*, 79 *Ga.* 358, 7 *S. E. Rep.* 217.—DISTINGUISHING Moses *v.* East Tenn., V. & G. R. Co., 73 Ga. 356.

A passenger who holds an unused round-trip ticket is entitled to ride on the return part of it without regard to who detached it from the other part; and for a stronger reason is he entitled to ride when it is detached by the passenger in the presence of the conductor, although the other part is marked "not good if detached." *Chicago, St. L. & P. R. Co.* v. *Holdridge*, 118 *Ind.* 281, 20 *N. E. Rep.* 837.

If a conductor refuses to accept such return coupon from the passenger, where it is detached in the presence of the conductor, and requires the passenger to leave the train at the next station, the company is liable in damages. *Chicago, St. L. & P. R. Co.* v. *Holdridge*, 118 *Ind.* 281, 20 *N. E. Rep.* 837.

71. Interpretation and effect, generally.—A company employed a band for an excursion, agreeing to pay so much in

money and to furnish a ticket for a lady for each member of the band. These tickets were marked so as to distinguish them from common tickets. Plaintiff procured one of these tickets from his brother, who was a member of the band, but the conductor refused it and put him off. *Held*, that it was not error to instruct the jury that the ticket did not, on its face, entitle plaintiff to passage. *Crosby* v. *Maine C. R. Co.*, 69 *Me.* 418.

In such case it was not error to exclude evidence offered by plaintiff as to instructions that his father gave him to ascertain before the excursion party started whether he could ride on the ticket, where such conversation was not communicated to the company or its agents. *Crosby* v. *Maine C. R. Co.*, 69 *Me.* 418.

An excursion ticket which contains a special contract is conclusive, and advertisements of the tour are inadmissible in evidence to vary its terms. *Howard* v. *Chicago, St. L. & N. O. R. Co.*, 18 *Am. & Eng. R. Cas.* 313, 61 *Miss.* 194.

Such ticket when accepted is a contract in writing, and may not be altered in its effect by parol agreement at the time of its execution, in the absence of fraud, etc. *Abram* v. *Gulf, C. & S. F. R. Co.*, 83 *Tex.* 61, 18 *S. W. Rep.* 321.

A ticket holder claiming fraud and imposition upon him by the carrier should allege such acts of fraud and deception. Without such allegation the testimony is inadmissible. *Abram* v. *Gulf, C. & S. F. R. Co.*, 83 *Tex.* 61, 18 *S. W. Rep.* 321.

72. —— where issuing carrier is agent for connecting lines.—Where a person has purchased and accepted a coupon return ticket containing a notice that the company selling it acts only for itself over its own line and as agent for the other lines specified on the coupons, but assumes no responsibility beyond its own line, the company selling the ticket is not responsible for injuries sustained upon a connecting railroad. *Kerrigan* v. *Southern Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 28, 81 *Cal.* 248, 22 *Pac. Rep.* 677.

Where a company issues a through ticket for itself and as agent for other lines on the route, and the ticket is to be restamped for return passage by the ticket agent of the terminal line, such agent is thereby made the agent of all the companies, and the initial road is responsible only for its own breaches of the contract. *Bethea* v. *Northeastern R. Co.*, 26 *So. Car.* 91, 1 *S. E. Rep.* 372.

73. Who may use — Holder of return coupon.*—Where one, holding an unused round-trip ticket from W. to M., enters a train at M., the return station, he is entitled to have the return part of such ticket, by whomsoever detached from the other part, accepted in payment for his transportation. *Chicago, St. L. & P. R. Co.* v. *Holdridge*, 118 *Ind.* 281, 20 *N. E. Rep.* 837.

A round-trip excursion ticket, used by the purchaser in going to the station named therein, and then sold and transferred, no restrictions appearing, is valid in the hands of the holder, and entitles him to a return passage, subject to prescribed limitations as to time, etc. *Carsten* v. *Northern Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 392, 44 *Minn.* 454, 47 *N. W. Rep.* 49. — FOLLOWED IN Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53.—*Hoffman* v. *Northern Pac. R. Co.*, 45 *Minn.* 53, 47 *N. W. Rep.* 312.—FOLLOWING Carsten *v.* Northern Pac. R. Co., 44 Minn. 454.

And where a conductor refuses to recognize such ticket in the hands of the holder, who is thereby entitled to ride thereon, and demands of him the regular fare, and attempts to eject him by force for non-payment thereof, the company is liable in damages for the assaul[illegible]d the jury, in assessing the damages [illegible]y consider the annoyance, vexation, and indignity suffered by him. *Carsten* v. *Northern Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 392, 44 *Minn.* 454, 47 *N. W. Rep.* 49.— DISTINGUISHED IN Mahoney *v.* Detroit St. R. Co., 93 Mich. 612.

By mistake a conductor returned to a passenger who presented a round-trip ticket the wrong part thereof. On the return trip the passenger presented that portion of the ticket, but the conductor refused it. The passenger had not before noticed the mistake but then explained it to the conductor, but he refused to carry the passenger without payment of fare, which was refused and the passenger ejected from the train. *Held*, that the company was liable. *Kansas City, M. & B. R. Co.* v. *Riley*, 47 *Am. & Eng. R. Cas.* 476, 68 *Miss.* 765, 9 *So. Rep.* 443.

* Round-trip tickets. Detachment of wrong coupon by conductor, see note, 47 AM. & ENG. R. CAS. 479.

74. Good on what trains. — Where the custom of trains to stop at a place misleads a person, without fault on his part, into the belief that it is a flag station, and, relying upon that custom, he buys a ticket to and from such place from an agent of the company, who knows that it is his intention to use it in returning on a train which does not stop at the point of his destination, and yet fails to inform him of that fact, the company will be liable for the failure of the train to stop when properly flagged. *St. Louis, I. M. & S. R. Co.* v. *Adcock*, 40 *Am. & Eng. R. Cas.* 682, 52 *Ark.* 406, 12 *S. W. Rep.* 874.

The purchase of a round-trip ticket does not create the relation of carrier and passenger as to any particular train. *Spannagle* v. *Chicago & A. R. Co.*, 31 *Ill. App.* 460.

Where an excursion ticket is sold at a reduced rate, and upon special conditions, the terms of which are printed on the ticket, and one of the conditions is that it shall be used "for a continuous trip only," and "is not good to stop off," the purchaser who accepts and uses it is bound to take a train which will carry him continuously through from one station to the other, both in going and returning, and may not stop off at an intermediate station while going either way. *Johnson* v. *Philadelphia, W. & B. R. Co.*, 18 *Am. & Eng. R. Cas.* 304, 63 *Md.* 106.— REVIEWING Pennington *v.* Philadelphia, W. & B. R. Co., 62 Md. 95.

If the passenger on his return knowingly takes a train which does not go as far as the station at which he purchased his ticket, and with the intention of stopping off at an intermediate station, the officers of the company are justified in refusing to accept the return coupon of the ticket for his fare, and in putting him off on his refusal to pay the regular fare demanded, or to produce a proper ticket to the station at which he intended to stop. And it is no excuse for his refusal that he went to one of the gatekeepers at the station where he took the train, who examined his ticket and negligently assigned him to the wrong train. *Johnson* v. *Philadelphia, W. & B. R. Co.*, 18 *Am. & Eng. R. Cas.* 304, 63 *Md.* 106.

Where a company prohibits passengers from riding on freight trains without a special permit, one holding an excursion ticket marked "good going on any train" is not entitled to ride on a through freight train without such permit. *Thomas* v. *Chicago & G. T. R. Co.*, 37 *Am. & Eng. R. Cas.* 108, 72 *Mich.* 355, 40 *N. W. Rep.* 463.

Where one purchases a round-trip ticket on a particular day, he acquires no right to ride on any particular train, or on any particular class of trains, unless the ticket so states, or the agent of the company so informed him at the time of the purchase. By the purchase of the ticket he acquired only the right to ride subject to the reasonable regulations of the company. *Claybrook* v. *Hannibal & St. J. R. Co.*, 19 *Mo. App.* 432.

Defendant's regular ticket agent sold to plaintiff a ticket good only on a special excursion train, which defendant had hired to a third person, in whose charge it was, and whose name was signed to the ticket. Plaintiff was not aware of the arrangement between carrier and such third person. *Held*, that the sale of the ticket constituted a contract of transportation binding upon defendant. *Eddy* v. *Harris*, 47 *Am. & Eng. R. Cas.* 473, 78 *Tex.* 661, 15 *S. W. Rep.* 107.

75. Good for how long. — A round-trip excursion ticket, not limited by its terms, is good until used, unless the purchaser was personally notified to the contrary at the time he bought it. The purchaser is not bound to make inquiries about regulations of the company not printed on the ticket. *Pennsylvania R. Co.* v. *Spicker*, 23 *Am. & Eng. R. Cas.* 672, 105 *Pa. St.* 142.

In an action against a railroad by the holder of a round-trip, unlimited ticket, for refusing to accept the return coupons thereon, evidence is not admissible to show that by the regulations of the company such excursion tickets were not good after a certain date, and that general public notice of such regulations was given in the office where the ticket was sold, and elsewhere, by posters, circulars, and excursion books, no offer having been made to show that direct notice of such regulation was given to plaintiff at the time he purchased the ticket. *Pennsylvania R. Co.* v. *Spicker*, 23 *Am. & Eng. R. Cas.* 672, 105 *Pa. St.* 142.

76. Ticket taken in exchange for excursion ticket.—If an excursion ticket provides that it is exchangeable for another good for the day and train designated in the latter, the holder of the exchange ticket cannot travel on a later train and day than those designated. *Howard* v. *Chicago, St.*

L. & N. O. R. Co., 18 *Am. & Eng. R. Cas.* 313, 61 *Miss.* 194.

77. When regular fare must be paid. — Where a company advertises a round trip "for one fare," passengers are chargeable with notice that it necessarily implies the purchase of a special ticket. *St. Louis & C. R. Co.* v. *Carroll*, 13 *Ill. App.* 585.

Where a passenger fails to get such ticket owing to the company having none on sale, and is carried one way by a conductor understanding the circumstances, for half fare, if he enters the train to return without a ticket he must pay full fare or be put off. *St. Louis & C. R. Co.* v. *Carroll*, 13 *Ill. App.* 585.

A return ticket only entitles the passenger to travel to and from the stations named in the ticket. If the passenger goes beyond the station named to another station, he must pay the additional fare, even though the price of a return ticket from the departure station to the further station be the same. *Great Western R. Co.* v. *Pocock*, 41 *L. T.* 415, 3 *Ry. & C. T. Cas.* xxi[1]

b. Rules or Stipulations Requiring Identification of Passenger and Stamping of Return Tickets.

78. Reasonableness of rule. — A regulation of a company that a "special excursion ticket" shall not be valid for the return journey unless presented by the original purchaser to the authorized agent of the company, to be stamped on the back, is not unreasonable, and if the passenger does not comply with the condition he has no right to use the ticket for the return journey. *Bowers* v. *Pittsburgh, Ft. W. & C. R. Co.*, 158 *Pa. St.* 302, 27 *Atl. Rep.* 893.

A stipulation in a ticket sold as good for thirty days, that the purchaser shall have himself identified as such at the terminal point of his journey, and that the ticket shall be good fifteen days only after identification, is not illegal or unreasonable, but is binding on the party who thus contracts with the company. *Rawitzky* v. *Louisville & N. R. Co.*, 31 *Am. & Eng. R. Cas.* 129, 40 *La. Ann.* 47, 3 *So. Rep.* 387.

The carrier issuing such ticket at a reduced rate has the right to limit the privilege of its use to the purchaser. To secure this right and prevent imposition, identification of the purchaser becomes necessary. The manner of identification may be the subject of contract. *Abram* v. *Gulf, C. & S. F. R. Co.*, 83 *Tex.* 61, 18 *S. W. Rep.* 321.

79. Such conditions in ticket are valid. — Defendant sold to plaintiff an excursion ticket from L. to C. and return. The right to a return passage was conditioned upon the presentation of the ticket to the agent at C., its dating and stamping by him, and the affixing of the signature of plaintiff to a printed statement on the back of the ticket, as evidence that he was the original purchaser. *Held*, that the condition was reasonable, and was a condition precedent to plaintiff's right to such return passage, and that the conductor to whom the ticket was presented was not called upon to investigate as to the identity of plaintiff. *Edwards* v. *Lake Shore & M. S. R. Co.*, 81 *Mich.* 364, 45 *N. W. Rep.* 827. *Cloud* v. *St. Louis, I. M. & S. R. Co.*, 14 *Mo. App.* 136.

The purchaser of such a ticket who has failed to comply with its terms cannot, in the absence of evidence of a waiver or of want of opportunity to know its contents when he purchased it, have an action against the railroad because he was ejected from the car of a connecting road for failure to pay his fare. *Cloud* v. *St. Louis, I. M. & S. R. Co.*, 14 *Mo. App.* 136.

A ticket had the following notice printed in large letters on its face: "Notice to purchaser. Read the above contract carefully—it is important—and take notice that the contract must be stamped at Chicago, Ill., before ticket will be accepted for return trip." *Held*, that the condition was not unreasonable, and that it was the passenger's duty to have informed himself of its existence. *Bowers* v. *Pittsburgh, Ft. W. & C. R. Co.*, 158 *Pa. St.* 302, 27 *Atl. Rep.* 893.

A stipulation in a ticket sold at reduced rates that it shall not be good for the return trip unless the passenger identifies himself to the satisfaction of the company's agent before beginning the return trip, and the ticket is stamped by him, is not unreasonable nor contrary to the policy of the law. *Bethea* v. *Northeastern R. Co.*, 26 *So. Car.* 91, 1 *S. E. Rep.* 372.

80. —— and binding upon purchaser. — A round-trip ticket contained a condition that to be good for the return trip it must be restamped by the agent at a certain place named, which was not on the route called for; but it was evident from the

whole contract that the restamping was to be done at the terminus before the return trip was commenced, and that the place named was only a misprint. *Held*, that as the holder could not be misled thereby, the provision requiring restamping was not invalidated. *Bethea* v. *Northeastern R. Co.*, 26 *So. Car.* 91, 1 *S. E. Rep.* 372.

If a passenger accepts an excursion ticket containing a condition that it cannot be used on return passage unless the manner of identification specified has been complied with, has had opportunity to know its conditions, uses it, and the carrier has resorted to no unfair means or deception, the passenger's assent to the same will be conclusively presumed. It is not necessary for the purchaser to sign the contract. *Abram* v. *Gulf, C. & S. F. R. Co.*, 83 *Tex.* 61, 18 *S. W. Rep.* 321.

81. Waiver of the condition.—When, by the express conditions of a ticket accepted and signed by a passenger, the right to return upon such ticket is conditional upon its being signed and stamped by the station agent at the terminus of the route, and no agent or employé of the company is authorized to alter, modify, or waive any condition, the action of the baggage master in punching the ticket and checking the passenger's baggage, or that of the brakeman in admitting him to the train, does not estop the company from denying the passenger's right to transportation. *Boylan* v. *Hot Springs R. Co.*, 40 *Am. & Eng. R. Cas.* 666, 132 *U. S.* 146, 10 *Sup. Ct. Rep.* 50.—FOLLOWED IN New York, L. E. & W. R. Co. *v.* Bennett, 50 Fed. Rep. 496, 6 U. S. App. 95, 1 C. C. A. 544.

If a round-trip ticket provides that it must be stamped and the passenger's signature witnessed for identification before beginning the return trip, the purchaser who fails to comply with such conditions cannot maintain an action against the company because he was ejected from a car on a connecting line for failure to pay his fare, in the absence of evidence of a waiver or want of opportunity to know the contents of such ticket when he purchased it. *Cloud* v. *St. Louis, I. M. & S. R. Co.*, 14 *Mo. App.* 136.

In such case, where the contract is made by the agent of a connecting road, the waiver of its terms by one of the roads will not bind the others. A conductor is not a general agent of the road authorized to waive the terms of a written contract of carriage. *Cloud* v. *St. Louis, I. M. & S. R. Co.*, 14 *Mo. App.* 136.

A contract requiring a passenger to identify himself and have the ticket stamped by an agent at a particular place may be waived by parol. *Taylor* v. *Seaboard & R. R. Co.*, 34 *Am. & Eng. R. Cas.* 344, 99 *N. Car.* 185, 6 *Am. St. Rep.* 509, 5 *S. E. Rep.* 750.

To show a waiver of an agreement by a passenger to identify himself, and have his ticket stamped by a particular agent, it is competent to prove that an agent of the carrier, other than that at the station designated in the contract, recognized the ticket by permitting the passenger to identify himself and by stamping it for the return trip. *Taylor* v. *Seaboard & R. R. Co.*, 34 *Am. & Eng. R. Cas.* 344, 99 *N. Car.* 185, 6 *Am. St. Rep.* 509, 5 *S. E. Rep.* 750.

The fact that a gateman permitted a passenger to pass through the gate without examining and punching a ticket, and that a conductor of a sleeping car failed to notice that the ticket was unstamped, is not evidence of a waiver of a condition by the company, requiring an excursion ticket to be stamped before the return trip begins. *Bowers* v. *Pittsburgh, Ft. W. & C. R. Co.*, 158 *Pa. St.* 302, 27 *Atl. Rep.* 893.

82. Failure to have ticket stamped.—Where a person has failed to have a return ticket stamped as required by an express condition contained in it, and has absolutely declined to pay fare upon the train, the fact that the conductor did not inform him of the amount of the fare before ejecting him is immaterial. *Boylan* v. *Hot Springs R. Co.*, 40 *Am. & Eng. R. Cas.* 666, 132 *U. S.* 146, 10 *Sup. Ct. Rep.* 50.

83. Absence of agent.—A round-trip ticket, good over different roads, contained the provisions that the company issuing it would not be liable beyond its own line, and that the ticket must be stamped by an agent before starting on the return trip. Absence of the agent prevented the stamping of the ticket, and the company selling it refused to accept it over its road for the return trip. *Held*, that it was not liable. *Mosher* v. *St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 339, 127 *U. S.* 390, 8 *Sup. Ct. Rep.* 1324; *affirming* 21 *Am. & Eng. R. Cas.* 283, 23 *Fed. Rep.* 326.—DISTINGUISHED IN Pouilin *v.* Canadian Pac. R. Co., 47 Fed. Rep. 858. FOLLOWED IN Boylan *v.* Hot Springs R. Co., 40 Am. & Eng. R. Cas. 666, 132 U. S. 146, 10 Sup. Ct. Rep. 50; New

York, L. E. & W. R. Co. *v.* Bennett, 50 Fed. Rep. 496, 6 U. S. App. 95, 1 C. C. A. 544.

84. Effect of refusal of agent to stamp upon presentation. — Where a passenger holds a round-trip ticket good over different roads which provides that the passenger must identify himself to the satisfaction of the agent of the terminal line and have the ticket stamped by him before beginning the return trip, such agent is made the agent of all the companies, and the initial road is liable only for its own breach of the contract; and the refusal of such agent to stamp the ticket, on the ground that he is not satisfied as to the identity of the holder, is conclusive; and it is error to submit to the jury whether or not the agent was satisfied. *Bethea* v. *Northeastern R. Co.*, 26 *So. Car.* 91, 1 *S. E. Rep.* 372.

Plaintiff purchased for his wife a round-trip ticket from D. to S., containing a stipulation that in order for it to be good for the return passage it should be presented by her within a stated time to the agent of defendant company at S., and should be signed and stamped by him. She duly presented the ticket to such agent, who wrongfully refused to sign and stamp it; and when she presented it to defendant's train conductor on the return trip, he refused to honor it, treated her with great rudeness, and as she had not money with her to pay her fare, exacted the deposit of her watch as security for the fare. *Held*, that plaintiff's wife was not a trespasser on defendant's train on the return trip, her contract right of passage not being lost because of the agent's refusal to sign and stamp the ticket, but that such refusal was well pleaded and proved by plaintiff, in connection with the other facts, as germane to his cause of action in damage for the wrongs suffered by his wife. *Missouri Pac. R. Co.* v. *Martino*, 2 *Tex. Civ. App.* 634, 18 *S. W. Rep.* 1066, 21 *S. W. Rep.* 781.

5. *Limited Tickets.*

85. Right to limit as to time—Waiver.* — An indorsement upon an expired limited ticket, by a conductor, showing that it had been used to an intermediate station, before the expiration of the time specified, or an allowed use of it for a portion of the distance thereafter, with an indorsement showing it, is not such a waiver of the condition as allows a further use of the ticket. *Hill* v. *Syracuse, B. & N. Y. R. Co.*, 63 *N. Y.* 101; *affirming* (?) 2 *Hun* 114, *mem.*, 4 *T. & C.* 685, *mem.*

A rule established by a carrier of passengers that tickets over its road should be dated on the day of their sale, and should only entitle each holder to a passage on that day, provided that joint tickets should be good for such further time as might be necessary to enable the holders, by the regular trains of the road, to reach the stations to which such tickets were sold, is reasonable. *Johnson* v. *Concord R. Corp.*, 46 *N. H.* 213.

A common carrier of passengers may, by agreement, evidenced by a ticket to that effect, provide that a passage shall be made within a time specified in the ticket, and in one continuous trip. *Barker* v. *Coffin*, 31 *Barb.* (*N. Y.*) 556.

86. Limitation not waived by checking baggage. — A passenger bought a ticket good for five days, with stop-over privileges. *Held*, that the provision limiting it to five days was valid and binding, and the fact that a baggageman checked the baggage and punched the ticket after the limitation of the time was not a waiver of the limitation. *Wentz* v. *Erie R. Co.*, 3 *Hun* (*N. Y.*) 241, 5 *T. & C.* 556.

87. —— or declarations of agent. — Where a ticket is issued, marked "good for this day only," the passenger is not entitled to use it on any subsequent day, notwithstanding the agent who sold it said afterwards that it would be good at any time, unless such agent had authority from the company to make an oral contract varying the one evidenced by the ticket. *Boice* v. *Hudson River R. Co.*, 61 *Barb.* (*N. Y.*) 611.

And such authority in the agent will not be presumed. *Boice* v. *Hudson River R. Co.*, 61 *Barb.* (*N. Y.*) 611.

Even if the conversation with the agent was formal enough to make a contract in

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*Tickets good for limited time, see notes, 9 AM. & ENG. R. CAS. 358; 21 *Id.* 283; 18 *Id.* 312; 34 *Id.* 349.

Limitation of use of ticket to continuous passage and to certain time, see note, AM. & ENG. R. CAS. 337.

Rights of passengers traveling on a ticket limited as to time, see 34 AM. & ENG. R. CAS. 349, *abstr.*

itself, it would not be binding where there was no consideration for it, being made after the ticket was sold. *Boice* v. *Hudson River R. Co.*, 61 *Barb.* (*N. Y.*) 611.

88. Not good after expiration.— Where a company sells a ticket which entitles the purchaser to ride upon its cars a certain number of times within a given period, for a price below the usual rate of fare, which ticket specifies upon its face that it is only good during such period, the purchaser having failed to ride the specified number of times within the period named is not entitled to ride upon such ticket after the period expires. *Powell* v. *Pittsburg, C. & St. L. R. Co.*, 25 *Ohio St.* 70, 13 *Am. Ry. Rep.* 477.

The plaintiff held a ticket over two roads, to expire on the tenth day of a month. He started on the return trip in time to complete the journey before the ticket expired, but without his fault the train on the first road did not arrive at the end of its line in time to make connection with an outgoing train on the other road. Plaintiff waited over night and tendered his ticket on the second road on the eleventh of the month. *Held*, that the conductor had a right to remove him and the company was not liable. If the company was liable for breach of contract because the first train was so delayed that plaintiff could not enter the train on the second road in time, that liability did not give him the right to ride on the train. *Pennsylvania Co.* v. *Hine*, 41 *Ohio St.* 276.

The purchaser of an excursion ticket which contains a stipulation that it shall be "good for one passage on the day sold only" cannot lawfully claim a passage under it at any time except on the day designated therein. *State* v. *Campbell*, 32 *N. J. L.* 309.

Where a passenger holds a ticket good over several roads, marked "good for one continuous passage to the point named in the coupon attached," the contract is not with any one company, or jointly by all the companies named, but is a separate contract by each company for a continuous passage over its road; and when it is presented to the last road on the date named when it shall expire and it is accepted, it is not necessary that the passage be completed on that day, and the passenger has a right to go through on the ticket. *Auerbach* v. *New York C. & H. R. R. Co.*, 89 *N. Y.* 281; *reversing* 60 *How. Pr.* 382.

Where a ticket limits the time within which it must be used, it will not entitle the holder to a passage after the expiration of that time. *Texas & P. R. Co.* v. *McDonald*, 2 *Tex. App.* (*Civ. Cas.*) 144.

89. Rule where trip is not continuous.*— Railroad companies are authorized to make a contract, as evidenced by a ticket sold, which provides that it is to be used within three days, and is good for a continuous trip only; and the passenger must use the ticket according to agreement. *Barker* v. *Coflin*, 31 *Barb.* (*N. Y.*) 556.— REVIEWING Cheney v. Boston & M. R. Co., 11 Metc. (Mass.) 121.

Where a passenger buys a ticket marked "good for this day and train only," he has a right to select any train on that day that goes to his place of destination, but he has no right to ride part of the way on one train, and afterwards to resume the trip on another train, and if he attempts to do so he may lawfully be ejected. *Gale* v. *Delaware, L. & W. R. Co.* 7 *Hun* (*N. Y.*) 670.

A holder of a through ticket limited on the route at expiration of the limit of his ticket should inform himself whether or not he can make the continuous passage contemplated by his ticket on any particular train. *Gulf, C. & S. F. R. Co.* v. *Henry*, 52 *Am. & Eng. R. Cas.* 230, 84 *Tex.* 678, 19 *S. W. Rep.* 870.

That the holder of a through ticket for continuous passage entered upon a train which only covered a part of the journey, and was permitted by the conductor to remain, upon the ticket, does not entitle him to have passage for the remaining distance upon the through train, the limit of the ticket having expired. *Gulf, C. & S. F. R. Co.* v. *Henry*, 52 *Am. & Eng. R. Cas.* 230, 84 *Tex.* 678, 19 *S. W. Rep.* 870.

90. When expire, generally.— A ticket entitling the purchaser to a continued passage between two given points, if used within a certain time, is good for such continued passage if the same be commenced within the time limited. *Lundy* v. *Central Pac. R. Co.*, 18 *Am. & Eng. R. Cas.* 309, 66 *Cal.* 191, 4 *Pac. Rep.* 1193.

A ticket which is dated, and bears upon its face a printed statement, "Good only two days after date," ceases to be valid after

* How far ticket may be used for passage after expiration of time limit, see note, 16 L. R. A. 471.

the expiration of the two days. *Boston & L. R. Co.* v. *Proctor*, 1 *Allen* (*Mass.*) 267.

91. Presented before midnight of last day.—A ticket was sold on the sixth day of December, marked to be used "within two days from the date sold." *Held*, that it was good until midnight of December 8, though the evidence showed that it was sold about noon on the 6th. The date of its issue is excluded. *Georgia Southern R. Co.* v. *Bigelow*, 68 *Ga.* 219.

A contract between a carrier and a passenger will, when open to construction, be so construed as to save a right and prevent a forfeiture, and the holder of a railway ticket, by the terms of which he agrees to "use the same on or before the expiration" of a day named, complies with the terms of that limitation where he enters upon the transit before midnight of the day named. *Evans* v. *St. Louis, I. M. & S. R. Co.*, 11 *Mo. App.* 463.

Where it is expressed in terms upon a ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and the acceptance of it by the conductor before midnight of that day, although the journey is not completed until the next morning, will be held to be a compliance with the condition; and where the terms of a ticket bind the passenger to a continuous journey, such requirement is fulfilled if the passenger commences his journey at an intermediate point. *Auerbach* v. *New York C. & H. R. R. Co.*, 6 *Am. & Eng. R. Cas.* 334, 89 *N. Y.* 281; *reversing* 60 *How. Pr.* 382.—FOLLOWING Brooke *v.* Grand Trunk R. Co., 15 Mich. 332. — DISTINGUISHED IN Gulf, C. & S. F. R. Co. *v.* Looney, 52 Am. & Eng. R. Cas. 197, 85 Tex. 158. REVIEWED IN Ward *v.* New York C. & H. R. R. Co., 56 Hun 268, 30 N. Y. S. R. 604, 9 N. Y. Supp. 377.

92. Over connecting lines.—A joint undertaking, executed by a company for itself and connecting lines, to transport a ticket holder to a designated place within a limited time would also apply to the time within which the journey should be commenced. The ticket holder having commenced the journey within the limit of the ticket, he would be entitled to be carried to his destination, notwithstanding the limit expired while on the continuous journey indicated by the ticket. *Gulf, C. & S. F. R. Co.* v. *Looney*, 52 *Am. & Eng. R. Cas.* 197, 85 *Tex.* 158, 19 *S. W. Rep.* 1039.

Where a limit of four days is shown to be a reasonable time in which to complete a journey, a ticket holder will be bound by it, as the journey could have been made in ordinary railroad time within the limit. The ticket, so far as obligatory upon defendant, required it to carry the passenger if the ticket was presented within the time specified. Defendant was not liable for the delay of an intermediate line whereby the ticket holder was prevented from reaching the line of defendant in time to avail himself of his ticket. *Gulf, C. & S. F. R. Co.* v. *Looney*, 52 *Am. & Eng. R. Cas.* 197, 85 *Tex.* 158, 19 *S. W. Rep.* 1039.

93. —— expiring on Sunday.—If a contract matures on Sunday, the performance of it is to be exacted on the next day. So where a passenger holds a limited ticket which expires on Sunday, and he is prevented from riding on that day because the company runs no trains, he is entitled to a passage on the next day. *Little Rock & Ft. S. R. Co.* v. *Dean*, 21 *Am. & Eng. R. Cas.* 279, 43 *Ark.* 529, 51 *Am. Rep.* 584.

The above rule is more applicable to a contract for carriage than to ordinary contracts, for the reason that the time for performance is imposed by the company by way of limitation, and the contract should be so construed as to save the right and prevent a forfeiture if it can be done; and a regulation of the company requiring the conductor to refuse such tickets after the last day of their limit cannot affect the passenger's legal rights. *Little Rock & Ft. S. R. Co.* v. *Dean*, 21 *Am. & Eng. R. Cas.* 279, 43 *Ark.* 529, 51 *Am. Rep.* 584.

94. "Good for this trip only."—A ticket marked "good for this trip only" is not limited to any particular day or train. The condition relates to the time of using the ticket and not to the journey; and the passenger may use it on the date when it is issued, or on any subsequent date. *Pier* v. *Finch*, 24 *Barb.* (*N. Y.*) 514.

95. Statute making ticket good for six years.—The provision of Me. Act of 1871, ch. 223, which declares that no railroad company shall limit the right of a ticket holder to any given train, but that such ticket holder shall have the right to travel on any train, whether regular or express train, and to stop at any of the stations at which such train stops, and that such ticket shall be good for a passage as above for six years from the day it is first issued, applies

to a foreign company doing business in the state, and it must conform to the statute. *Dryden* v. *Grand Trunk R. Co.*, 60 *Me.* 512. — DISTINGUISHED IN Lafarier *v.* Grand Trunk R. Co., 84 Me. 286.

A ticket, bought in another state for a passage thence to a point in Massachusetts, was by a statute of the former state good for six years, and allowed passengers to stop over at will. The passenger stopped at an intermediate point in Massachusetts and received a stop-over check stating on its face that it was good only for ten days. After that limit had expired, and within the six years, he renewed his journey and tendered such check in payment of his fare, but it was refused. *Held*, that the statute only referred to transportation in the other state, and that the company could maintain an action in Massachusetts against the passenger to recover his fare. *Boston & M. R. Co.* v. *Trafton*, 151 *Mass.* 229, 23 *N. E. Rep.* 829.

6. *Mileage Tickets.*

96. Statute compelling issuance— Massachusetts Act of 1892, ch. 389, provides that railroad companies shall sell to all persons applying therefor thousand-mile tickets, at the rate of twenty dollars each, and redeem all such tickets, or any part thereof, upon presentation by any other railroad corporation, and accept from all persons for passage over their own lines all such tickets issued by any other railroad corporations operating lines within the state. *Held*, that the act is void as applying and appropriating individual property to the public use without the owner's consent and without legal provision for a reasonable compensation therefor. (Knowlton and Holmes, JJ., dissenting.) *Attorney-General* v. *Old Colony R. Co.*, 56 *Am. & Eng. R. Cas.* 59, 160 *Mass.* 62, 35 *N. E. Rep.* 252.

97. Conditions and stipulations, generally.—A company owning one road and leasing another, the two forming a continuous line between Indianapolis and St. Louis, sold a thousand-mile ticket authorizing the purchaser to travel 300 miles upon one of said roads and 700 miles upon the other, having black figures representing the one road and red figures the other, with directions to conductors to punch out the black figures representing the number of miles traveled on the western division of the road, and the red figures for the miles traveled on the eastern end. On the back of the ticket were printed conditions on which the ticket was issued, signed by the purchaser, among which was a stipulation that the miles traveled each trip should be indicated by the conductor punching out corresponding figures on the opposite side. After all the red figures had been punched out, the purchaser offered the ticket for passage on a train on the eastern division, but the conductor refused to accept it, though there were black figures not punched out amounting to the number of miles for which it was offered, and the holder of the ticket, refusing to pay his fare, or to leave the car unless forcibly ejected, was put off by the conductor and his assistants. *Held*: (1) that the terms expressed on the ticket constituted a contract between the seller and the purchaser of the ticket; (2) that the stipulation for punching black or red figures, according to the division traveled upon, was a part of the contract, and operative against the passenger—not a mere direction to the conductor; (3) that when the purchaser had traveled on the eastern part of the line a sufficient number of miles to exhaust the red figures, the ticket gave him no claim to be carried any more on that part of the road; and that his refusal to pay fare or to leave the car on request justified his expulsion therefrom. *Terre Haute & I. R. Co.* v. *Fitzgerald*, 47 *Ind.* 79, 8 *Am. Ry. Rep.* 282.

98. —— as to stamping and signing. — A company sold and delivered a thousand-mile ticket to a purchaser, who paid in money the usual rate to the class of travelers to which he belonged, and who secured it in ignorance of the following directions printed thereon: "Conductors will not honor this ticket unless properly stamped and signed by the purchaser, and will strictly enforce the above conditions." Instructions of the company to its ticket agents, and the uniform custom regulating the sale of such tickets, required that purchasers sign certain conditions printed thereon before delivery to them. The ticket in question was delivered to the purchaser, and several times honored by the company's conductors, without requiring him to sign the conditions. *Held*, that the company thereby waived such requirement, and its conductor was not justified in ejecting the purchaser from a car by reason of his re-

fusal to sign the ticket, or to pay the usual fare in money for his proposed passage. *Kent* v. *Baltimore & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 125, 45 *Ohio St.* 284, 10 *West. Rep.* 457, 12 *N. E. Rep.* 798.

99. —— as to identification of purchaser. — Conditions in a mileage ticket that "the purchaser agrees to sign his name in the presence of the conductor each time before detachment is made," and that the ticket shall be forfeited "unless the proper signature is given" do not authorize the conductor to decide for the passenger, as well as for the company, whether the passenger is the one who purchased the ticket. *Pittsburgh, C., C. & St. L. R. Co.* v. *Russ*, 57 *Fed. Rep.* 822.

A thousand-mile ticket containing the purchaser's signature provided that when presenting the ticket for passage the purchaser, if requested, should sign his name and "otherwise identify" himself. *Held*, that where a conductor to whom the purchaser presented the ticket arbitrarily refused to permit him to sign his name, accompanying the refusal with gross insult, the conductor had no right to require any further identification. *Norfolk & W. R. Co.* v. *Anderson*, 58 *Am. & Eng. R. Cas.* 53, 90 *Va.* 1, 17 *S. E. Rep.* 757.—DISTINGUISHING Norfolk & W. R. Co. *v.* Wysor, 26 Am. & Eng. R. Cas. 234, 82 Va. 250. QUOTING Richmond, T. & P. R. Co. *v.* Ashby, 79 Va. 130.

100. —— as to use on freight train. —A railroad mileage ticket, upon which is expressed the condition, expressly assented to by the purchaser, that it shall not be good for passage on freight trains, does not entitle such purchaser to ride on a freight train, although the carrier, subsequent to the purchase of the ticket, has advertised that passengers with tickets may ride on such trains. *Dunlap* v. *Northern Pac. R. Co.*, 35 *Minn.* 203, 28 *N. W. Rep.* 240.

101. —— as to time of expiration. —A mileage ticket stipulated that it should be good only for a certain period, and that, if presented after the expiration of that time, the conductor should take up the ticket and collect fare. *Held*, that its use a number of times in violation of the condition would not estop the company from taking it up and ejecting the passenger from its train upon refusal to pay fare. *Sherman* v. *Chicago & N. W. R. Co.*, 40 *Iowa* 45, 8 *Am. Ry. Rep.* 410.

Plaintiff held a thousand-mile ticket which was marked "good for six months only." After the lapse of that time he entered a baggage car and tendered his ticket, which was refused and he was put off after refusing to pay fare. *Held*, that the ticket was void; that plaintiff was not a passenger but a trespasser on the car, and therefore the statute which provides that passengers can only be put off near a station or dwelling house had no application. *Lillis* v. *St. Louis, K. C. & N. R. Co.*, 64 *Mo.* 464. — REVIEWING Union Pac. R. Co. *v.* Nichols, 8 Kan. 505; Robertson *v.* New York & E. R. Co., 22 Barb. (N. Y.) 92.— DISTINGUISHED IN Brown *v.* Memphis & C. R. Co., 1 Am. & Eng. R. Cas. 247, 7 Fed. Rep. 51; Brown *v.* Hannibal & St. J. R. Co., 66 Mo. 588.

7. *Tickets over Connecting Lines.**

102. Interpretation and effect of through tickets, generally.† — A contract for one continuous emigrant passage from Omaha to San Francisco is not a contract to carry one person from Omaha to an intermediate station, and a second to another station, and so on, but only a contract to carry the same person through the entire route. *Cody* v. *Central Pac. R. Co.*, 4 *Sawy.* (*U. S.*) 114.

A through ticket, that is, a ticket over more than one road, with a corresponding baggage check, implies a special undertaking to carry the passenger and his baggage to the place of destination, whether over the initial road or another. *Illinois C. R. Co.* v. *Copeland*, 24 *Ill.* 332. — NOT FOLLOWED IN Crawford *v.* Southern R. Assoc., 51 Miss. 222. REVIEWED IN Gray *v.* Jackson, 51 N. H. 9.

103. Coupons deemed distinct tickets for each line.‡—Through tickets in the form of coupons, sold to a passenger by one company, entitling him to pass over

* See also CARRIAGE OF PASSENGERS, **499-519.**

† Sale by company of through ticket beyond its own line, see note, 18 AM. & ENG. R. CAS. 304. Through contract for passenger transportation over connecting line, see note, 18 AM. & ENG. R. CAS. 345. Duty and liability of the several companies to persons traveling on through coupon tickets, see 26 AM. & ENG. R. CAS. 263, *abstr.*

‡ Through tickets regarded as separate contract over each road, see note, 2 L. R. A. 186.

successive connecting lines, in the absence of an express agreement create no contract with the company selling the same to carry him beyond the line of its own road, but, so far as the passenger is concerned, they are distinct tickets for each road, sold by the first company as agent for the others. *Pennsylvania R. Co.* v. *Connell*, 18 *Am. & Eng. R. Cas.* 339, 112 *Ill.* 295, 54 *Am. Rep.* 238.

Through tickets over several distinct lines of transportation, issued in the form of coupons and recognized by the proprietors of each line [illegible] to be regarded as distinct tickets for each line, sold by one as agent for the others. The rights and liabilities of the parties are the same as if the purchase had been made at the ticket offices of the respective lines. But railroads may so issue their tickets and so conduct themselves as to have the purchasers understand that they undertake for the whole route, in which case they will be held responsible to that extent. *Knight* v. *Portland, S. & P. R. Co.*, 56 *Me.* 234.—REVIEWED IN Gray *v.* Jackson, 51 N. H. 9.

A coupon ticket not limited to a continuous passage, showing on its face that it was issued by a company as principal as to its own lines but as agent as to the other lines to be passed over, evinces a contract entire as to a passage over the line of each road, which, when begun, must be completed, but severable as between the different roads. If such ticket contains no provision against its transfer, but merely purports to be sold at reduced rates, it is assignable at the end of any division. *Nichols* v. *Southern Pac. Co.*, 52 *Am. & Eng. R. Cas.* 205, 23 *Oreg.* 123, 31 *Pac. Rep.* 296, 18 *L. R. A.* 55. —QUOTING Drummond *v.* Southern Pac. Co., 7 Utah 118, 25 Pac. Rep. 733; Cody *v.* Central Pac. R. Co., 4 Sawy. (U. S.) 115. RECONCILING Walker *v.* Wabash, St. L. & P. R. Co., 15 Mo. App. 333. REVIEWING Little Rock & Ft. S. R. Co. *v.* Dean, 21 Am. & Eng. R. Cas. 279, 43 Ark. 530.

A passenger purchased a coupon ticket over several connecting lines, and was informed by the agent that the ticket was good for six days, and would permit him to stop off. He accordingly stopped off at M., and afterwards, before the expiration of the ticket's limitation, proceeded to S., the terminus of one of the roads over which a coupon attached to his ticket entitled him to ride. After leaving S., and while on the road to H., over a different road but operated by the first road, he tendered his ticket to the conductor, who was the same as on the train from M. to S. The conductor refused the ticket, and ejected the passenger from the train. He afterwards boarded another train, and his ticket was accepted. He thereupon brought suit for trespass against the road which sold him the ticket. *Held:* (1) that through tickets in the form of coupons, entitling the holder to pass over successive roads, are regarded as distinct tickets for each road, sold by the agent of the first company as agent for the others; (2) that when such a ticket has been purchased in good faith from an agent acting within the general scope of his employment, it is the duty of the several companies named therein to honor it until it is used or expires by its own limitation; and such company is bound by the representations of the agent as to stop-over privileges; (3) that the evidence was sufficient to warrant the jury in finding that the company selling the ticket was the agent for the other company, and that the ticket was good and the passenger wrongfully ejected; (4) that testimony that the train from which the passenger was ejected was the same train, in charge of the same conductor, which carried the passenger on defendant's road, and that defendant company claimed the proportion of fare on plaintiff's ticket, as afterwards accepted, over the road where he was ejected, is evidence sufficient to be submitted to the jury that defendant company was operating the other road, and that the alleged trespass was committed by an employé of defendant company. *Young* v. *Pennsylvania R. Co.*, 28 *Am. & Eng. R. Cas.* 114, 115 *Pa. St.* 112, 7 *Atl. Rep.* 741.

104. Power and authority to sell. —A company which, under an agreement with a connecting line, sells a ticket over its own line to which is attached a coupon entitling the holder to passage one way over the connecting line, cannot sell a return coupon over the connecting line. *Anderson* v. *New York & N. H. R. Co.*, 1 *Fed. Cas.* 845, 6 *Am. Law Rev.* 754.

105. Liability of issuing carrier.* —One carrier may sell to a passenger its own ticket and at the same time the ticket of connecting lines, entitling the passenger

* Liability of company selling through ticket for injury to passenger on connecting line, see note, 1 AM. ST. REP. 200.

to through transportation over all the lines, and may receive the fare for the whole distance, without becoming responsible for the carriage of the passenger beyond its own line. *Louisville & N. R. Co.* v. *Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea* (*Tenn.*) 38.

Tickets for the several lines are in such cases known as coupon tickets, and each ticket, apparently without reference to the form, is considered a separate contract of the carrier over whose route it entitles the holder to be carried. *Louisville & N. R. Co.* v. *Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea* (*Tenn.*) 38.

106. —— limiting liability to its own line.—Where a ticket is sold by one company for travel over its own and connecting lines, on the face of which ticket the responsibility of the selling company is limited to its own line, and an action is afterwards brought against the selling company for a refusal to accept the ticket while the holder is traveling on the road of another company, and subject to its regulations, though in a car of the selling company in charge of a conductor in the uniform of that company, it is a question for the jury whether the conductor was, at the time of the alleged injury, in the employ and acting under the directions of defendant company. *Pennsylvania R. Co.* v. *Spicker*, 23 *Am. & Eng. R. Cas.* 672, 105 *Pa. St.* 142.

Where it is expressly stipulated that the selling carrier acts as the agent of the connecting carriers and will not be responsible beyond its own line, each coupon is a separate contract for the line for which issued; and the ticket does not imply a joint obligation resting upon each of the companies. *Gulf, C. & S. F. R. Co.* v. *Looney*, 52 *Am. & Eng. R. Cas.* 197, 85 *Tex.* 158, 19 *S. W. Rep.* 1039.

Plaintiff took a tourist ticket from a company on the faith of its programme of tourist ticket arrangements. On the back was printed: "This ticket is subject to the regulations and conditions stated in the company's time tables and bills." The monthly time-bill stated that the company did not "hold itself responsible for any delay, detention, etc., arising off its lines, or from the acts or defaults of other parties, nor for the correctness of the times over other lines or companies." Plaintiff was detained by the lateness of another company's train. *Held*, that he was bound by the monthly time-table, and could not recover the expenses incurred through such detention. *Thompson* v. *Midland R. Co.*, 34 *L. T.* 34, 3 *Ry. & C. T. Cas.* xxiii.

107. —— refunding money upon refusal to honor.*—Where a company issues a through ticket calling for passage beyond its own line which a connecting line refuses to accept, the company selling the ticket must furnish a local ticket or the amount of money necessary to procure one, and failing in this a passenger has a right of action against it for a breach of contract; and where there is no limit on the right to transfer the ticket it may be used by a transferee. *Hudson* v. *Kansas Pac. R. Co.*, 3 *McCrary* (*U. S.*) 249, 9 *Fed. Rep.* 879.

108. Liability of subsequent carrier.—Where a passenger buys a round-trip ticket for passage over two roads, with a special agreement attached that he shall sign his name before the agent at the terminal point previous to the commencement of the return trip, such special agreement is controlling, and if he fails so to sign the company may eject him. *Moses* v. *East Tenn., V. & G. R. Co.*, 73 *Ga.* 356.

The ticket being for the purpose of passing him over two roads, each has the right to stand on the contract; and if one passes him, the other is not bound thereby to pass him also, in the teeth of the special contract. *Moses* v. *East Tenn., V. & G. R. Co.*, 73 *Ga.* 356.

It seems that a company cannot be called upon to answer for damages for failure to carry a passenger on a ticket issued by another company, in the absence of any allegation that the issuing company was a joint contractor, or had the right to issue such ticket. *Matthews* v. *Charleston & S. R. Co.*, 38 *So. Car.* 429, 17 *S. E. Rep.* 225.

109. Duration.—Where a passenger buys a ticket good over two roads it is not incumbent on him to make a continuous journey. Having used the ticket over the first road, he is at liberty to begin the journey over the second road when he pleases. A delay of two months will not defeat his right to be carried on the ticket. *Brooke* v. *Grand Trunk R. Co.*, 15 *Mich.* 332.—FOLLOWED IN Auerbach *v.* New York C. & H. R. R. Co., 6 Am. & Eng. R. Cas. 334, 89 N. Y. 281.

* Rights of passengers traveling on through tickets, see note, 35 AM. Rep. 708.

III. FARES.

1. *Regulation of Rates.*

110. By the carrier. — A railroad may establish fares, and also regulate the time, place, and manner of receiving them, and may direct to whom payment shall be made. *State* v. *Chovin*, 7 *Iowa* 204.

A company is under no general obligation to carry any one for less than the usual rates, and if it does so as a matter of special accommodation, any reasonable condition imposed upon the passengers should be performed; and if such passengers neglect to perform such conditions they cannot complain if the regular fares are demanded. *Goetz* v. *Hannibal & St. J. R. Co.*, 50 *Mo.* 472, 3 *Am. Ry. Rep.* 427.

111. By carrier's agents.—Rates of fare need not be established by the board of directors and proved by a record of their action. Agents, other than the directors, may be empowered to regulate such matters. *Jeffersonville R. Co.* v. *Rogers*, 28 *Ind.* 1.

112. Manner of regulating.—The distance and manner in which a passenger is to be carried over a road is a matter of contract, entered into between him and the company, and unless prohibited by law, a company has the right to charge higher fares to way stations than their proportion of the distance. *State* v. *Overton*, 24 *N. J. L.* 435.

There is no law which prevents a carrier from prescribing a tariff of prices by which it will charge a passenger who has no baggage a less sum than a passenger with baggage, or increase the charge according to the amount of the baggage, except that the charge must be just and reasonable, and must be proportioned to the value of the services rendered and the risk incurred. *Nevins* v. *Bay State Steamboat Co.*, 4 *Bosw.* (*N. Y.*) 225.

When the proper notice of such a regulation is given to the passenger, or when from the uniform and notorious usage of business he is chargeable with such notice, it is reasonable and just that he be held bound thereby; and a carrier may require a disclosure of the contents and value of the baggage and may charge accordingly. *Nevins* v. *Bay State Steamboat Co.*, 4 *Bosw.* (*N. Y.*) 225.

113. Regulation by ordinance. — A company was authorized to build a short suburban road, to extend into a city, subject to such restrictions and conditions as the city might prescribe. The city, by an ordinance, fixed the fare at five cents for each passenger for all distances within the city limits. Subsequently an act was passed authorizing the company to collect not more than thirty cents for a ride over the entire road, and not more than six cents for each mile or fraction thereof for way passengers on any portion of the road. *Held*, that the company could not charge a passenger to the city from a place less than a mile from the city more than eleven cents, that is, the five cents for the city ride and the six cents for the fractional ride outside of the city. *Baltimore & Y. Turnpike Road* v. *Boone*, 45 *Md.* 344.

And as the limit was fixed by law, the company could not exercise its discretion as to the amount of the fare, and could not charge more than the fixed amount by giving a "drawback." *Baltimore & Y. Turnpike Road* v. *Boone*, 45 *Md.* 344.

114. Power of state to regulate, generally.*—The right of a state reasonably to limit the amount of charges by a railroad for the transportation of persons or property within its jurisdiction cannot be granted away by the legislature, unless by words of positive grant, or words equivalent in law; and a statute which grants to a company the right "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation" does not deprive the state of its power to act upon the reasonableness of tolls and charges. *Stone* v. *Farmers' L. & T. Co.*, 116 *U. S.* 307, 6 *Sup. Ct. Rep.* 334, 388, 1191.

But this power of regulation is not without limit. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a company to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. *Stone* v. *Farmers' L. & T. Co.*, 116 *U. S.* 307, 6 *Sup. Ct. Rep.* 334, 388, 1191. See also *Chicago, M. & St. P. R. Co.*

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* See also RAILWAY COMMISSIONERS, **1-17.**
Power of state to regulate freights and fares, see notes, 9 L. R. A. 754; 11 *Id.* 452.

v. *Minnesota*, 134 *U. S.* 418, 10 *Sup. Ct. Rep.* 462, 702.

A legislature has power to fix rates for transportation of passengers by railways, and the extent of judicial interference is protection against unreasonable rates. *Chicago & G. T. R. Co.* v. *Wellman*, 49 *Am. & Eng. R. Cas.* 1, 143 *U. S.* 339, 12 *Sup. Ct. Rep.* 400. — QUOTED IN Mercantile Trust Co. *v.* Texas & P. R. Co., 50 Am. & Eng. R. Cas. 559, 51 Fed. Rep. 529.

It is competent for the legislature to prescribe a fixed and definite compensation for the services of common carriers. *People* v. *Budd*, 117 *N. Y.* 1, 22 *N. E. Rep.* 670, 26 *N. Y. S. R.* 533.—FOLLOWING Sawyer *v.* Davis, 136 Mass. 239; Munn *v.* Illinois, 94 U. S. 113.

Where the right of the legislature to regulate fares or charges on railroads is reserved by charter, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legislature to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But where there is no reservation in the charter the legislature may, nevertheless, interfere and prescribe or limit the charges. *People* v. *Budd*, 117 *N. Y.* 1, 22 *N. E. Rep.* 670, 26 *N. Y. S. R.* 533.

Under its reserved power to alter or repeal charters, a state legislature may alter and regulate the fares charged by a carrier formed by the consolidation of different roads under Ohio Act of April 10, 1856. *Shields* v. *State*, 26 *Ohio St.* 86. — FOLLOWED IN Mansfield, C. & L. M. R. Co. *v.* Brown, 26 Ohio St. 223.

115. Particular statutes construed.—(1) *Arkansas.*—Ark. Act of April 4, 1887, regulating the rates of charges for the carriage of passengers, is constitutional. *St. Louis & S. F. R. Co.* v. *Ryan*, 56 *Ark.* 245, 19 *S. W. Rep.* 839.— DISTINGUISHING Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418. FOLLOWING St. Louis & S. F. R. Co. *v.* Gill, 54 Ark. 101.

(2) *Michigan.*—Michigan Act of June 28, 1889, fixing the amount per mile to be charged for the transportation of passengers, does not violate any provision in the Constitution of the United States, so far as disclosed by the facts in this case. *Chicago & G. T. R. Co.* v. *Wellman*, 49 *Am. & Eng. R. Cas.* 1, 143 *U. S.* 339, 12 *Sup. Ct. Rep.* 400.

(3) *Missouri.* — The provision of Mo. Const. art. 12, § 14, that railways within the state are public highways, does not authorize one to ride on a train without payment of fare and in defiance of the regulations of the company. *Farber* v. *Missouri Pac. R. Co.*, 116 *Mo.* 81, 22 *S. W. Rep.* 631.—QUOTING Hyde *v.* Missouri Pac. R. Co., 110 Mo. 272.

(4) *New York.*—It was the purpose of the General Railroad Act of 1850 to confer on existing companies the same duties, privileges, and liabilities as on the companies created thereunder. Therefore an existing corporation which was limited by its charter to a rate of fares less than that fixed by the act, that is, three cents a mile, has a right to increase its rates to three cents. *Johnson* v. *Hudson River R. Co.*, 49 *N. Y.* 455, 2 *Am. Ry. Rep.* 285; *reversing* 2 *Sweeny* 298.— DISTINGUISHING Clarkson *v.* Hudson River R. Co., 12 N. Y. 304.

The limitation contained in the Act of 1846, ch. 195, as to the amount of fare which defendant road might collect from passengers, was expressly limited to that portion of its own road within the state, and does not apply to a road run by defendant under lease. *Palm* v. *New York, N. H. & H. R. Co.*, 35 *N. Y. S. R.* 457, 26 *J. & S.* 502, 12 *N. Y. Supp.* 554.

But the above limitation does not extend to a spur track of half a mile over lands of the lessor company to a race track, for the purpose of carrying persons during the racing season, and a charge of fifty cents for the round trip of five or six miles each way is not a violation of the statute which fixed the limit at three cents a mile. *Palm* v. *New York, N. H. & H. R. Co.*, 42 *N. Y. S. R.* 219, 28 *J. & S.* 162, 17 *N. Y. Supp.* 471.

The provision of the General Railroad Act of 1850 that railroad companies should not charge more than three cents a mile for the transportation of a passenger and his ordinary baggage, under a penalty, does not apply to ordinary horse railroads in cities, but only to railroads whose cars are propelled by steam, which transport passengers and their baggage from one fixed place or station to another, without stopping at any intermediate point. *Hoyt* v. *Sixth Ave. R. Co.*, 1 *Daly* (*N. Y.*) 528. — APPLIED IN Mayor of N. Y. *v.* Third Ave. R. Co., 3 N. Y. S. R. 181.

(5) *Ohio.*—Whether the rate of passenger fare fixed by a company under the Act of 1848, § 12 (S. & C. 271), for distances less than thirty miles be reasonable or not is a question of fact for the jury, to be determined under such instructions by the court as the circumstances of the particular case may require. *Smith* v. *Pittsburg, Ft. W. & C. R. Co.*, 23 *Ohio St.* 10.—FOLLOWED IN Peters *v.* Marietta & C. R. Co., 18 Am. & Eng. R. Cas. 492, 42 Ohio St. 275.

Under the Act of March 30, 1875 (72 L. 143), which provides that "any corporation operating a railroad, in whole or in part in this state, may demand and receive for the transportation of passengers on said road not exceeding three cents per mile for a distance of more than eight miles; provided the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance," a charging of twenty-five cents for carrying a passenger a distance less than eight miles and more than six miles will not, as a matter of law, be declared unreasonable. *Cincinnati, S. & C. R. Co.* v. *Skillman*, 13 *Am. & Eng. R. Cas.* 31, 39 *Ohio St.* 444.

(6) *Virginia.*—A state has the right to limit reasonably the amount of charges for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. *Norfolk & W. R. Co.* v. *Pendleton*, 86 *Va.* 1004, 11 *S. E. Rep.* 1062.

A company succeeding to the rights and liabilities of another is subject to a section of the former's charter which provides that it shall be subject to all the laws of the state, whereof the act of 1853 prescribing what rates of toll shall be charged for transportation is one, notwithstanding any provision in the charter granted to its predecessor, giving to it the power to regulate its own tolls until a certain event, which has never occurred. *Norfolk & W. R. Co.* v. *Pendleton*, 86 *Va.* 1004, 11 *S. E. Rep.* 1062. —FOLLOWED IN Norfolk & W R. Co. *v.* Pendleton, 88 Va. 350.

116. Posting schedule of passenger rates—Florida.—A rule adopted by the railroad commission requiring each company to post in a conspicuous place, and keep continuously posted, in each of its stations, a copy of the schedule of its freight and passenger rates, revised and adopted by the commission for the use of the company, rules and regulations, official classifications, and table of distances, means that the publication shall be in placard or bill form, and that the placards shall be so attached to something in a conspicuous place in each station that they can, in the position in which they are placed, or without being removed, be read conveniently by the public, and that they shall be kept posted in this manner continuously. Nailing up by one corner in a conspicuous place in a station, and in such manner as to be accessible to every one, a pamphlet of about eleven printed pages, containing the rules and regulations governing the transportation of passengers and freight, or a similar pamphlet containing the classifications, is not a posting within the meaning of the rule; nor is the binding of these pamphlets and the schedules of freight and passenger rates together and placing them conspicuously upon a shelf desk in the station agent's office such a posting. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

Where a schedule of passenger rates is headed "Pensacola and Atlantic Railroad Ticket Rates," and it states the full sum charged from each station to any other station, that half rates will be charged for children between designated ages traveling with parents or guardian, and that no charge will be made for those under a specified age traveling in the same manner, and gives the extra charge to be collected of passengers who omit to purchase tickets, and it is not denied that the charges correspond in amount with the passenger rates revised and adopted by the commission for the use of the company, and it does not appear that passenger rates have ever been prescribed or adopted by the commission in any other form for the company, the schedule will be held sufficient as to its contents, and the company cannot be required in a proceeding by mandamus to state in such schedule the rate per mile or the distances between stations, in the absence of any law or any rule of the commission requiring it. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

General rule 4, adopted by the commission September 23, 1889, does not require that the schedule of passenger rates shall state the distances between stations. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am.*

& Eng. R. Cas. 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

A table which does not of itself or upon its face give the distance between any two stations on a railroad is not a table of distances within the meaning intended by such rule of the commission. It is not sufficient if the schedule merely supply data for computing distances between stations. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

The fact that a schedule of passenger rates is in two parts, or on two cards instead of one, is not, where the two cards may be posted together, and so posted read as one, of itself a violation of the rule requiring the schedule to be posted. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

In the absence of a rule of the commission, or a law, prescribing the size of type in which a schedule of passenger rates or table of distances shall be printed for posting, a court cannot by mandamus direct in what size type they shall be printed. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

Passenger rule 6 and freight rules 3 and 11 of the rules adopted by the commission September 23, 1889, are not inapplicable to the Pensacola and Atlantic railroad company. They should be posted as other rules applicable to it. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

Where a company has, under freight rule 3 of the commission, the right to make at its discretion special rates reduced below commission rates for particular persons and places for temporary use, such special rates need not be posted under the requirements of general rule 4 of the commission. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

It is the duty of companies not only to post, but to keep continuously posted, as provided by general rule 4, whatever falls within its provisions. Furnishing the posters to agents, with instructions to post, does not answer the public duty imposed upon companies. *State ex rel.* v. *Pensacola & A. R. Co.*, 46 *Am. & Eng. R. Cas.* 704, 27 *Fla.* 403, 9 *So. Rep.* 89.

2. Payment and Collection.

117. Tender of United States notes.—In the absence of special statute providing for payment in coin, a tender by a passenger of payment of his fare in legal tender notes is sufficient. *Tarbell* v. *Central Pac. R. Co.*, 34 *Cal.* 616.

Under Act of Congress of Feb. 25, 1862, declaring that the notes thereby authorized shall "be lawful money and a legal tender for all debts, public and private, within the United States, except duties on imports and interest," a company is bound to accept such notes at their face value in payment of fare upon its railroad, when payment is demanded in advance of transportation on such road. *Lewis* v. *New York C. R. Co.*, 49 *Barb.* (*N. Y.*) 330.

118. Using ticket in reverse direction. — Where a passenger deliberately enters a train, knowing that his ticket entitles him to be carried in the reverse direction from that in which he proposes to go, and with ample opportunity to procure another, the conductor may refuse to honor such ticket and has the right to collect fare. *Godfrey* v. *Ohio & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 8, 116 *Ind.* 30, 15 *West. Rep.* 533, 18 *N. E. Rep.* 61.

119. Passenger carried beyond destination.* — Plaintiff purchased a round-trip ticket at reduced rates, and signed a contract to make a continuous journey each way. On returning he got on a train which according to schedule did not stop at his destination. The conductor punched and took up his ticket, but refused to stop the train and carried plaintiff to the next station, some miles beyond, charging regular fare for the extra distance. Plaintiff resided near the station, but testified that he did not know that the train did not stop at his station. *Held*, that he was not entitled to recover. *Trotlinger* v. *East Tenn., V. & G. R. Co.*, 13 *Am. & Eng. R. Cas.* 49, 11 *Lea* (*Tenn.*) 533.

If a passenger, holding a return ticket, on the return journey goes beyond the station named to another station, he must pay the additional fare even though the price of a return ticket from the departure station to the further station is the same. *Great Western R. Co.* v. *Pocock*, 41 *L. T.* 415.

120. Who responsible for child's fare. — If a conductor finds a child sitting beside a female passenger, and knows that its father is in the car, or could know upon

* See also CARRIAGE OF PASSENGERS, **250, 251.**

proper inquiry, he has no right to hold the female passenger responsible for the child's fare. *Philadelphia, W. & B. R. Co.* v. *Hoeflich*, 18 *Am. & Eng. R. Cas.* 373, 62 *Md.* 300, 50 *Am. Rep.* 223.

By 7 & 8 Vict. c. 85, § 6, railway companies must carry by certain trains children under three years of age free of charge. *Austin* v. *Great Western R. Co.*, *L. R.* 2 *Q. B.* 442, 8 *B. & S.* 327, 36 *L. J. Q. B.* 201, 15 *W. R.* 863, 16 *L. T.* 320.

121. Allowing discount for purchase of tickets.—It is a reasonable regulation for a carrier to fix rates of fare by a tariff posted at the stations, and to allow a uniform discount on these rates to those who purchased tickets before entering the cars. *State* v. *Goold*, 53 *Me.* 279.

A regulation of a carrier, that a passenger who shall purchase a ticket before entering its cars shall be entitled to a discount from the advertised rates of fare, but if such ticket is not purchased, the full rate shall be charged, is a reasonable regulation, and does not violate a rule prescribed by statute, that the rates shall be the same for all persons between the same points. *Swan* v. *Manchester & L. R. Co.*, 6 *Am. & Eng. R. Cas.* 327, 132 *Mass.* 116, 42 *Am. Rep.* 432.

122. Right to charge extra when fare is paid on train.* — Where a passenger gets on a train without a ticket and pays extra for riding to a certain station, but upon getting there changes his mind and decides to ride further, he may be required to pay extra again. *Chicago, B. & Q. R. Co.* v. *Parks*, 18 *Ill.* 460.

A company has a right to make and enforce a rule requiring passengers who do not procure tickets to pay ten cents in addition to the regular fare. *Lake Erie & W. R. Co.* v. *Quisenberry*, 48 *Ill. App.* 338.

A company may discriminate in its passenger fares in favor of those who purchase tickets before entering the cars. *Jeffersonville R. Co.* v. *Rogers*, 28 *Ind.* 1.—DOUBTING AND DISTINGUISHING Crocker *v.* New London, W. & P. R. Co., 24 Conn. 249. QUOTING Nellis *v.* New York C. R. Co., 30 N. Y. 505.—APPROVED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432. RECONCILED IN Lake Erie & W. R. Co. *v.* Fix, 11 A[illegible] Eng. R. Cas. 109, 88 Ind. 381, 45 Am 464.—*Indianapolis, P. & C. R. Co.* v. *Rinard*, 46 *Ind.* 293, 6 *Am. Ry. Rep.* 328. *Toledo, W. & W. R. Co.* v. *Wright*, 68 *Ind.* 586.—DISAPPROVED IN Phettiplace *v.* Northern Pac. R. Co., 84 Wis. 412. DISTINGUISHED IN Lake Erie & W. R. Co. *v.* Fix, 11 Am. & Eng. R. Cas. 109, 88 Ind. 381, 45 Am. Rep. 464. REVIEWED IN Lake Erie & W. R. Co. *v.* Mays, 4 Ind. App. 413.—*Evansville & I. R. Co.* v. *Gilmore*, 1 *Ind. App.* 468, 27 *N. E. Rep.* 992.

A regulation of a company, whereby passengers who pay their fare upon the train are required to pay a higher rate than those who purchase tickets before entering the cars, is reasonable, and the company will be protected in its enforcement. *Wi[illegible]* *Louisville & N. R. Co.*, 26 *Am. & E[illegible]* *Cas.* 258, 83 *Ky.* 511. *McGowen* v. *Morg[illegible]* *L. & T. R. & S. Co.*, 39 *Am. & Eng. R. Cas.* 460, 41 *La. Ann.* 732, 6 *So. Rep.* 606, 5 *L. R. A.* 817. *State* v. *Hungerford*, 34 *Am. & Eng. R. Cas.* 265, 39 *Minn.* 6, 38 *N. W. Rep.* 628. *Hilliard* v. *Goold*, 34 *N. H.* 230.

Under a statute authorizing a company "to fix, regulate, and receive the tolls and charges by them to be received for the transportation of property or persons," it may establish two rates of fare, discriminating between cases where fare is paid to a conductor and where a ticket is purchased. *Bordeaux* v. *Erie R. Co.*, 8 *Hun* (*N. Y.*) 579.

123. When ticket might have been purchased.—A rule requiring a passenger traveling without a ticket, or on a ticket which has been forfeited, to pay for the part of the route already passed over as well as the part yet to be traveled is a reasonable rule; and on his failure or refusal to comply with it, the passenger may be ejected. *Manning* v. *Louisville & N. R. Co.*, 95 *Ala.* 392, 11 *So. Rep.* 8.—APPLYING Ward *v.* New York C. & H. R. R. Co., 56 Hun. (N. Y.) 268. REVIEWING Alabama G. S. R. Co. *v.* Carmichael, 90 Ala. 19.

Passengers who fail to purchase tickets may be charged additional fare if proper conveniences and facilities for procuring tickets are furnished to them. *Chicago, B. & Q. R. Co.* v. *Parks*, 18 *Ill.* 460.—FOLLOWED IN St. Louis, A. & C. R. Co. *v.* Dalby, 19 Ill. 353; Terre Haute, A. & St. L. R. Co. *v.* Vanatta, 21 Ill. 188. LIMITED IN St. Louis, A. & T. H. R. Co. *v.* South, 43 Ill. 176.

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* Right of company to charge passenger extra who fails to purchase a ticket, see 58 AM. & ENG. R. CAS. 51, *abstr.*; note, 20 L. R. A. 483.

Extra fare where tickets are not obtained, see notes, 13 AM. & ENG. R. CAS. 36; 23 *Id.* 476; 41 AM. DEC. 483; 11 AM. ST. REP. 650.

A carrier may charge a passenger who pays his fare on the train a higher rate of fare than it charges one who buys a ticket before entering the train, if it extends ample facilities to all persons who desire to purchase tickets. *Chicago, St. L. & P. R. Co.* v. *Graham*, 3 *Ind. App.* 28, 29 *N. E. Rep.* 170.

Under Iowa Act of 1874, ch. 68, § 2, providing that "a charge of ten cents may be added to the fare of any passenger, where the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train," it is not necessary, in order to justify the carrier in demanding an extra charge and in ejecting a passenger who refuses to pay it, to keep the ticket office at a small station open until the very moment that the train leaves. All that the passenger can demand is that he have a reasonable opportunity to purchase a ticket. *Everett* v. *Chicago, R. I. & P. R. Co.*, 27 *Am. & Eng. R. Cas.* 98, 69 *Iowa* 15, 28 *N. W. Rep.* 410.

Under the South Carolina statute, where a ticket office is kept open for thirty minutes before the train leaves, a passenger who boards the train without having purchased his ticket must not only pay the ordinary fare, but also twenty-five cents additional. *Moore* v. *Columbia & G. R. Co.*, 58 *Am. & Eng. R. Cas.* 493, 38 *So. Car.* 1, 16 *S. E. Rep.* 781.

124. Where no opportunity was given to procure ticket.—A company has a right to enforce a regulation that passengers paying fares to conductors shall be charged a higher rate than those purchasing tickets, but it must afford to the passenger every reasonable and proper facility to procure a ticket. *St. Louis, A. & C. R. Co.* v. *Dalby*, 19 *Ill.* 353.—DISAPPROVING Crocker *v.* New London, W. & P. R. Co., 24 Conn. 249. FOLLOWING Chicago, B. & Q. R. Co. *v.* Parks, 18 Ill. 460.—LIMITED IN St. Louis, A. & T. H. R. Co. *v.* South, 43 Ill. 176.—*Chicago & A. R. Co.* v. *Flagg*, 43 *Ill.* 364.—APPROVED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432.

It is only where a railroad company affords a reasonable opportunity to a passenger to purchase a ticket that it will be allowed to charge such passenger a higher rate of fare because he is without a ticket. *Lake Erie & W. R. Co.* v. *Close*, 5 *Ind. App.* 444, 32 *N. E. Rep.* 588. *Lake Erie & W. R. Co.* v. *Mays*, 4 *Ind. App.* 413, 30 *N. E. Rep.* 1106.

125. —— because office was closed.—Before a company can collect excess fare from a passenger who has not purchased a ticket, under Kan. Act of 1886, ch. 139, it must have a ticket office open for the sale of tickets at the station where passage is taken, at least thirty minutes prior to the departure of the train. A keeping of the office open for thirty minutes prior to the advertised time of departure will not suffice where the train is behind time. If the office is not open, with an agent in the same, ready upon call to sell tickets, long enough before the actual departure of the train, whether delayed or not, to enable passengers to purchase tickets and safely board the train, no excess fare can be collected. *Atchison, T. & S. F. R. Co.* v. *Dwelle*, 44 *Am. & Eng. R. Cas.* 402, 44 *Kan.* 394, 24 *Pac. Rep.* 500.

The fact that a ticket office is closed does not raise a presumption that a regulation to sell tickets at less than the fare paid on the cars is discontinued. *Du Laurans* v. *St. Paul & P. R. Co.*, 15 *Minn.* 49 (*Gil.* 29).

Under N. Y. Act of 1857, ch. 228, which provides that defendant company, at every station on its road where a ticket office shall be established, shall keep the same open for the sale of tickets at least one hour prior to the departure of each passenger train from such station, but that it shall not be required to keep such offices open between 9 P.M. and 5 A.M. except at Utica and six other stations on its road, and that if any person shall, at any station where a ticket office is established and open, enter the cars as a passenger without first having purchased a ticket, it shall be lawful for the company to demand and receive from him a sum not exceeding five cents, in addition to the usual rate of fare, the extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket office that is open. *Nellis* v. *New York C. R. Co.*, 30 *N. Y.* 505.—DISTINGUISHED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432; Bordeaux *v.* Erie R. Co., 8 Hun (N. Y.) 579. QUOTED IN Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1.

A company has no right to charge extra for fare paid on the cars where the ticket office was closed so long before the departure of the train that a passenger arriving

in time to buy his ticket and get safely on the cars was unable to purchase. *Porter* v. *New York C. R. Co.*, 34 *Barb.* (*N. Y.*) 353.

Where the office was open until the time fixed for the departure of the train, which, however, arrived late, and the plaintiff, who did not apply until he heard the whistle, found the office closed, the statute requiring the company to keep the office open "at least an hour prior to the departure of each train"—*held*, that the statute had not been complied with. *Porter* v. *New York C. R. Co.*, 34 *Barb.* (*N. Y.*) 353. — DISTINGUISHED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432; Bordeaux *v.* Erie R. Co., 8 Hun (N. Y.) 579.

Under New York Act of March 27, 1857, entitled "An act to prevent extortion by railroad companies," and providing that any company which shall receive a greater fare than that allowed by law shall forfeit fifty dollars, together with the excess so received, a conductor violates the statute by receiving more than the statutory limit, though he did not know of the absence of the ticket agent where plaintiff got on, and exacted the extra fare in good faith. *Porter* v. *New York C. R. Co.*, 34 *Barb.* (*N. Y.*) 353.

126. —— getting on at stations having no ticket office. — A company which has provided a station without a ticket office, and at which its passenger trains stop, has not put it in the power of a traveler to comply with a rule requiring additional payment where fare is paid on the train, and such rule would be unreasonable as applied to such stations, or to such traveler, when he offered to pay the usual fare. If the railroad has failed or neglected to furnish to the traveler the opportunity to procure a ticket, and he applies for a passage or enters the train without having such ticket, but offers to pay the regular fare, it cannot lawfully eject him. *Poole* v. *Northern Pac. R. Co.*, 16 *Oreg.* 261, 19 *Pac. Rep.* 107.

A rule of a company requiring a passenger without a ticket to pay extra fare is unreasonable and unlawful if a ticket cannot be procured at the station from which passage is taken, although the company has a system whereby the extra fare may be refunded. *Phettiplace* v. *Northern Pac. R. Co.*, 58 *Am. & Eng. R. Cas.* 61, 84 *Wis.* 412, 54 *N. W. Rep.* 1092.

One who has bought a ticket to a station where there is no ticket office, but decides, before reaching it, to go on to the next station beyond, cannot lawfully be charged more than the regular rate for the extra distance. *Phettiplace* v. *Northern Pac. R. Co.*, 58 *Am. & Eng. R. Cas.* 61, 84 *Wis.* 412, 54 *N. W. Rep.* 1092.

127. Extra charge must be reasonable.—A rule to charge one price to passengers purchasing tickets before entering the cars, and to exact a small additional sum of those who neglect to do so, is not unreasonable. *State* v. *Chovin*, 7 *Iowa* 204.

A regulation requiring passengers without tickets to pay twenty-five cents extra is not unreasonable. *McGowen* v. *Morgan's L. & T. R. & S. Co.*, 39 *Am. & Eng. R. Cas.* 460, 41 *La. Ann.* 732, 6 *So. Rep.* 606, 5 *L. R. A.* 817.

128. —— and within the maximum legal rate. — A company may charge a higher price for carrying passengers when the fare is paid on the train than it does at its ticket offices, provided the price thus charged is reasonable, and the fare charged on the train does not exceed the maximum allowed by law. *Skillman* v. *Cincinnati, S. & C. R. Co.*, 13 *Am. & Eng. R. Cas.* 31, 39 *Ohio St.* 444.

Or by charter. *Louisville, N. & G. S. R. Co.* v. *Guinan*, 13 *Am. & Eng. R. Cas.* 37, 11 *Lea* (*Tenn.*) 98, 47 *Am. Rep.* 279.

129. Drawback checks for extra fare paid.—The fact that a company gives a drawback coupon for the extra fare, on which a passenger may collect back the excess from any agent at a station, does not affect the validity of a regulation requiring passengers without tickets to pay extra. *McGowen* v. *Morgan's L. & T. R. & S. Co.*, 39 *Am. & Eng. R. Cas.* 460, 41 *La. Ann.* 732, 6 *So. Rep.* 606, 5 *L. R. A.* 817.

A regulation which requires passengers who fail to procure tickets to pay an additional charge of ten cents, which they are entitled to have refunded upon presentation at any ticket office of a check delivered to them by the conductor, is not unreasonable or oppressive, or needlessly inconvenient to the traveler. Such additional charge is not "a charge for transportation" within the meaning of a statute limiting the rate of fare which may be charged for the carriage of passengers. *Reese* v. *Pennsylvania R. Co.*, 41 *Am. & Eng. R. Cas.* 31, 131 *Pa. St.* 422, 19 *Atl. Rep.* 72.

Such a regulation is not unfair and partial in its operation because it provides that

passengers entering the train at stations where there is no ticket office and passengers traveling on trains where, on account of the excessive rush of business, it is impossible to issue the refunding checks, shall not be required to pay the additional charge. *Reese* v. *Pennsylvania R. Co.*, 41 *Am. & Eng. R. Cas.* 31, 131 *Pa. St.* 422, 19 *Atl. Rep.* 72.

3. *Overcharges; Excessive Fares.*

130. Remedy, generally — Jurisdiction.—Cal. Act of April 14, 1863, providing for the enforcement of penalties against a railroad for overcharges upon fares, is an entirety, and the unconstitutionality of a portion thereof would be fatal to the whole act. *Reed* v. *Omnibus R. Co.*, 33 *Cal.* 212.

A district court in California has no jurisdiction of actions to recover a forfeiture imposed upon railroad companies by the Act of April 14, 1864, for charging an excessive fare, the act prescribing that the recovery shall be before a justice. *Reed* v. *Omnibus R. Co.*, 33 *Cal.* 212.

Under Ill. Act of April 13, 1871, a railroad is not liable for charging a passenger more than the prescribed rate, where the charge is not unreasonable, and where the commissioners had not at the time assigned the road to any class as required by the act. *Moore* v. *Illinois C. R. Co.*, 68 *Ill.* 385.

An allegation in a complaint charging a company with extorting illegal or excessive fares from its passengers is no ground for granting an injunction to prevent its laying certain side tracks or turnouts in a street, or for erecting certain buildings across a street. If the company violates its charter the remedy is by an action by the attorney-general, or an action for damages by the individual who pays the extra fare. *Haight* v. *New York El. R. Co.*, 49 *How. Pr.* (*N. Y.*) 20.

131. Complaint — Petition. — It is not necessary that a complaint in an action against a consolidated company, to recover a forfeiture for charging more than the legal fare, should set out the various statutes by which the consolidation was effected, or show that the consolidated company was restricted to a two-cent fare per mile. It is sufficient to allege that the company is duly organized and that it is authorized to receive a certain fare, and has demanded and received a higher fare. *Nellis* v. *New York C. R. Co.*, 30 *N. Y.* 505.

A complaint contained allegations that defendant company had, contrary to N. Y. Act of March 27, 1857, "to prevent extortion by railroad companies," charged plaintiff thirteen cents extra fare on 567 occasions, and asked for judgment for the excess, and fifty dollars penalty for each violation of the statute. *Held*, that he was entitled to recover one penalty of fifty dollars, and the excessive fare paid, but not 566 penalties in addition. *Bissell* v. *New York C. & H. R. R. Co.*, 67 *Barb.* (*N. Y.*) 385; *affirmed at general term in* 67 *Barb.* 393, *n.*

A petition under Ohio Act of April 20, 1874, giving a penalty of $150 against a company for an overcharge on passengers or property, is not bad on demurrer for want of an averment that the purchaser of the ticket was, in fact, carried on the ticket for which excessive fare was exacted. *Cincinnati, S. & C. R. Co.* v. *Cook*, 6 *Am. & Eng. R. Cas.* 317, 37 *Ohio St.* 265.

Neither is a petition under the above act bad for want of an averment that the excessive fare was paid in due course of business, although judgment was not rendered until after the act was repealed, saving only pending actions where the excessive fare was paid in due course of business and not for the purpose of obtaining the penalty. Several causes of action for penalties under the statute may be united in the same petition. *Cincinnati, S. & C. R. Co.* v. *Cook*, 6 *Am. & Eng. R. Cas.* 317, 37 *Ohio St.* 265.

132. Forfeiture and penalty. — Where a ticket agent, contrary to orders, makes an excessive charge, his act is within the scope of his authority, and the company is liable for the statutory penalty. *St. Louis & S. F. R. Co.* v. *Ryan*, 56 *Ark.* 245, 19 *S. W. Rep.* 839.—DISTINGUISHING Grover & B. Sewing Mach. Co. *v.* Missouri Pac. R. Co., 70 Mo. 672; Friedlander *v.* Texas & P. R. Co., 130 U. S. 416.

A company which exacts, after the passage of the Legal Tender Act of 1862, payment of the legal fare in gold or the value thereof in paper currency, is guilty of extortion, and is liable to the passenger for the penalty of fifty dollars provided by N. Y. Act of 1857 for asking and receiving a greater rate of fare than that allowed by law. *Lewis* v. *New York C. R. Co.*, 49 *Barb.* (*N. Y.*) 330.

Ohio Act of April 25, 1873, amendatory of section 13 of the Act of May 1, 1852 (70 Ohio

L. 161), which prohibits any corporation operating a railroad in the state from demanding and receiving for the transportation of passengers more than three cents per mile, for a distance of more than eight miles, gives to the party aggrieved a right to recover from such corporation a forfeiture of not less than twenty-five dollars for each case of overcharge. *Pittsburgh, C. & St. L. R. Co.* v. *Moore*, 33 *Ohio St.* 384.—DISTINGUISHING Fisher *v.* New York C. & H. R. R. Co., 46 N. Y. 644.

Ohio Act of April 20, 1874 (71 Ohio L. 146), giving a penalty of $150 to the party aggrieved by an overcharge for the transportation of passengers or property made by a railroad corporation, is not in contravention of the Constitution. *Cincinnati, S. & C. R. Co.* v. *Cook*, 6 *Am. & Eng. R. Cas.* 317, 37 *Ohio St.* 265.

The word "forfeit" used in Tex. Rev. St. art. 4258, providing a forfeiture to the party injured by an overcharge on a passenger fare, is used in the same sense as "penalty"; therefore a suit under the statute is a suit to recover a penalty. *Etter* v. *Missouri Pac. R. Co.*, 2 *Tex. App.* (*Civ. Cas.*) 48.

133. Defenses—Evidence.—In a suit under Ark. Act of April 4, 1887, regulating the rates of charge for the carriage of passengers by railroads, a voluntary payment will not preclude a recovery of the penalty for an overcharge. *St. Louis & S. F. R. Co.* v. *Gill*, 47 *Am. & Eng. R. Cas.* 462, 54 *Ark.* 101, 15 *S. W. Rep.* 18.— FOLLOWED IN St. Louis & S. F. R. Co. *v.* Ryan, 56 Ark. 245.

Under the above act a person who has paid several overcharges may recover the penalty for each overcharge, although he went upon the train solely for the purpose of accumulating penalties. *St. Louis & S. F. R. Co.* v. *Gill*, 47 *Am. & Eng. R. Cas.* 462, 54 *Ark.* 101, 15 *S. W. Rep.* 18.

The forfeiture given by N. Y. Act of 1857, ch. 185, of a penalty of fifty dollars, together with the excess of fare charged, is not a satisfaction for the injury received, but to stop the practice. Therefore a recovery may be had by one who has paid an excessive fare, though he was riding simply for the purpose of obtaining the penalty. *Fisher* v. *New York C. & H. R. R Co.*, 46 *N. Y.* 644.—DISTINGUISHED IN Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 15 Am. & Eng. R. Cas. 1, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103. FOLLOWED IN Micks *v.* New York C. & H. R. R. Co., 49 N. Y. 654, *mem.*; Casey *v.* New York C. & H. R. R. Co., 49 N. Y. 675; Barker *v.* New York C. & H. R. R. Co., 61 N. Y. 655, *mem.*; Gere *v.* New York C. & H. R. R. Co., 19 Abb. N. Cas. 193.

Where a statute provides for the construction and operation of a road, and for a lease thereof "when duly formed into a corporation under and pursuant to the general railroad law of the state," the company cannot be held liable for a penalty prescribed by the general law for collecting more than the fixed amount of fare, unless plaintiff shows that an actual corporation was formed under the general law. *Palm* v. *New York, N. H. & H. R. Co.*, 35 *N. Y. S. R.* 457, 26 *J. & S.* 502, 12 *N. Y. Supp.* 554.

134. Amount of recovery.—A mere threat by a conductor to eject a passenger unless he shall pay a small amount in addition to the regular fare because not provided with a ticket does not entitle him to punitive damages, although he had tried to procure a ticket and found the office closed. Where no malice or wantonness appears on the part of the conductor a recovery is limited to the excess over the regular fare, with interest. *Paine* v. *Chicago, R. I. & P. R. Co.*, 45 *Iowa* 569.

The penalty imposed by N. Y. Act of 1857, ch. 185, upon carriers for exacting a greater fare than is allowed by law is incurred where a conductor collects more than the legal fare because the passenger has no ticket. The Act of 1857, ch. 228, allows a charge of five cents for not having a ticket only when the company has its ticket office open at the time of starting, though it be midnight. *Chase* v. *New York C. R. Co.*, 26 *N. Y.* 523.—DISTINGUISHED IN Swan *v.* Manchester & L. R. Co., 6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432; Bordeaux *v.* Erie R. Co., 8 Hun (N. Y.) 579. QUOTED IN Moneypenny *v.* Sixth Ave. R. Co., 7 Robt. (N. Y.) 328, 4 Abb. Pr. N. S. 357, 35 How. Pr. 452.

Under the above statute only one penalty of fifty dollars, together with the excess of fare, can be recovered for all acts committed prior to the time of beginning the suit. *Fisher* v. *New York C. & H. R. R. Co.*, 46 *N. Y.* 644.—DISTINGUISHED IN Pittsburgh, C. & St. L. R. Co. *v.* Moore, 33 Ohio St. 384. FOLLOWED IN Fritsche *v.* New York C. & H. R. R. Co., 47 N. Y. 660; Lounsbury *v.* New York C. & H. R. R. Co., 47 N. Y. 661; Mix *v.* New York C. R. Co., 47 N. Y.

678; Foote *v.* New York C. & H. R. R. Co., 50 N. Y. 693. NOT FOLLOWED IN State ex rel. *v.* Kansas City, Ft. S. & G. R. Co., 32 Fed. Rep. 722. QUOTED IN Parks *v.* Nashville, C. & St. L. R. Co., 18 Am. & Eng. R. Cas. 404, 13 Lea (Tenn.) 1, 49 Am. Rep. 655. REVIEWED IN Langdon *v.* New York, L. E. & W. R. Co., 29 N. Y. S. R. 656.

Where a statute provides a penalty of three times the amount of an excessive charge collected, a carrier is only liable for an excessive charge on its own road, and not for an excessive charge on goods over a connecting road from which it received the goods and to which it advanced the charges. *Streeter* v. *Chicago, M. & St. P. R. Co.*, 40 *Wis.* 294, 13 *Am. Ry. Rep.* 439.

135. Attorney's fee.—Ark. Act of April 4, 1887, to regulate passenger charges, provides that, for an overcharge beyond the maximum fixed by the act, the company or person operating the road shall forfeit and pay not less than $50 nor more than $300, and costs of suit, including a reasonable attorney's fee. *Held*, that the attorney's fee is a part of the penalty, and stands upon the same footing as the money judgment to be recovered; and including it as part of the penalty does not make the act objectionable as being partial or unequal legislation. *Dow* v. *Beidelman*, 31 *Am. & Eng. R. Cas.* 14, 49 *Ark.* 455, 5 *S. W. Rep.* 718.

4. *English Passenger Fares.*

a. In General.

136. Interpretation and effect of special acts.—A company, by its act of incorporation, was authorized to make a railway to be worked by horse power only, and also a railway to be worked in the ordinary way, by locomotive steam engines; and it was enacted that the maximum rate of charge for conveyance on the railways, including the tolls for the use thereof, and of carriages, and for locomotive power and every other expense incidental to such conveyance, should not exceed certain amounts therein mentioned. *Held*, that the railway to be worked by horse power was subject to this enactment, and that a higher charge could not be made in respect of that railway, although such higher rate might be reasonable, having regard to the increased expense of working the railway by horse power. *Buckfastleigh, T. & S. D. R. Co.* v. *South Devon R. Co.*, 1 *Ry. & C. T. Cas.* 321.

A company (whose act contained an equality clause) charged a smaller fare to passengers who traveled from D. to H. intending to proceed from H. to L. by another railway than it charged passengers from D. to H. who had no such intention. *Held*, by the chancellor, on motion for an injunction, that the equality clause was meant only to prevent the exercise of a monopoly to the prejudice of one passenger or carrier and in favor of another, and that, even if he had jurisdiction to interfere, he would not do so unless it was clear that the public interest required it; and in this case, it being admitted that the higher charge was not more than the act authorized, it did not appear that the public were prejudiced by the arrangement. *Attorney-General* v. *Birmingham & D. J. R. Co.*, 2 *Railw. Cas.* 124, 1 *Ry. & C. T. Cas.* 18.

The W. company, by its original act, was authorized to charge reasonable rates for the conveyance of passengers. By a subsequent act it was empowered to extend its line, and to charge a lump sum for carrying passengers over the extension. A third and later act allowed it to amalgamate with another company, provided that it reduced its charges to the same scale as that of the other company, which scale was one penny a mile for each third-class passenger. Plaintiff traveled over the line of W. company with a third-class ticket, and was charged more than one penny a mile. In the course of his journey he traveled over the extension. The W. company also charged the company with the government duty. *Held*, that the W. company was not entitled to charge plaintiff more than one penny per mile, but was entitled to charge him with the government duty. *Brown* v. *Great Western R. Co.*, 9 *Am. & Eng. R. Cas.* 271, *L. R.* 9 *Q. B. D.* 744, 51 *L. J. Q. B. D.* 529, 47 *L. T.* 216, 30 *W. R.* 671, 4 *Ry. & C. T. Cas.* xvii; *affirming* 51 *L. J. Q. B. D.* 156, 45 *L. T.* 471, 30 *W. R.* 214.

By one of the clauses in an act relating to the W. company it was forbidden to take tolls unless milestones were maintained along the line; and another act relating to the company incorporated the Railways Clauses Consolidation Act, 1845, which, in section 95, contains a similar provision. *Held*, that the word "tolls" related to tolls properly so called, and did not extend to charges for carrying passengers in the company's own carriages. *Brown* v. *Great*

Western R. Co., 9 *Am. & Eng. R. Cas.* 271, *L. R.* 9 *Q. B. D.* 744, 51 *L. J. Q. B. D.* 529, 47 *L. T.* 216, 30 *W. R.* 671, 4 *Ry. & C. T. Cas.* xvii; *affirming* 51 *L. J. Q. B. D.* 156, 45 *L. T.* 471, 30 *W. R.* 214.

137. Cheap Trains Act. — The provisions for charges for fractions of a mile contained in the Cheap Trains Act, 1858, do not apply to third-class passengers by other than the trains run in pursuance of the act. *Brown* v. *Great Western R. Co.*, 9 *Am. & Eng. R. Cas.* 271, *L. R.* 9 *Q. B. D.* 744, 51 *L. J. Q. B. D.* 529, 47 *L. T.* 216, 30 *W. R.* 671, 4 *Ry. & C. T. Cas.* xvii; *affirming* 51 *L. J. Q. B. D.* 156, 45 *L. T.* 471, 30 *W. R.* 214.

138. Railway and Canal Traffic Act. — The mere fact that railway companies make charges for the conveyance of passengers in excess of those authorized by their special acts, but without any undue preference, is not a breach of their obligation, under 17 & 18 Vict. c. 31, § 2, to "afford according to their respective powers all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively and for the return of carriages, trucks, boats, and other vehicles." And the railway commissioners have no jurisdiction to grant an injunction to restrain the making of such excessive charges. *Great Western R. Co.* v. *Railway Com'rs*, 2 *Am. & Eng. R. Cas.* 617, *L. R.* 7 *Q. B. D.* 182.—EXPLAINING Aberdeen Com. Co. *v.* Great North of Scotland R. Co., 3 N. & M. 205; Pryce *v.* Monmouthshire C. & R. Co., L. R. 4 App. Cas. 197. QUOTING South Eastern R. Co. *v.* Railway Com'rs, L. R. 6 Q. B. D. 586.

Upon complaint that a company did not afford "all reasonable facilities" within the meaning of the Railway and Canal Traffic Act, 1854, § 2, because it charged passenger fares in excess of the sums it was entitled to demand under the maximum clause of its special act—*held*, by the court of appeal, affirming the judgment of the queen's bench division, that the commissioners had no jurisdiction to entertain the complaint, because the mere fact that a railway charged beyond the maximum sums contained in its special act did not amount to a refusal to afford "reasonable facilities." *Brown* v. *Great Western R. Co.*, 3 *Ry. & C. T. Cas.* 523.

139. Rates of fare—Preferences.—A special act, imposing a general limit of one penny a mile upon the charges which a company may make for third-class passengers, in effect repeals the authority given to it by a prior special act to charge not more than two shillings for the five miles next to its terminal station. *Brown* v. *Great Western R. Co.*, 9 *Am. & Eng. R. Cas.* 271, *L. R.* 9 *Q. B. D.* 744, 51 *L. J. Q. B. D.* 529, 47 *L. T.* 216, 30 *W. R.* 671, 4 *Ry. & C. T. Cas.* xvii; *affirming* 51 *L. J. Q. B. D.* 156, 45 *L. T.* 471, 30 *W. R.* 214.

An inequality of charge does not constitute an undue or unreasonable preference, unless it is for traveling over the same line or the same portion of the line. *Caterham R. Co.* v. *London, B. & S. C. R. Co.*, 1 *C. B. N. S.* 410, 26 *L. J. C. P.* 161.

The court refused to grant an injunction, on the complaint of a company having a branch on a trunk line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainants' terminus than it charged for the conveyance of passengers to the terminus of another branch line (in which the parent company was interested), extending over the same number of miles. *Caterham R. Co.* v. *London B. & S. C. R. Co.*, 1 *C. B. N. S.* 410, 26 *L. J. C. P.* 161.

A company fixed the rates for passengers traveling between the *termini* of the line according to a much lower scale than the rates exigible from passengers traveling between intermediate stations. *Held*, that no one can complain of such proportional rating unless there be a competition of interest, or unless the complainer set forth personal disadvantage to himself. The mere statement that the complainer has frequent occasion to travel upon the railway is not sufficient. *Hozier* v. *Caledonian R. Co.*, 1 *Ry. & C. T. Cas.* 27.

140. Deductions for difference in quality of service.—A passenger desiring to use an ordinary train for part of a journey, for which he has taken a through ticket entitling him to travel by express, is not entitled to any deduction from the through fare on account of the difference of the service. *Dublin Steam Packet Co.* v. *London & N. W. R. Co.*, 4 *Ry. & C. T. Cas.* 10.

141. Recovery for excessive charges. — Defendant, a passenger on plaintiff's railway, took a ticket to S., for which he paid eight shillings. The ticket contained a condition that if used for any

other station it would be forfeited and the full fare charged. He alighted at F., a station short of S., to which the fare was nine shillings; he then took a ticket from F. to his destination on a branch line, but did not give up at F. the ticket he had originally taken. Plaintiff brought an action in the county court, claiming to be entitled to recover nine shillings, the full fare to F., or one shilling, if defendant was entitled to be credited with the eight shillings paid by him for his original ticket, but was nonsuited on the ground that it was suing for a penalty which was only recoverable before justices. *Held*, that plaintiff was not suing to recover a penalty, but to recover a fare under the contract; that the action was therefore maintainable and the nonsuit was wrong. *Great Northern R. Co.* v. *Winder*, [1892] 2 *Q. B.* 595. — DISTINGUISHING London & B. R. Co. *v.* Watson, L. R. 4 C. P. D. 118.

142. Crown duties on fares collected. — By 5 & 6 Vict. c. 79, and 7 & 8 Vict. c. 85, provision is made for exempting from passenger duty cheap traffic or parliamentary trains. *Held*, that trains, to be entitled to the exemption, must stop for putting down passengers at every passenger station passed on the line. *Attorney-General* v. *Oxford, W. & W. R. Co.*, 31 *L. J. Ex.* 218, 1 *Ry. & C. T. Cas.* 21.

Where a company is entitled upon payment of a percentage to use a loop line belonging to another company, and it exercises its powers by its own trains and servants, but the money paid at the stations is collected by the servants of the company owning the line, the company using the loop is bound to keep the accounts and pay the duty required by 5 & 6 Vict. c. 79. *Great Western R. Co.* v. *Attorney-General*, *L. R.* 1 *H. L.* 1, 12 *Jur. N. S.* 417, 35 *L. J. Ex.* 123, 14 *W. R.* 519, 14 *L. T.* 33.

A cheap train within the meaning of 7 & 8 Vict. c. 85, § 6 (the fares of passengers on which are exempt from the payment of duty), must be a train carrying third-class passengers at a uniform rate of one penny a mile, both for the whole distance between the *termini* and for the intermediate distances between one station and another. *North London R. Co.* v. *Attorney-General*, 45 *L. J. Ex. D.* 315, *L. R.* 1 *App. Cas.* 148, 24 *W. R.* 852, 34 *L. T.* 297; *affirming* 43 *L. J. Ex.* 223, *L. R.* 9 *Ex.* 330, 31 *L. T.* 377.

And must stop for taking up and setting down passengers at every station between each end of the trunk, branch, or junction line on which it travels. *North London R. Co.* v. *Attorney-General*, 45 *L. J. Ex. D.* 315, *L. R.* 1 *App. Cas.* 148, 24 *W. R.* 852, 34 *L. T.* 297; *affirming* 43 *L. J. Ex.* 223, *L. R.* 9 *Ex.* 330, 31 *L. T.* 377.

The power of the board of trade under 7 & 8 Vict. c. 85, § 8, of dispensing with "any of the conditions hereinbefore required with regard to the conveyance of passengers" does not authorize it to dispense with the requisites constituting a cheap train, within the meaning of section 6 of said act, exempting the fares of passengers on such trains from the payment of duty. *North London R. Co.* v. *Attorney-General*, 45 *L. J. Ex. D.* 315, *L. R.* 1 *App. Cas.* 148, 24 *W. R.* 852, 34 *L. T.* 297; *affirming* 43 *L. J. Ex.* 223, *L. R.* 9 *Ex.* 330, 31 *L. T.* 377.

Under 5 & 6 Vict. c. 79, § 2, the crown is entitled to duty on the whole amount received by a company for the conveyance of passengers, although such amount exceeds the maximum charge for conveyance fixed by the company's local act. *Attorney-General* v. *London & N. W. R. Co.*, 1 *Am. & Eng. R. Cas.* 578, *L. R.* 6 *Q. B. D.* 216, 50 *L. J. Q. B. D.* 170, 44 *L. T.* 236, 29 *W. R.* 346, 3 *Ry. & C. T. Cas.* xviii; *affirming* *L. R.* 5 *Ex. D.* 247, 49 *L. J. Ex. D.* 670, 42 *L. T.* 395, 28 *W. R.* 513.

And the crown is entitled to claim duty upon sums charged by a company to passengers in addition to the ordinary fare for sleeping-car accommodations. *Attorney-General* v. *London & N. W. R. Co.*, 1 *Am. & Eng. R. Cas.* 578, *L. R.* 6 *Q. B. D.* 216, 50 *L. J. Q. B. D.* 170, 44 *L. T.* 236, 29 *W. R.* 346, 3 *Ry. & C. T. Cas.* xviii; *affirming* *L. R.* 5 *Ex. D.* 247, 49 *L. J. Ex. D.* 670, 42 *L. T.* 395, 28 *W. R.* 513.

Where an information is filed in equity to recover passenger duty on a company, the question in dispute being whether certain trains were cheap trains within the meaning of the act exempting from duty fares for the conveyance of passengers at rates not exceeding one penny per mile by cheap trains, an application by the company to have the evidence taken orally should be granted. *Attorney-General* v. *Metropolitan Dist. R. Co.*, *L. R.* 5 *Ex. D.* 218, 42 *L. T.* 342, 28 *W. R.* 376; *reversing* 42 *L. T.* 93.

A train is not a cheap train within 7 & 8 Vict. c. 85, § 6, exempting from passenger duty fares paid on cheap trains, if third-class passengers are charged more than the

parliamentary fare. *Attorney-General* v. *Metropolitan R. Co.*, 50 *L. J. Q. B. D.* 573.

b. Punishment and Penalties for Failure to Pay Fare or Produce Ticket.

143. Validity and effect of carriers' by-laws, generally.—A company has no power to enact a by-law in pursuance of 8 & 9 Vict. c. 20, § 108, punishing passengers for evading payment of fare, in the absence of any intention on the part of the passenger to defraud. *Bentham* v. *Hoyle*, *L. R.* 3 *Q. B. D.* 289, 47 *L. J. M. C.* 51, 37 *L. T.* 753, 26 *W. R.* 314.

A by-law of a company providing that a passenger traveling without a ticket shall be required to pay the fare from the station from which the train originally started is unreasonable and void as against a passenger who has in good faith and without intention to defraud traveled a short distance without having procured a ticket. The statute 8 & 9 Vict. c. 20, §§ 103, 109, authorizes punishment under such by-laws only where the act has been done fraudulently. *London & B. R. Co.* v. *Watson*, *L. R.* 4 *C. P. D.* 118, 48 *L. J. C. P. D.* 316, 40 *L. T.* 183, 27 *W. R.* 614; *affirming* *L. R.* 3 *C. P. D.* 429, 47 *L. J. C. P. D.* 634, 39 *L. T.* 199, 26 *W. R.* 856.

144. —— subjecting passenger to a forfeiture.—Under 8 & 9 Vict. c. 20, § 109, which makes a fraudulent intent the gist of the offense of traveling without having paid the fare, a by-law of a company is illegal and void which imposes a forfeiture without regard to such fraudulent intent. *Dearden* v. *Townsend*, 6 *B. & S.* 861, *L. R.* 1 *Q. B.* 10, 12 *Jur. N. S.* 120, 35 *L. J. M. C.* 50, 14 *W. R.* 52, 13 *L. T.* 323.

A by-law of a company requiring passengers to have tickets and deliver them up when required, and providing that any passenger not producing or delivering up his ticket shall be required to pay the fare from the place whence the train originally started or forfeit a sum not exceeding forty shillings, only applies to persons wilfully refusing to produce their tickets and not to a person traveling without having obtained a ticket, but with no intent to defraud the company. *Dearden* v. *Townsend*, 6 *B. & S.* 861, *L. R.* 1 *Q. B.* 10, 12 *Jur. N. S.* 120, 35 *L. J. M. C.* 50, 14 *W. R.* 52, 13 *L. T.* 323.

145. —— subjecting passenger to a penalty.—Under a by-law of a company providing that any person traveling without permission "in a carriage or by a train of a superior class to that for which his ticket was issued is hereby made subject to a penalty not exceeding forty shillings, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is traveling from the station whence the train originally started, unless he shows that he had no intention to defraud," a passenger cannot be convicted where he is guilty of no intention to defraud; the words "intention to defraud" apply to the entire by-law. *Bentham* v. *Hoyle*, *L. R.* 3 *Q. B. D.* 289, 47 *L. J. M. C.* 51, 37 *L. T.* 753, 26 *W. R.* 314.

A by-law providing that "any person traveling, without special permission of some duly authorized servant of the company, in a carriage or by a train of a class superior to that for which his ticket was issued is hereby subject to a penalty not exceeding forty shillings, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is traveling from the station where the train originally started, unless he shows that he had no intention to defraud," is illegal and void. *Dyson* v. *London & N. W. R. Co.*, 2 *Am. & Eng. R. Cas.* 629, *L. R.* 7 *Q. B. D.* 32, 50 *L. J. M. C.* 78, 3 *Ry. & C. T. Cas.* xxiv.—FOLLOWING Dearden *v.* Townsend, L. R. 1 Q. B. 10; Bentham *v.* Hoyle, L. R. 3 Q. B. D. 289.

The statute 8 & 9 Vict. c. 20, § 103, makes a fraudulent intention the gist of the offense of traveling on a railway without having paid the fare, and a by-law of a railway company subjecting persons committing such offense to a penalty without regard to the fraudulent intention is void. *London & B. R. Co.* v. *Watson*, *L. R.* 4 *C. P. D.* 118, 48 *L. J. C. P. D.* 316, 40 *L. T.* 183, 27 *W. R.* 614; *affirming* *L. R.* 3 *C. P. D.* 429, 47 *L. J. C. P. D.* 634, 39 *L. T.* 199, 26 *W. R.* 856. *Saunders* v. *South Eastern R. Co.*, *L. R.* 5 *Q. B. D.* 456, 49 *L. J. Q. B. D.* 761, 3 *Ry. & C. T. Cas.* xxi, 43 *L. T.* 281, 29 *W. R.* 56. *Dyson* v. *London & N. W. R. Co.*, 2 *Am. & Eng. R. Cas.* 629, *L. R.* 7 *Q. B. D.* 32, 50 *L. J. M. C.* 78, 44 *L. T.* 609, 29 *W. R.* 565.

Assuming that the power given by the Railways Clauses Consolidation Act, § 108, to make by-laws for "regulating the traveling upon or using and working the railway," applies to persons traveling in the company's carriages, it is not competent for the

company by a by-law to make the refusal to show the ticket an offense in the absence of a fraudulent intention. The by-law was void for unreasonableness, because the penalties thereunder for offenses of equal criminality would vary with the distance from which the train might originally have started; and it was inapplicable to the case, as the power to make by-laws was confined to the case of persons traveling on the railway, which plaintiff was not doing when required to show his ticket. *Saunders* v. *South Eastern R. Co.*, *L. R.* 5 *Q. B. D.* 456, 49 *L. J. Q. B. D.* 761, 3 *Ry. & C. T. Cas.* xxi, 43 *L. T.* 281, 29 *W. R.* 56.

The by-law was void for unreasonableness because the penalty for not showing the ticket varied according to the distance the train had traveled, and also because the passenger was required not only to show his ticket, but to deliver it up whenever required for any purpose. *Saunders* v. *South Eastern R. Co.*, *L. R.* 5 *Q. B. D.* 456, 49 *L. J. Q. B. D.* 761, 3 *Ry. & C. T. Cas.* xxi., 43 *L. T.* 281, 29 *W. R.* 56.

A by-law was made by a company, under 8 & 9 Vict. c. 20, that: "Any person traveling without the special permission of some duly authorized servant to the company in a carriage or by a train of a superior class to that for which his ticket was issued is hereby subject to a penalty not exceeding forty shillings, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is traveling from the station where the train originally started, unless he shows that he had no intention to defraud." Appellant was convicted in a penalty of ten shillings under this by-law for traveling in a first-class carriage with only a second-class ticket; but it was found as a fact that he had no intention to defraud the company. *Held*, that the conviction must be quashed, for without deciding whether the by-law did or did not make proof of the absence of fraudulent intention an exemption from the penalty as well as from the extra fare, it was, if it made the fraudulent intention immaterial in the case of the penalty, repugnant to 8 Vict. c. 20, § 103, and *ultra vires* the company. *Bentham* v. *Hoyle*, *L. R.* 3 *Q. B. D.* 289, 47 *L. J. M. C.* 51. See *Barny* v. *Midland R. Co.*, 1 *Ir. R. C. L.* 130, 3 *Ry. & C. T. Cas.* xxi.

A by-law of a company provided that "any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings." *Held*, that the by-law was only applicable to cases where an attempt was made to cheat the company, and that it was oppressive to prosecute for the penalty when there was no such attempt. *Thorn* v. *Caledonian R. Co.*, 14 *Sess. Cas.* (*Just. Cas.*) 5, 6 *Ry. & C. T. Cas.* lxx.

Where a company sues a passenger to recover a fare and not a penalty the action is maintainable in the county court, and not before the justices, and a nonsuit by the county court is error. *Great Northern R. Co.* v. *Winder*, [1892] 2 *Q. B.* 595.

146. Refusal to produce ticket.— A passenger who has no intention to defraud is not liable to be convicted under a by-law requiring passengers to show and deliver up their tickets whenever required, where he has a ticket entitling him to travel over two connecting lines, and at the junction, while passing from one station to the other is asked to show his ticket and refuses. *Saunders* v. *South Eastern R. Co.*, *L. R.* 5 *Q. B. D.* 456, 49 *L. J. Q. B. D.* 761, 43 *L. T.* 281, 29 *W. R.* 56, 3 *Ry. & C. T. Cas.* xxi.

147. Conviction of traveling with intent to avoid payment of fare.— Where a passenger produces a tourist's return ticket originally issued to another person under a condition that it is not transferable, he is liable to be convicted under 8 & 9 Vict. c. 20, § 103, for traveling without having previously paid his fare with intent to avoid payment. *Langdon* v. *Howells*, *L. R.* 4 *Q. B. D.* 337, 48 *L. J. M. C.* 113, 40 *L. T.* 880, 27 *W. R.* 657, 3 *Ry. & C. T. Cas.* xxii.

Where a passenger with intent to defraud travels in a carriage of a class superior to that in which his ticket entitles him to travel, he is liable to be convicted under 8 & 9 Vict. c. 20, § 103, for traveling without having paid his fare. *Gillingham* v. *Walker*, 44 *L. T.* 715, 29 *W. R.* 896.

148. Enforcement of penalty — Jurisdiction.— A by-law of a company requiring passengers traveling without a ticket to pay their fare from the station whence the train originally started does not create a debt recoverable in a court of civil jurisdiction. *London & B. R. Co.* v. *Watson*, *L. R.* 4 *C. P. D.* 118, 48 *L. J. C. P. D.* 316, 40 *L. T.* 183, 27 *W. R.* 614, 3 *Ry. &*

C. T. Cas. xx.; *affirming L. R.* 3 *C. P. D.* 429, 47 *L. J. C. P. D.* 634, 39 *L. T.* 199, 26 *W. R.* 856.

The penalty imposed by 8 & 9 Vict. c. 20, § 103, upon passengers traveling with intent to avoid payment of fare is not subject to the procedure for the recovery of civil debts in a court of summary jurisdiction prescribed by the Summary Jurisdiction Act, 1879, § 35. *Reg.* v. *Paget*, *L. R.* 8 *Q. B. D.* 151, 51 *L. J. M. C.* 9, 45 *L. T.* 794, 30 *W. R.* 336.

149. Necessity of demand for fare.—Before a company can take proceedings under a by-law against passengers traveling without tickets, requiring such passengers to pay the fare from the station whence the train originally started, a notice of demand for the fare due must have been first made to the passenger who refused or was unable to produce his ticket. *Brown* v. *Great Eastern R. Co.*, 46 *L. J. M. C.* 231, *L. R.* 2 *Q. B. D.* 406, 36 *L. T.* 767, 25 *W. R.* 792, 3 *Ry. & C. T. Cas.* xxii.

IV. TICKET BROKERS AND SCALPERS

150. Power of city to impose license tax.—A city may impose a license tax on ticket brokers or "scalpers," under a provision in its charter giving to it power to license, tax, and regulate certain occupations and all other trades, professions, occupations, and callings the taxing of which is not regulated by the Constitution. *Hirshfield* v. *Dallas*, 4 *Tex. App.* (*Civ. Cas.*) 259, 15 *S. W. Rep.* 124.

Under the power of a city to license, tax, and regulate trades, professions, occupations, and callings, a city may impose a reasonable tax for revenue, but not such a tax as to be prohibitory. So where a city imposes a tax of $500 on ticket brokers, there cannot be a conviction for violation of the ordinance, if the uncontradicted evidence shows that such tax was prohibitory. *Hirshfield* v. *Dallas*, 4 *Tex. App.* (*Civ. Cas.*) 259, 15 *S. W. Rep.* 124.

151. Rights of purchasers of scalpers' tickets.—Where a person purchases a ticket from a dealer outside of Pennsylvania who is not an authorized agent of the company, he may maintain an action in the courts of the state against the company for a refusal to carry him on said ticket, notwithstanding the provisions of Pa. Act of May 6, 1863 (P. L. 582), making it unlawful for an unauthorized party to sell railroad tickets in the state. *Sleeper* v. *Pennsylvania R. Co.*, 9 *Am. & Eng. R. Cas.* 291, 100 *Pa. St.* 259, 45 *Am. Rep.* 380.

Where an unauthorized agent of another road assures the purchaser of a ticket already used for part of the trip, and conditioned to be void if presented by any other person than the original purchaser, that the ticket will be honored, and gives to the purchaser a letter to the conductors of defendant company, and relying upon these representations he buys the ticket and intends to ride on it, defendant company is in no way bound by the representations. *Drummond* v. *Southern Pac. Co.*, 7 *Utah* 118, 25 *Pac. Rep.* 733.

In such case the conductor has a right to take up the ticket when not presented by the original purchaser, and the holder cannot claim damages because the ticket is not returned to him. *Drummond* v. *Southern Pac. Co.*, 7 *Utah* 118, 25 *Pac. Rep.* 733.

152. Statutes regulating sales of tickets.—A statute making it unlawful for any person to sell a railroad or steamboat ticket, without a certificate from the carrier, except as to fractions of tickets which have been bought in good faith, does not violate the constitutional provision against depriving one of life, liberty, or property without due process of law. *Burdick* v. *People*, 149 *Ill.* 600, 36 *N. E. Rep.* 948, 24 *L. R. A.* 152.

The regulation of the sale of tickets as above is not a regulation of commerce beyond the power of a state legislature, but is a mere police regulation of a public employment. *Burdick* v. *People*, 149 *Ill.* 600, 36 *N. E. Rep.* 948, 24 *L. R. A.* 152.

And such a statute is not in conflict with that provision of the state Constitution which prohibits the legislature from passing special laws granting exclusive privileges, immunities, or franchises. *Burdick* v. *People*, 149 *Ill.* 600, 36 *N. E. Rep.* 948, 24 *L. R. A.* 152.

Ind. Act of March 9, 1875, § 8 (1 Rev. St. 1876, p. 259), regulating the issuing and taking up of railroad tickets, exempts from the operation of its provisions all special tickets, whether they are half-fare or excursion tickets, or special in any other respect. A ticket having stamped upon its face the word "special" is *prima facie* exempt from the provisions of the act. *State* v. *Fry*, 6 *Am. & Eng. R. Cas.* 340, 81 *Ind.* 7.

Minn. Act of 1893, ch. 66, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers, and to provide punishment for the violation of the same," is not unconstitutional either as class legislation or as granting special privileges to carriers. *State* v. *Corbett*, 57 *Minn.* 345, 59 *N. W. Rep.* 317, 24 *L. R. A.* 498.

Neither is the act unconstitutional as a delegation of police power of the state to grant licenses to engage in the business, or as an interference with interstate commerce; nor does the act deprive the citizen of his property without due process of law, at least as to tickets purchased after the passage of the act. *State* v. *Corbett*, 57 *Minn.* 345, 59 *N. W. Rep.* 317, 24 *L. R. A.* 498.

Under N. Y. Act of March 23, 1860, prohibiting the sale of passenger tickets except as therein provided, an indictment must state the station or port from which the passage under the ticket is to begin. *Enright* v. *People*, 21 *How. Pr.* (*N. Y.*) 383.

A statute making it a misdemeanor for any unauthorized person "to sell or deal in" tickets issued by a railroad company is not violated by the sale of a single railroad ticket by a person not a dealer in such tickets. Such statute relates to the practice or business of selling railroad tickets. *State* v. *Ray*, 52 *Am. & Eng. R. Cas.* 157, 109 *N. Car.* 736, 14 *S. E. Rep.* 83, 14 *L. R. A.* 529.

Pa. Act of May 6, 1863, and its amendment of April 10, 1872, which prohibit the sale of tickets except by the agents of the companies, and make a violation of the act a misdemeanor, are constitutional. State legislatures have the right to pass such acts. *Com.* v. *Wilson*, 56 *Am. & Eng. R. Cas.* 230, 14 *Phila.* (*Pa.*) 384.

TICKET SCALPERS.

Selling at reduced rates through, see INTERSTATE COMMERCE, **89.**
See also TICKETS AND FARES, **150–152.**

TIES.

Admissibility of evidence as to defects in, see EVIDENCE, **93.**

TIMBER.

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Cut on land taken, or adjoining lands, value of, as an element of land damages, see EMINENT DOMAIN, **723.**
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— strip taken, company's rights relative to, see EMINENT DOMAIN, **138.**
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As essence of contract to locate stations, see STATIONS AND DEPOTS, **36.**
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During which excursion ticket is good, see TICKETS AND FARES, **75.**
— — office must be open, see TICKETS AND FARES, **27–29.**
— — trains may block street, ordinances limiting, see STREETS AND HIGHWAYS, **307.**
For claiming damages, limitation of, see LIMITATION OF LIABILITY, **22.**
— completion of road, fixing, see ELEVATED RAILWAYS, **14.**
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— — — — power to take lands after expiration of, see EMINENT DOMAIN, **74.**
— construction of road allowed by charter, see CHARTERS, **62.**
— — — — forfeiture for failure to begin within, see DISSOLUTION, ETC., **3.**
— payment of coupons, see COUPONS, **8.**
— sale of superfluous lands under English statutes, extension of, see EMINENT DOMAIN, **1118.**
From which interest on damages should be calculated, see DAMAGES, **110.**
— — — should be computed, see INTEREST, **11–14.**
In which notice shall be given or suit brought, see CARRIAGE OF MERCHANDISE, **485–490.**
— — to produce ticket before expulsion of passenger, see EJECTION OF PASSENGERS, **21.**
— — — prosecute claims against government, see CLAIMS AGAINST UNITED STATES, **15.**
Limited by statute for construction of road, ejectment after lapse of, see EMINENT DOMAIN, **1013.**

Loss of, as an element of damages, see CARRIAGE OF PASSENGERS, 628.
— — — — — — — for injury to employé, see EMPLOYÉS, INJURIES TO, 759.
— — damages for, see EJECTION OF PASSENGERS, 111.
— — resulting from injuries, measure of damages for, see DAMAGES, 74.
Obligation to run on, see TIME-TABLES, 2, 3.
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TIME BOOK

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TIME-TABLES.

Admissibility and effect of, as evidence, see EVIDENCE, 251.
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1. General nature and effect.— For the convenience and safety of the public, and for their own safety and transaction of the business of common carriers, railroads adopt and publish time-tables, giving schedules of times of arrival and departure of the different trains at the depots at which they stop; and these schedules constitute an invitation to the public and persons desiring to use the railroads as passengers or for business to be there at such times of arrival and departure of trains, and also, impliedly, within a reasonable time before such arrivals and departures, to enable persons desiring

passage to avoid hurry and confusion in purchasing tickets and getting ready to enter the cars. *Grimes* v. *Pennsylvania Co.*, 36 *Fed. Rep.* 72.

A time-table which announces that it is for the government and information of employés only, and in terms reserves to the company the right to vary therefrom at pleasure, and which bears also the explanation as to the stations mentioned in it that flag stations are designated by a star, is not of itself sufficient evidence to show that a station not so designated on it had been advertised either to the public or plaintiff as a regular passenger station. *Denver, S. P. & P. R. Co.* v. *Pickard*, 18 *Am. & Eng. R. Cas.* 284, 8 *Colo.* 163, 6 *Pac. Rep.* 149.

A baggage master is not presumed to know that the company's schedules for running trains are defective. *Georgia R. & B. Co.* v. *Rhodes*, 56 *Ga.* 645.

When, according to regular schedule, one train is to arrive at a given point thirteen minutes before the time fixed for another train to leave that point daily on a new trip, such point is a terminus as to the latter train, and not a meeting point as to either; especially when real meeting points are plainly designated as such on the schedule, and the designation is omitted in respect to the point in question. *Georgia R. & B. Co.* v. *McDade*, 59 *Ga.* 73.

It is not necessarily negligence to run a hand-car over a railway when a train is past due, even though more than ordinary danger is incurred thereby. The measure of care required must be estimated with a view to the safety of the employés operating the hand-car and of the passengers upon the train, and determined by the facts of each particular case. *Campbell* v. *Chicago, R. I. & P. R. Co.*, 45 *Iowa* 76.

Railroad corporations, by advertising the hours when trains will start, agree with holders of tickets that trains will start at the hours named; but with an implied reservation of power to change the hours, upon giving reasonable notice. *Sears* v. *Eastern R. Co.*, 14 *Allen* (*Mass.*) 433.

It is gross negligence in a company so to arrange its time-table that within one minute from the time that an accommodation train is to leave a station an express train, running at the rate of thirty miles an hour or more, is due at the same place. *Gonsales* v. *New York & H. R. Co.* 39 *How. Pr.* (*N. Y.*) 407.

Conductors, engineers, and other train employés, and those directly connected with the management of trains, are bound to know the times when trains are liable to meet or to pass each other, or to pass stations; and it is their duty, if trains are out of time, to be on the lookout and to give seasonable notice to each other of any meeting of trains out of time or place; and in this they are bound to exercise the utmost care and diligence. *Gonsales* v. *New York & H. R. Co.*, 39 *How. Pr.* (*N. Y.*) 407.

The time-table of a company, which on its face announces that it is for the government and information of employés only, and in terms reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not stopping the train at a place mentioned in the time-table, but at which no station was ever really established. *Beauchamp* v. *International & G. N. R. Co.*, 9 *Am. & Eng. R. Cas.* 307, 56 *Tex.* 239.

Where a company circulates time-tables representing that there is a train to a particular place at a certain time on a connecting line, which carries passengers forward from its terminus, knowing such representation to be false, it is liable to a person who sustains damage by reason of having made arrangements to travel on the faith of such representations. *Denton* v. *Great Northern R. Co.*, 5 *El. & Bl.* 860, 2 *Jur. N. S.* 185, 25 *L. J. Q. B.* 129.

A time-table cannot be treated as part of the contract between a company and its passengers, but amounts to representation only. *Briggs* v. *Grand Trunk R. Co.*, 24 *U. C. Q. B.* 510.

2. Obligation to run on schedule time.* — Where the official printed schedule furnished to conductors and locomotive engineers prescribes a given hour and minute for leaving the starting terminus, and no provision is made in the rules and regulations for starting at any other time, to enter on the trip fifteen minutes after the prescribed time has expired is to vary from the schedule; and if done without express authority from the superintendent, or the proper general officer of the road, it is a breach of orders. *Georgia R. & B. Co.* v. *McDade*, 59 *Ga.* 73.

* Obligation of company to run trains so as to arrive and depart on time and stop at stations, see note, 9 AM. & ENG. R. CAS. 314.

For conductors and engineers to abide absolutely and invariably by the schedules furnished them for running trains, except when clearly and expressly authorized to vary therefrom, is of the last importance to both life and property; and where the printed rules which accompany the schedules warn both classes of employés that they will be held responsible for the satisfactory running of the schedules, an engineer cannot excuse himself for commencing a trip fifteen minutes after his schedule time has expired by the fact that he acted under orders from the conductor. The schedule being prescribed by their common superior, neither can absolve the other from his obligation to observe it. *Georgia R. & B. Co.* v. *McDade*, 59 *Ga.* 73.

The publication of a time-table, in common form, imposes upon a company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated therein; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to its negligence. *Gordon* v. *Manchester & L. R. Co.*, 52 *N. H.* 596.—QUOTING Denton *v.* Great Northern R. Co., 5 El. & Bl. 860. REVIEWING Hawcroft *v.* Great Northern R. Co., 16 Jur. 196, 8 Eng. L. & Eq. 362.

A company, with respect to its employés, has the right to vary from the regular time-table in running its trains; it is merely required to use due care and diligence in notifying employés of the running of the train upon a changed time. *Slater* v. *Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.

The fact that a company states on its time-table that it will not hold itself responsible for delay or for consequences arising therefrom will not relieve it from liability for the result of its negligence in not starting a train. *Buckmaster* v. *Great Eastern R. Co.*, 23 *L. T.* 471.

3. Failure to run on schedule time. —(1) *State decisions.*— A company which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable to a person sustaining injury from such failure for the damages actually sustained by him as the direct and necessary result thereof, but not for conjectural or unproved damages. *Savannah, S. & S. R. Co.* v. *Bonaud*, 58 *Ga.* 180.

If the hours at which trains will start have been advertised in public newspapers, it is not giving reasonable notice of a change of the hour of any particular train to post up handbills announcing it at stations and in the cars; and, if no other notice is given, one who has bought tickets, by the package, in advance, and in accordance with the advertisement has presented himself at the station to be carried before the appointed hour for a train to start, without knowledge of the change, may recover damages for the injury sustained by him from the delay. And the railroad cannot exonerate itself by showing a usage on its part, for several years, to make occasional changes in the hours for certain trains to start, without other notice thereof than by handbills. *Sears* v. *Eastern R. Co.*, 14 *Allen* (*Mass.*) 433.

A locomotive engineer is not bound, at all hazards, to comprehend fully all the results of changes in the running time of trains made by a new time-table, and is not necessarily guilty of negligence in running his train contrary to the rules of such time-table on the first trip after it takes effect. *Nelson* v. *Chicago, M. & St. P. R. Co.*, 22 *Am. & Eng. R. Cas.* 391, 60 *Wis.* 320, 19 *N. W. Rep.* 52.

The length of time given to an engineer to examine the new time-table, his recent severe and protracted labors upon the road, his state of health and the fact that he had applied to be relieved from duty on such trip, the previous manner of running trains, and his understanding of the changes, are all pertinent to the issue of negligence. *Nelson* v. *Chicago, M. & St. P. R. Co.*, 22 *Am. & Eng. R. Cas.* 391, 60 *Wis.* 320, 19 *N. W. Rep.* 52.

(2) *English decisions.*— Where a company's trains fail to connect as advertised, and a passenger is compelled to stay over at the connecting point until the next day, he is entitled to recover his hotel expenses and the fare the next day to his destination, but cannot recover for any damage occasioned by his not reaching other places by the time he might have reached them if the company had performed its contract. *Hamlin* v. *Great Northern R. Co.*, 1 *H. & N.* 408, 2 *Jur. N. S.* 1122, 26 *L. J. Ex.* 20.— FOLLOWED IN Le Blanche *v.* London & N. W. R. Co., L. R. 1 C. P. D. 286, 45 L. J. C. P. D. 521, 34 L. T. 667, 24 W. R. 808.

A passenger taking a ticket made subject to the regulations stated in the company's time-tables cannot recover on account of detention caused by the lateness of another company's train, where the time-table stated that the company did not "hold itself responsible for any delay, detention, etc., arising off its lines, or from the acts or defaults of other parties, nor for the correctness of the times over other lines or companies." *Thompson* v. *Midland R. Co.*, 34 *L. T.* 34.

Where a passenger holds a ticket marked "issued subject to the conditions stated on the company's time-bills," the conditions of the time-bills are incorporated in his contract with the company; and if such conditions relieve the company from liability for injury arising from delay unless in consequence of the wilful misconduct of the company's servants, a passenger who reaches his destination several hours after the advertised time cannot recover, if there is no evidence of the company's wilful misconduct. *Woodgate* v. *Great Western R. Co.*, 51 *L. T.* 826, 33 *W. R.* 428, 49 *J. P.* 196.

A company is liable to a passenger for damages sustained in consequence of a train not running as advertised, although the company had given notice in its time-table that it would not guarantee the arrival or departure of trains at the time stated. *Denton* v. *Great Northern R. Co.*, 5 *El. & Bl.* 860, 2 *Jur. N. S.* 185, 25 *L. J. Q. B.* 129.

Where the time-tables of a company contain a condition which in effect provides that the company refuses to guarantee the punctuality of its trains according to the time mentioned, such condition forms a part of the contract with a passenger, and no recovery can be had for expenses to which the passenger is put by reason of trains failing to connect as provided in the time-table. *McCartan* v. *North-Eastern R. Co.*, 54 *L. J. Q. B.* 441.

Plaintiff took a ticket from B. to L., by a train which was advertised to arrive at L. at 10:10 P.M. Between B. and D. the train was delayed by floods, and consequently failed to catch the corresponding train from D. to L. On arriving at D. plaintiff found that no other train would go to L. that night. Plaintiff claimed damages from the company for breach of an absolute contract to carry from B. to L. on the day when the ticket was taken. *Held*, that the company had only contracted to use due diligence to reach D. in time to catch the corresponding train to L., and that as it failed to do so from unavoidable causes, it was not bound to forward plaintiff by special train. *Fitzgerald* v. *Midland R. Co.*, 34 *L. T.* 771, 3 *Ry. & C. T. Cas.* xxii.

A company cannot absolve itself from the results of negligence in not starting a train by stating on the time-tables that the company will not "hold itself responsible for delay or any consequences arising therefrom." *Buckmaster* v. *Great Eastern R. Co.*, 23 *L. T.* 471, 3 *Ry. & C. T. Cas.* xxiv.

4. Requirement to post time of arrival of trains.—Ind. Act of March 9, 1889, which provides that "every corporation, company, or person operating a railroad within this state" shall post in a conspicuous place "in each passenger depot of such company, located at any station in this state at which there is a telegraph office," a blackboard upon which "each company or person shall cause to be written," at least twenty minutes before the schedule time for the arrival of each passenger train stopping upon such route at each station, the fact whether such train is on schedule time or not, and, if late, how much, and prescribing penalties for the violation of the act, is not indefinite and inoperative as to corporations for the reason that the word "corporation" is omitted in the designation of the parties required to make the specified statement on such blackboard. *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

Although the statute is awkwardly expressed, it is evident that it is intended that a board shall be put up at every station where trains stop, if there is a telegraph office at such stopping place operated in connection with the railroad, receiving and giving information as to the time of the arrival and departure of trains; the word "station," as used in the statute, being synonymous with "passenger depot." *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

The statute cannot be objected to as being class legislation, for the reason that it only applies to stations where there is a telegraph office, because it applies to all of the same class of stations, and all roads may come within its provisions. *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

The statute is not invalid as attempting to regulate interstate commerce from the mere fact that railroad companies to which its provisions are applicable may operate a line of railroad crossing the state boundaries, where such companies are only required by the laws to bring into use knowledge which they may have, or which is possessed by their servants situate in another state, as to the time of the arrival and departure of trains. *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

5. Penalty for violation of such requirement.—Ind. Act of March 9, 1889, provides a penalty "for each violation of the provision of this act, in failing to report or in making a false report," such penalty to be recovered in a civil action, one half of which shall go to the prosecuting attorney of the county, and the remainder to the common-school fund of the county. *Held*, that, although no penalty was imposed for failure to provide the blackboard, a company could not avoid the penalty for failure to make the required report on the ground that it was not compelled to hang a blackboard, and therefore had no means of giving the required information, since it was the duty of the corporation to furnish the proper means of observing the statute. *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

The provision of the Constitution declaring that the common-school fund shall be derived from, among other things, "the fines assessed from breaches of the penal law of the state, and from all forfeitures which may accrue," does not contravene the provision of the statute apportioning the penalty between the prosecuting attorney and the school fund, since the Constitution has reference to fines assessed in criminal proceedings only. *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

It is not a valid objection to the statute that it gives to the prosecuting attorney an interest in the amount recovered. *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

The statute does not limit the liability of a company to a single penalty for a violations of its provisions; but a separate penalty may be recovered in regard to each train stopping at each station during each trip, either for failure to make the entry or for making a false entry. *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

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TRAMWAYS (ENGLAND).

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1. Incorporation and powers, generally.—A tramway company incorporated by act of parliament is not only entitled to carry out the provisions of the statute but is bound to obey. *Edinburgh St. Tramways Co.* v. *Black*, *L. R.* 2 *Sc. App. Cas.* 336.

Where an act incorporating a tramway company directs compliance with the deposited plans and sections they are regarded as embodied in the statute. *Edinburgh St. Tramways Co.* v. *Black*, *L. R.* 2 *Sc. App. Cas.* 336.

2. Authority to construct.—A tramway which is dangerous and inconvenient to horses and vehicles, and which was constructed without authority of parliament, but by virtue of a contract with the vestry of the parish, is a public nuisance. *Queen* v. *Train*, 2 *B. & S.* 640, 31 *L. J. M. C.* 169, 3 *F. & F.* 22.

3. Obligation to repair—Paving (Tramways Act, 1870).—Where a tramway company in constructing its track merely raises the sleepers and rails to the level of the road, or raises the stone packing of the road to the level of the surface of the rails, it is maintaining and keeping the road in good repair under the Tramways Act, 1870, § 23, and is not liable to the

vestry of the parish for the expenses of the superintendence of the road under section 26. *St. Luke's Vestry* v. *North Metropolitan Tramways Co.*, *L. R.* 1 *Q. B. D.* 760, 35 *L. T.* 329.

By a local tramway act, passed after and incorporating the Tramways Act, 1870, the space between the rails and for a distance of eighteen inches beyond each external rail was to be paved by the company to the satisfaction of the local authority for the district, with wood or other paving, to be approved of by the local authority. On an application by the company the local authority declined to approve of a particular paving, and the company thereupon liad it down without such approval. *Held*, on an application by the local authority for a mandamus to the company to take up the paving (affirming the judgment of the Queen's Bench Division), that the powers given to the local authority were subject to the provisions of the Tramways Act, 1870; that a difference had arisen within section 33 of that act which ought to be determined by a referee appointed by the board of trade, and that the mandamus ought not to be granted. *Queen* v. *Croydon & N. Tramways Co.*, *L. R.* 18 *Q. B. D.* 39.—DISTINGUISHED IN Bristol T. & C. Co. *v.* Mayor, etc., of Bristol, 25 Q. B. D. 427.

A municipal corporation, as the road and local authority, has power to alter a road within its district, upon which a tramway has been constructed under the Tramways Act, 1870, by taking up the existing granite pavement and laying down a wood pavement over the whole of the roadway, including the space between the rails of the tramway and eighteen inches on each side thereof. Such alteration is not a difference within the Tramways Act, 1870, § 33, to be referred to a referee to be appointed by the board of trade. *Bristol T. & C. Co.* v. *Mayor, etc., of Bristol*, *L. R.* 25 *Q. B. D.* 427.—DISTINGUISHING Queen *v.* Croydon & N. Tramways Co., L. R. 18 Q. B. D. 39.

4. Use of tracks by other vehicles.—Under 43 Vict. Act No. 25, § 3, the commission for railways in New South Wales has a right to run steam motors upon the tramway lines mentioned in the second schedule thereto. *Commissioner for Railways* v. *Tookey*, *L. R.* 9 *App. Cas.* 720, 53 *L. J. P. C.* 91, 51 *L. T.* 582.

An omnibus proprietor who attaches to his vehicle a lever with arms having a small revolving disk or roller which the driver might drop into the groove of the rail at the lower side of each fore wheel when on the tramway, such disk operating when down as a flange at the point of contact with the rails, but when withdrawn leaving the vehicle free to travel over any part of the road, violates the Tramways Act, 1870, § 54, which prohibits the user of a tramway by unlicensed persons with carriages having flanged wheels or other wheels suitable only to run on the rail of such tramway. *Cottam* v. *Guest*, 1 *Am. & Eng. R. Cas.* 574, *L. R.* 6 *Q. B. D.* 70, 50 *L. J. Q. B. D.* 174, 29 *W. R.* 305.

5. Fares—Municipal regulation.—It is competent to the local authority of any borough to make and to enforce a by-law, under the Tramways Act, 1870, § 48, for regulating the number of passengers to be carried in and upon tramcars, and the extent of accommodation to be afforded to them. The assent of the lessees of the line, under section 46, is not necessary to the validity of such by-law. *Smith* v. *Butler*, *L. R.* 16 *Q. B. D.* 349.

Where a company is authorized to abandon some of the lines specified in its act, and substitute omnibuses, and is authorized to charge a higher rate of fare "on those routes, and any tramway routes worked in connection therewith," it is not authorized to demand a higher fare from passengers traveling by the tramways only. *Edinburgh St. Tramways Co.* v. *Torbain*, *L. R.* 3 *App. Cas.* 58, 37 *L. T.* 288.

Where a person becomes a passenger upon a tramway he is liable to pay the fare whenever it is demanded of him by the conductor. *Egginton* v. *Pearl*, 33 *L. T.* 428.

A by-law of a company providing that "every passenger shall upon demand pay the fare legally demandable for the journey" is authorized by a provision in the company's act empowering it to "make regulations for regulating the traveling in or upon any carriage belonging to them," and also providing that "the tolls, etc., shall be paid to such persons and at such places upon and near the tramways and in such manner and under such regulations as the company shall by notice appoint." *Egginton* v. *Pearl*, 33 *L. T.* 428.

6. Liability for injuries caused by negligence.—The General Tramways Act, 1870 (33 & 34 Vict. c. 78), enacts in section 55 that "the promoters or lessees, as the

case may be, shall be answerable for all accidents, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages." *Held*, that the section applies only to a wrongful act or default, and does not make the promoters or lessees answerable for mere accident caused without negligence by their use of tramcars. *Brocklehurst* v. *Manchester, B., R. & O. S. Tramways Co.*, 26 *Am. & Eng. R. Cas.* 369, *L. R.* 17 *Q. B. D.* 118.

The statutory powers of defendant company could not be taken to authorize it to run its tramcars along the highway upon a tramway in a defective condition. The tramway being defective, defendant in running its tramcar on the highway was doing an unlawful act, and was liable as for a trespass in respect of the injury occasioned to plaintiff by its immediate action. *Sadler* v. *South Staffordshire & B. D. S. Tramways Co.*, 38 *Am. & Eng. R. Cas.* 476, *L. R.* 23 *Q. B. D.* 17.

7. —— or non-repair of highway.—Where a company has entered into a contract with the road authority under 33 & 34 Vict. c. 78, § 29, whereby such authority has undertaken the repair of the portion of the road which, under section 128, the company had to repair, the company is not liable for injuries occasioned through non-repair of such portion of the road to a person using the same. *Alldred* v. *West Metropolitan Trams Co.*, [1891] 2 *Q. B.* 398.—APPROVING Howitt *v.* Nottingham & D. Tramways Co., L. R. 12 Q. B. D. 16.

8. Winding up—Disposal of parliamentary deposit.—Under the discretion given by the Tramways Act, 1870, rule 26, the court ordered a parliamentary deposit fund to be paid out to the official liquidator on the winding up of a tramway company, to be applied by him for the benefit of the company's creditors, and refused to consider such fund forfeited to the crown. *In re Tynemouth Borough Tramway Co.*, 33 *L. T.* 8.

The winding up of a company having been ordered on the ground that it was unable to pay its debts, the court refused to order the parliamentary deposit fund to be applied as part of the assets for the payment of the company's debts, until it was proved that there were debts which could not be paid by means of calls on the shareholders. *In re Bradford Tramways Co.*, 35 *L. T.* 827, 46 *L. J. Ch. D.* 89, *L. R.* 4 *Ch. D.* 18; *reversing* 34 *L. T.* 478.

The intention of the board of trade regulations under the Tramways Act, 1870, relative to the ultimate disposal of the deposit made by a tramway company on obtaining a provisional order authorizing the construction of the tramway, is, that the promoters are not to get back the deposit, either directly or indirectly, if the tramway is not completed; that on an application under rule 28 for application of the deposit, the creditors are to be considered and not the shareholders; and, that only meritorious creditors are to be considered. Otherwise, the deposit will be forfeited to the crown. *In re Lowestoft, Y. & S. Tramways Co., L. R.* 6 *Ch. D.* 484, 46 *L. J. Ch. D.* 393, 25 *W. R.* 525, 36 *L. T.* 578.—FOLLOWED IN Re Birmingham & L. J. R. Co., L. R. 28 Ch. D. 652, 54 L. J. Ch. 580, 52 L. T. 729, 33 W. R. 517.

Where a company which has been authorized to construct tramways by a provisional order of the board of trade, made under the Tramways Act, 1870, and afterwards confirmed by an act of parliament, has failed to construct the authorized tramways within the time limited for the purpose, and has been ordered to be wound up, the court has not, under rule 22 of the Board of Trade Rules, 1886 (the terms of which are in substance the same as those of section 1, subsection 2, of the Parliamentary Deposits and Bonds Act, 1892), jurisdiction to order the liquidator's general costs of the liquidation to be paid out of the deposit made, in pursuance of the Tramways Act, 1870, § 12, prior to the issue of the provisional order. *In re Colchester Tramways Co.*, [1893] 1 *Ch.* 309.

The liquidator cannot be allowed out of the deposit any costs beyond those of proceedings taken by him in reference to the application of the deposit. *In re Colchester Tramways Co.*, [1893] 1 *Ch.* 309.

Where the undertaking authorized by parliament of a tramway or other company has been abandoned, all the creditors of the company, including the solicitor or parliamentary agent, concerned in the promotion of the bill in parliament are, as between themselves and the depositors, entitled, under the Parliamentary Deposits and Bonds Act, 1892, § 1, subsec. 1, 2, to be paid

out of the parliamentary deposit in priority to the depositors. But where the company never had any existence beyond statutory incorporation, and there is a contest between several claimants to the deposit, including the solicitor and parliamentary agent who have been instrumental in obtaining the passing of the company's act, none of the claimants is entitled to rank as a creditor. *In re Manchester, M. & D. Tramways Co.*, [1893] 2 *Ch.* 638.

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1. Amount of recovery against.—A transfer company undertook to convey plaintiff from a station through a city to her home, but set her down a mile from her residence, on the sidewalk of a street much frequented, and on which street-cars ran to within one square of her home. It was daylight, but the weather was cold, and plaintiff was a lady of delicate constitution. She walked, and in doing so contracted a cold which resulted in sickness permanently impairing her health. *Held*, that she could only recover reasonable cost of a conveyance home and any necessary expense in endeavoring to avoid exposure to the cold; that both her own contributory negligence and the remoteness of the damages would prevent a recovery of damages resulting from the sickness. *Francis* v. *St. Louis Transfer Co.*, 5 *Mo. App.* 7.—FOLLOWED IN Morse *v.* Duncan, 8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396.

2. Liability of, as connecting carriers.—A transfer company employed by a consignee to remove goods from a station is not a connecting carrier. *Nanson* v. *Jacob*, 32 *Am. & Eng. R. Cas.* 553, 93 *Mo.* 331, 12 *West. Rep.* 358, 6 *S. W. Rep.* 246; *affirming* 12 *Mo. App.* 125.

Defendant company received a piano for a point beyond its line, and gave a bill of lading reciting that it was to be carried to the end of its line and delivered "to the next connecting common carrier." The next railroad line and defendant's road

were connected by a "Y," but their freight depots were about one mile apart. It was the habit of the companies in transferring freights by the car-load from one line to the other to use the "Y," but freights in less quantities were removed from the cars and transported by drays. In this case defendant removed the piano from its car and delivered it to persons doing business as a transfer company, who let the piano fall, in transporting it from one station to the other, and injured it. *Held*, that such transfer company was not "a connecting common carrier," within the meaning of the bill of lading, and that defendant company was liable for the injury. *Missouri Pac. R. Co.* v. *Young*, 25 *Neb.* 651, 41 *N. W. Rep.* 646.—APPLYING Hooper *v.* Chicago & N. W. R. Co., 27 Wis. 81.

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I. IN GENERAL.

1. What amounts to a trespass.—Trespass is an unlawful act committed with violence on the property or rights of another. An action of trespass is that which is instituted for the recovery of damages for a wrong committed with immediate force. *St. Julien* v. *Morgan's L. & T. R. & S. Co.*, 33 *Am. & Eng. R. Cas.* 92, 39 *La. Ann.* 1063, 3 *So. Rep.* 280.

Where defendant has no legal right, without the consent of complainant, to place piers for a new bridge where the attempt is made to locate them, it is of no consequence whether complainant suffered damage or not by the proposed erections on the canal and middle ground, so far as complainant's rights are concerned. It is his right to have the use of the canal and its embankments free and unobstructed by defendant's new bridge, and the act of the latter in its attempt to infringe that right is a wilful trespass which should be restrained. *Newaygo Mfg. Co.* v. *Chicago & W. M. R. Co.*, 29 *Am. & Eng. R. Cas.* 505, 64 *Mich.* 114, 30 *N. W. Rep.* 910.

It was trespass for defendant telegraph company to dig and bore under a railway for the purpose of carrying its wires under the spot where the railway crossed a highway, the Telegraph Companies Act authorizing it to carry its wires over railways "directly but not otherwise." *South Eastern R. Co.* v. *European & A. E. P. Tel. Co.*, 9 *Ex.* 363, 23 *L. J. Ex.* 113.

A traveler on the highway is not justified in throwing down gates, wrongfully erected by a railway company at the point where its line intersects the highway, so as to block up the way, but must seek his damage at law. *Ellis* v. *London & S. W. R. Co.*, 2 *H. & N.* 424, 3 *Jur. N. S.* 1008, 26 *L. J. Ex.* 349.

Defendant company, having acquired land ninety feet wide for the construction of its line, conveyed to plaintiff a portion going twenty-two feet into an embankment, which at that point was high. Plaintiff built a root house on his portion, which fell in, and defendant filled up the hole and repaired the embankment, for which plaintiff brought trespass. The jury found that what defendant did was necessary for the safety of the railway. *Held*, that nevertheless it was liable; for, having conveyed the land, as it had a right to do, it could not afterwards, without notice or compensation, interfere with the vendee. *McDonald* v. *Grand Trunk R. Co.*, 28 *U. C. Q. B.* 320.

2. What does not.—A person who, while refreshing himself at a public house, keeps his van standing outside upon ground which is a part of the premises of a company whose station is close by, cannot be

charged under 3 & 4 Vict. c. 97, § 16, as a wilful trespasser, where it appears that the only access to the public house was across this ground. *Wilkinson* v. *Goffin*, 33 *L. T.* 824.

Where an individual has an implied, unrevoked license to land goods upon a wharf, he does not commit a trespass in ordering goods to be delivered there. *Davis* v. *Chautauqua Lake S. S. Assembly*, 2 *N. Y. S. R.* 365, 41 *Hun* 638.

3. Crossing railway track.—By 3 & 4 Will. IV. c. 34, establishing a railway, a party whose property has been cut through is entitled to cross the line at any point, in order to get to his land on the other side, unless the company, under the provisions of the act, furnishes a proper method of communication. *Grand Junction R. Co.* v. *White*, 8 *M. & W.* 214.

A landowner who has been awarded compensation for the total separation of his land by the railway, without method of communication being provided, has no right afterwards to cross the track for the purpose of the occupation of his lands, and in so doing is a trespasser within the meaning of 3 & 4 Vict. c. 97, § 16. *Manning* v. *Eastern Counties R. Co.*, 12 *M. & W.* 237, 3 *Railw. Cas.* 637, 13 *L. J. Ex.* 265.

4. Tearing up bridge. — A railroad was constructed over the site of a highway bridge. The railroad company failing to erect a new bridge, the township authorities gave to plaintiffs the contract for erecting a new bridge on the railroad right of way, claiming that the president of the company had agreed thereto. After the work was begun, defendants, acting by authority of the railroad, tore up the bridge, and plaintiffs brought trespass *vi et armis*. *Held*, that if the jury found that the president of the railroad had the necessary authority, and agreed to the erection of the bridge on the right of way, then defendants were trespassers, and plaintiffs could recover. *Bean* v. *Howe*, 85 *Pa. St.* 260.

5. Pleading—Verdict—Judgment.—The rule at common law that, in an action of trespass against several defendants, a verdict and judgment may be rendered for or against one or more of them, has not been narrowed by the Indiana statute. *Louisville, N. A. & St. L. A. L. R. Co.* v. *Duvall*, 40 *Ind.* 246.

In an action of trespass against a company it should be alleged in the petition that it is a corporation or copartnership, or that it acts as such. *Byington* v. *Mississippi & M. R. Co.*, 11 *Iowa* 502.

II. TRESPASS UPON LAND.

6. In general.*—Railroad corporations may commit trespass. *Mobile & M. R. Co.* v. *McKellar*, 59 *Ala.* 458. — FOLLOWING Owsley *v.* Montgomery & W. P. R. Co., 37 Ala. 560.

Railroad companies, acting within the limits of their franchises, and using due skill and care in the construction and operation of their roads, and having the right of way, are not liable as trespassers, nor for injuries to outside property which are the natural and unavoidable effect of the road. *St. Louis, I. M. & S. R. Co.* v. *Morris*, 5 *Am. & Eng. R. Cas.* 48, 35 *Ark.* 622.

Trespass will lie against a corporation. *Whiteman* v. *Wilmington & S. R. Co.*, 2 *Harr.* (*Del.*) 514.

Trespass *quare clausum fregit* will lie against a railroad company or other private corporation. *Main* v. *North Eastern R. Co.*, 12 *Rich.* (*So. Car.*) 82. — FOLLOWED IN Greenville & C. R. Co. *v.* Partlow, 14 Rich. 237.

One whose land has been taken for a railroad has no right afterwards to enter thereupon and dig and carry away the turf, or do any other act which in any degree interrupts or endangers its use by the company, and for such entry he will be liable in trespass. *Connecticut & P. R. R. Co.* v. *Holton*, 32 *Vt.* 43.—QUOTING Jackson *v.* Rutland & B. R. Co., 25 Vt. 159.—FOLLOWED IN Troy & B. R. Co. *v.* Potter, 42 Vt. 265. QUOTED IN Tennessee & C. R. Co. *v.* East Ala. R. Co., 75 Ala. 516, 51 Am. Rep. 475. REVIEWED IN Vermilya *v.* Chicago, M. & St. P. R. Co., 66 Iowa 606.

7. Venue.—A railroad charter provided that the company could be sued only at its domicil "except in actions of trespass." *Held*, that the word "trespass" was employed by the legislature in its broadest sense, so as to comprehend a variety of wrongs, whether direct or indirect, in which force was used, and not in the technical sense of the common-law term. *State ex rel.* v. *Judge*, 33 *La. Ann.* 954.

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* Trespass against railroads for entering on and using lands without due process of law, see note, 10 AM. & ENG. R. CAS. 43.

And under the provisions of the charter, as well as of La. Code of Practice, the corporation can be sued for trespass out of its domicil and in the parish in which the trespass had taken place. *State ex rel.* v. *Judge*, 33 *La. Ann.* 954.—QUOTED IN Caldwell *v.* Vicksburg, S. & P. R. Co., 39 Am. & Eng. R. Cas. 239, 40 La. Ann. 753. REVIEWED IN St. Julien *v.* Morgan's L. & T. R. & S. Co., 33 Am. & Eng. R. Cas. 92, 39 La. Ann. 1063, 3 So. Rep. 280.

Trespass for injuries to real estate or its corporeal hereditaments cannot be brought beyond the jurisdiction where the land is situated. So where a company trespasses on land in New Jersey it cannot be sued in New York. *Huenermund* v. *Erie R. Co.*, 48 *How. Pr.* (*N. Y.*) 55.

Against persons committing trespasses, the Texas statute authorizes suit to be brought in the county wherein the trespass was committed. (Paschal's Dig. art. 1423.) A railroad company is a person within the meaning of this act, and is liable to be sued in any county in which its agents may have committed a trespass. *Bartee* v. *Houston & T. C. R. Co.*, 36 *Tex.* 648. — DISTINGUISHED IN Houston & T. R. Co. *v.* Oram, 49 Tex. 341.

In an action against a corporation for a trespass, brought in the county in which the trespass is charged to have been committed, an allegation of residence of defendant is not material to show that the court had jurisdiction of the person. *Southern C. P. & M. Co.* v. *Bradley*, 52 *Tex.* 587.

8. Who may sue.*—A city proceeded under an ordinance to condemn land for a street, with the condition that a railroad company should pay the damages to the city for the use of the landowners, and have a right to lay its tracks thereon. The company paid the damages and constructed its track, but the city failed to pay over the damages to the landowners, and reversioners brought an action of trespass. *Held:* (1) that the entry upon the land either for the purpose of making a street or for the purpose of constructing a railroad was a trespass, and the investment of the money after the commencement of the suit had no effect upon the right to recover for the trespass committed before bringing the suit; (2) that there was no such ouster or disseisin by the company as would prevent the landowners from maintaining the action. *Baltimore & O. R. Co.* v. *Boyd*, 63 *Md.* 325. —QUOTING Murray *v.* Fitchburg R. Co., 130 Mass. 101.

Where a company occupies a portion of the land appropriated to its use for depot and station purposes, the manner of its use for these purposes is in its discretion; and it is no concern of the owner of the fee. Even if it exceeds its franchise in the manner of such occupancy, it does not thereby disseise the owner of the fee, nor authorize an action for trespass by him, nor justify a demand for damages for rents and profits for such use and occupation. *Peirce* v. *Boston & L. R. Corp.*, 24 *Am. & Eng. R. Cas.* 634, 27 *Am. & Eng. R. Cas.* 359, 141 *Mass.* 481, 6 *N. E. Rep.* 96.—DISTINGUISHING Prop'rs of Locks, etc., *v.* Nashua & L. R. Co., 104 Mass. 1.

Trespasses upon real property effected by an illegal structure thereon are continuous in their nature and give to the owner separate successive causes of action at law for damages, from time to time, as the injuries are perpetrated. *Pappenheim* v. *Metropolitan El. R. Co.*, 50 *Am. & Eng. R. Cas.* 260, 128 *N. Y.* 436, 28 *N. E. Rep.* 518, 40 *N. Y. S. R.* 445; *affirming* 27 *J. & S.* 576, 36 *N. Y. S. R.* 1024, 13 *N. Y. Supp.* 955.

In each action the measure of recovery is for the damages sustained up to the time of its commencement. *Pappenheim* v. *Metropolitan El. R. Co.*, 50 *Am. & Eng. R. Cas.* 260, 128 *N. Y.* 436, 28 *N. E. Rep.* 518, 40 *N. Y. S. R.* 445; *affirming* 27 *J. & S.* 576, 36 *N. Y. S. R.* 1024, 13 *N. Y. Supp.* 955.

The owner may also resort to equity to prevent a continuance of the trespass and a multiplicity of actions at law. *Pappenheim* v. *Metropolitan El. R. Co.*, 50 *Am. & Eng. R. Cas.* 260, 128 *N. Y.* 436, 28 *N. E. Rep.* 518, 40 *N. Y. S. R.* 445; *affirming* 27 *J. & S.* 576, 36 *N. Y. S. R.* 1024, 13 *N. Y. Supp.* 955.

A corporation may maintain an action of trespass *quare clausum fregit*. *Greenville & C. R. Co.* v. *Partlow*, 14 *Rich.* (*So. Car.*) 237.—FOLLOWING Main *v.* North Eastern R. Co., 12 Rich. 82.

A company may maintain trespass for all unlawful entries and acts upon land taken by it for railroad purposes under its charter, whenever such entries and acts embarrass the use of the road or interfere with the exclusive possession of such land to which

* When owner of land taken may bring trespass, see note, 14 AM. & ENG. R. CAS. 225.

the company is entitled. *Connecticut & P. R. R. Co.* v. *Holton*, 32 *Vt.* 43.

9. Title or possession necessary to maintain the action.— One who has a contract to erect a building on premises, and is in actual possession, may maintain trespass *quare clausum fregit* against a company that forcibly enters thereon. *Illinois & St. L. R. Co.* v. *Caldwell*, 17 *Ill. App.* 409.

In making proof of title in an action of trespass to realty, when the title is put in issue, if plaintiff puts in evidence the deed only of his immediate grantor, and the grantor is not the United States, he should show further that he is in possession under the deed. *McCormick* v. *Chicago, R. I. & P. R. Co.*, 47 *Iowa* 345.

A company was sued for a trespass in cutting and carrying away earth, and answered admitting the acts complained of, but denied that they were committed on "any lot of this plaintiff," but did not claim any title to the land itself. *Held*, that plaintiff was not required to show paper title, where it was shown that he, and those under whom he claimed, had been in possession for nearly 100 years. *Chesapeake & O. R. Co. v. Hickey*, (*Ky.*) 22 *S. W. Rep.* 441.

A father gave to his son a license to enter upon land under a parol agreement that the son was to occupy and pay taxes thereon, and to receive a deed in the future upon the happening of a certain contingency. Subsequently a company built its road across the land, and the damages were paid to the father, and he made a deed conveying the right of way, all of which was known to the son, who kept silent. *Held*, that he could not afterwards assert title as against the company and recover for trees cut along the right of way, although he had been in possession for more than ten years. *Louisville, N O. & T. R. Co.* v. *Day*, 67 *Miss.* 227, 7 *So. Rep.* 349.

In an action for trespass upon realty, where plaintiff fails to show that he had possession at the date of the alleged trespass, he cannot recover, the gist of the action being injury to the possession. *Masterson* v. *West End Narrow-Gauge R. Co.*, 5 *Ga. App.* 575.

The possession, unaccompanied by paper title, requisite to furnish the presumption of ownership sufficient to maintain an action for an injury to the freehold, must be actual. Evidence of merely occasional entries at long intervals upon an uninclosed wood-lot that is not parcel of an improved farm or connected with one is not sufficient to establish the requisite possession. Nor is payment of taxes on the lot evidence of possession. *Miller* v. *Long Island R. Co.*, 71 *N. Y.* 380; *reversing* 9 *Hun* 194.

In an action at law to recover for an injury in the nature of a trespass to real estate, plaintiff's rights can be determined only in accordance with the situation existing when the action was commenced; where his title is put in issue he must stand or fall by the title and right to recover which he then had, and no other. *Dean* v. *Metropolitan El. R. Co.*, 119 *N. Y.* 540, 23 *N. E. Rep.* 1054, 30 *N. Y. S. R.* 81.

10. Right of landlord or tenant to sue.— The owner of land cannot bring trespass *quare clausum fregit* where the premises are, at the time of the trespass, in the exclusive possession of tenants, and not held at will. *Halligan* v. *Chicago & R. I. R. Co.*, 15 *Ill.* 558.— DISTINGUISHING Starr *v.* Jackson, 11 Mass. 519; Hingham *v.* Sprague, 15 Pick. (Mass.) 102; Curtiss *v.* Hoyt, 19 Conn. 154; Davis *v.* Nash, 32 Me. 411.

Where there is a lease for years, rent to be paid by delivery to the landlord of a certain share of the crops when mature, the crops while growing and before delivery are the property of the tenant, and he can maintain a suit for a trespass thereto even against one who purchases the land from the landlord. In such case a grant by the landlord to a company is no defense to a suit by the tenant for injury to crops growing on the lands so granted. *Chicago & W. M. R. Co.* v. *Linard*, 20 *Am. & Eng. R. Cas.* 352, 94 *Ind.* 319.

A person claiming to be the owner of land as against all the world, and in possession thereof by a tenant, may maintain an action against a mere wrong-doer for injuries done to the land, although he has never had personal possession of the land, and although his title to the land may be ever so defective. Such possession and claim of ownership are *prima facie* evidence of ownership as against any person, and are conclusive evidence of ownership as against a mere wrong-doer. A mere wrong-doer cannot dispute the title of the person so in possession and claiming ownership. *Pacific R. Co.* v. *Walker*, 12 *Kan.* 601.

A company is not liable to a tenant for a trespass committed by its contractors, where

the tenant only had a verbal lease of which the company had no notice, and was not in possession at the time the contract was made. *McKinley* v. *Chicago, S. F. & C. R. Co.*, 40 *Mo. App.* 449.

Where there are apt words in a writing to constitute a lease of lands for farming, and giving exclusive occupation to the tenant, although the rent is to be returned in kind by a share of the crops, the landlord is out of possession, and cannot maintain trespass. *New Jersey & M. R. Co.* v. *Van Syckle*, 37 *N. J. L.* 496.

If a company, in violation of a contract with the landlord, enters and commits a trespass upon land held by a tenant, it is liable, in an action on the case, to the tenant for the damages sustained by him; otherwise if there is no contract with the company by which the tenant is protected in his possession of the premises. *Louisville & N. R. Co.* v. *Faulkner*, 2 *Head* (*Tenn.*) 65.

11. Parties defendant.—Individuals entering upon the land of another, and trespassing on the same, and assuming and claiming to act by authority of a railroad corporation, in doing acts which the corporation had no legal right to do, are individually liable for their trespasses. *Waller* v. *Martin*, 17 *B. Mon.* (*Ky.*) 181.

In an action for appropriating plaintiff's lots as depot grounds, the defense pleaded was that the alleged trespass was committed by another company, a corporation still existing and fully organized. The testimony showed that such other company was, in fact, the defendant under that name. *Held*, that defendant was liable, and the evidence did not present a case of one road aiding in the construction of another. *DeLissa* v. *Missouri Pac. R. Co.*, 36 *Mo. App.* 706.

An entry without bond on land in the line of one railway, by contractors employed by another company, which is the principal stockholder in the first company, will not authorize a suit for trespass against the first company, although this company filed a bond within four days after the suit was commenced. *Heller* v. *North & W. Branch R. Co.*, 148 *Pa. St.* 563, 24 *Atl. Rep.* 114.

A company made a contract with an individual for the construction and ballasting of its road. The contractor, in ballasting the road, made a track across plaintiff's land to a gravel pit on adjoining land. *Held*, that the company was not liable for the trespass, the track being made without its authority, and being merely collateral to the work to be performed under the contract. *Payne* v. *Fredericton R. Co.*, 13 *New Brun.* 497.

12. Declaration or complaint.—In a suit against a company for damages for taking a portion of a mining claim and cutting timber thereon, a complaint showing an entry without permission on the claim in plaintiff's possession and the doing an injury to the soil and timber sufficiently avers possession, entry, and damage. *Jackson* v. *Dines*, 13 *Colo.* 90, 21 *Pac. Rep.* 918.

In such case, where the complaint contains no averment of citizenship on the part of plaintiffs, but there is no issue, objection, or specific assignment of error in that regard by defendant below, it will not be considered on appeal. *Jackson* v. *Dines*, 13 *Colo.* 90, 21 *Pac. Rep.* 918.

If the owner of land is disseised while in possession, he may maintain trespass; and it is immaterial that the declaration alleges, as an aggravation of the entry, acts which plaintiff is not permitted to prove. *Murray* v. *Fitchburg R. Co.*, 130 *Mass.* 99.—DISTINGUISHING Bartlett *v.* Perkins, 13 Me. 87.—QUOTED IN Baltimore & O. R. Co. *v.* Boyd, 63 Md. 325.

13. Defenses, generally. — Proof which will support the plea of *liberum tenementum* is a complete defense to trespass *quare clausum*. *Chicago & W. I. R. Co.* v. *Slee*, 33 *Ill. App.* 416.

As to when a company is justified in entering upon land under a plea of *liberum tenementum*, see *Chicago & W. I. R. Co.* v. *Slee*, 33 *Ill. App.* 416.

Where one having a license to enter upon the lands of another makes entry thereon, using such force as is necessary for that purpose, he cannot be held liable for a trespass on real estate, although he may render himself liable for any other trespass committed at the same time, as, for example, to the person. *Willoughby* v. *Northeastern R. Co.*, 43 *Am. & Eng. R. Cas.* 660, 32 *So. Car.* 410, 11 *S. E. Rep.* 339.

Defendant was sued for trespass to land, claimed to belong to plaintiff, but which had been taken and used for a railway. Defendant was superintendent of government railways, and application was made for a stay of proceedings on an affidavit alleging that the trespass was committed by him in the employ of the government as such superintendent, and not otherwise.

Plaintiff in answer swore that the action was brought against defendent for personally trespassing on his land, and denied that the land had been legally taken by the government. *Held*, that the court ought not, on a summary application, to stay the proceedings, but should leave defendant to resist the action by plea in the ordinary way. *Milner* v. *Brydges*, 18 *New Brun.* 113.

14. Plea or answer.—Trespass against a company, for entering upon plaintiff's close with men, etc., and digging up and carrying away earth, etc. The record did not show that the injuries were committed by the company when acting under its charter, or in the construction of its road. *Held:* (1) that it could not be presumed that they were so committed; (2) that the company, if it desired to avail itself of such defense, should have set it up by plea. *Crawfordsville & W. R. Co.* v. *Wright*, 5 *Ind.* 252.

In an action of trespass *quare clausum fregit*, title to the land may be given in evidence under the plea of not guilty; but matter admitting the trespass, and seeking to justify it, as leave and license, must be specially pleaded. *Hetfield* v. *Central R. Co.*, 29 *N. J. L.* 571; *reversing* 29 *N. J. L.* 206.

15. Evidence—Burden of proof.—In an action for trespass to real estate, by which permanent injury to it is done, if the property has a rental value the depreciation in the annual rental value caused by the injury may be shown, in order to show how much the value of the real estate was diminished by the trespass. *Schroeder* v. *De Graff*, 5 *Am. & Eng. R. Cas.* 298, 28 *Minn.* 299, 9 *N. W. Rep.* 857.

Though a company may inadvertently remove soil from plaintiff's land, it is liable for at least nominal damages; but evidence that the soil was again replaced, upon the company's attention being called to it, is admissible in mitigation of damages. *Flynt* v. *Chicago, B. & Q. R. Co.*, 38 *Mo. App.* 94.

Where a claim is made for trespass and waste, some amount of damages must be shown in order to entitle plaintiff to a judgment. *Murtfeldt* v. *New York, W. S. & B. R. Co.*, 25 *Am. & Eng. R. Cas.* 144, 102 *N. Y.* 703, 1 *Silv. App.* 93, 7 *N. E. Rep.* 404, 2 *N. Y. S. R.* 444; *affirming* 34 *Hun* 632.

Defendant company leased to plaintiff a quantity of iron rails with which plaintiff constructed a railway upon her land. The lease agreement contained a clause providing that in case of condition broken the company should have the right to take possession and remove the rails. Plaintiff failed to pay the rent, and the company entered upon her land and removed the rails, claiming that the agreement gave to it a license to enter. Plaintiff objected to defendant's proceedings and was forcibly removed from the track, where she had placed herself. On the trial plaintiff admitted that the agreement had been signed by her, and that she claimed under it. *Held:* (1) that defendant had the right to establish its defense by the cross-examination of plaintiff's witnesses, and that a refusal to allow the written agreement to be read at that time without proof of other signatures than that of plaintiff was erroneous; a subsequent reading of the contract as a part of the testimony did not cure such error; (2) that the entry by defendant, even if the force used constituted an assault, did not make it guilty of trespass *ab initio*. If an assault was committed plaintiff has her proper action. *Willoughby* v. *Northeastern R. Co.*, 43 *Am. & Eng. R. Cas.* 660, 32 *So. Car.* 410, 11 *S. E. Rep.* 339.

16. Damages, generally.*—In trespass for disturbing the bed of a turnpike road, by building a railroad thereon, the measure of damages is the damage actually sustained by reason of the acts of defendant, not the entire value of the land composing the bed of the road. *Stockton & L. Gravel Road Co.* v. *Stockton & C. R. Co.*, 53 *Cal.* 11.

The only damages plaintiffs could recover under their declaration in trespass (if they were not entitled to exemplary damages) were damages done to their land, and their rights as owners of the close or lot by the trespasses complained of in the declaration, that is to say, damages caused by the acts of defendant in having on various days and times within three years before the institution of the suit driven large cars drawn by locomotives "upon and over their said close." *Baltimore & O. R. Co.* v. *Boyd*, 63 *Md.* 325.

In an action for malicious trespass, though no estimate, in dollars and cents, of the amount of the actual damages sustained is given by any witness, the jury is not lim-

* Value of improvements put upon land set off against damage caused by trespass, see note, 23 AM. & ENG. R. CAS. 107.

ited, in determining such amount, to nominal damages. *Wampach* v. *St. Paul & S. C. R. Co.*, 22 *Minn.* 34, 19 *Am. Ry. Rep.* 421.

For unlawful excavation and removal of his soil, a party is entitled to recover, not the cost of refilling, but the amount of the diminution of the value of the property injured by such excavation and removal. *Karst* v. *St. Paul, S. & T. F. R. Co.*, 22 *Minn.* 118. — FOLLOWED IN Baldwin *v.* Chicago, M. & St. P. R. Co., 27 Am. & Eng. R. Cas. 402, 35 Minn. 354.

A trespass consisted in constructing a railroad across a farm without the right to do so having been acquired by ascertaining damage and paying compensation to the owner. *Held*, that if the ties and rails increased the value of the farm, that should be considered in determining the amount of damages; but if the farm was no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage done to the farm should be made on account of the value of the ties and rails. *Schroeder* v. *De Graff*, 5 *Am. & Eng. R. Cas.* 208, 28 *Minn.* 299, 9 *N. W. Rep.* 857.

Costs incurred in preparing a bill for an injunction cannot be recovered in the action of trespass for taking possession of plaintiff's land. *Abthorp* v. *Bedford & C. R. Co.*, 8 *L. T.* 200.

Plaintiff was in possession of certain lands under an oral agreement of purchase at $450 payable in bricks deliverable as demanded, of which $100 worth had been demanded and delivered. Defendant, without making any compensation or taking any steps under the statute therefor, built its railway in front of the land so as to interfere with plaintiff's right of access, whereupon an action was brought and damages recovered by plaintiff, he being treated as entitled to the whole estate in the land and the injury permanent, reducing the value. *Held*, that the company was a trespasser, and could not justify the acts complained of under the statute; that substantial damages, on proof of them, were recoverable for the disturbance of the possession, but in a first action only nominal damages for the injury to the reversion. *Mason* v. *South Norfolk R. Co.*, 19 *Ont.* 132.

17. Destroying crops — Rental value.—In an action to recover damages for a trespass alleged to have been committed by destroying plaintiff's fences and by trampling upon and destroying the grain and herbage growing on his land, plaintiff cannot recover for injury done to the grain by the cattle of a third person, for any period of time after the original entry and trespass. *Berry* v. *San Francisco & N. P. R. Co.*, 50 *Cal.* 435.

The measure of damages against a company which, as a naked trespasser upon inclosed land, so uses its possession as to prevent the making of crops is not the supposed value of the crops that might have been made, but the rental value of the land, as also the value of fences destroyed or other specific injury directly inflicted. *Houston, E. & W. T. R. Co.* v. *Adams*, 20 *Am. & Eng. R. Cas.* 246, 63 *Tex.* 200.

In an action to recover damages for trespass upon certain lands the jury found that defendant had without authority taken possession of one twelfth of an acre of plaintiff's lands, of the value of fifty dollars per acre, that no damage had been done to the land itself, and that plaintiff was not entitled to recover anything for restoring the soil, but allowed him the sum of fifty dollars as the rental value of the land occupied by defendant for four and one half years. *Held*, that the verdict was excessive. *Henderson* v. *Chicago, R. I. & P. R. Co.*, 83 *Iowa* 221, 48 *N. W. Rep* 1029.

Where a railroad, by mistake, occupies the land of another without his consent, the law will not imply a contract to pay to the owner such sum for the use as he has notified the trespasser will be charged therefor during the time it occupies the same. In such case the proper measure of damages is what the owner could have leased the land for if defendant had not inadvertently occupied it. *Galveston Wharf Co.* v. *Gulf, C. & S. F. R. Co.*, 36 *Am. & Eng. R. Cas.* 668, 72 *Tex.* 454, 10 *S. W. Rep.* 537.

18. Interest on damages.—In ascertaining the damages for a trespass to lands and removing material therefrom, the jury may, in their discretion, add to the value of the material taken interest thereon at six per cent. per annum, without finding, as in suits on contract, that there has been unreasonable delay of payment. *Pittsburgh, Ft. W. & C. R. Co.* v. *Swinney*, 97 *Ind.* 586. —DISTINGUISHING Rogers *v.* West, 9 Ind. 400; Borum *v.* Fouts, 15 Ind. 50; Reed *v.* Helm, 15 Ind. 428; Frazer *v.* Boss, 66 Ind. 1; Dobenspeck *v.* Armel, 11 Ind. 31; Bissell *v.* Hopkins, 4 Cow. (N. Y.) 53; Pekin *v.*

Reynolds, 31 Ill. 529; Hoyt *v.* Gelston, 13 Johns. (N. Y.) 139.

19. Punitive or exemplary damages.—In actions of trespass to real estate, punitive or exemplary damages can properly be awarded only where the trespass was wanton, wilful, or malicious. *Carli* v. *Union Depot, St. R. & T. Co.*, 32 *Minn.* 101, 20 *N. W. Rep.* 89.

Where a company has condemned a right of way it has a right to use it in taking dirt from one place to another, and the landowner cannot recover damages on account of the unsightliness of his plantation or its supposed unhealthiness from water standing in the excavations, or the inconvenience of crossing the right of way; and he cannot recover punitive damages because the company encroaches a little on his land, where there is no evidence of malice. *New Orleans, B. R., V. & M. R. Co.* v. *Brown*, 64 *Miss.* 479, 1 *So. Rep.* 637.

20. Treble damages.—Where a company is authorized by its charter to enter upon land and cut timber upon making application for the appointment of disinterested freeholders to assess the damages, and the charter provision is complied with, it is not liable for treble damages under a statute which provides for such damages against persons knowingly committing trespass. If the company acted in good faith it is only liable for actual damages. *Lindell* v. *Hannibal & St. J. R. Co.*, 25 *Mo.* 550.

It is the actual damages suffered which are allowed to be trebled when the trespass is wilful and intentional; the distinction being that when the trespass is casual or involuntary, single damages are given, but when the trespass is wilful, they are trebled. *Oregon & C. R. Co.* v. *Jackson*, 21 *Oreg.* 360, 28 *Pac. Rep.* 74.

III. TRESPASS UPON PERSONAL PROPERTY OR THINGS ATTACHED TO THE SOIL.

21. When the action lies. — The owner of trees cut from his land by a trespasser cannot be divested of his title thereto, although the trespasser has converted them into railroad ties and sold them to a *bona fide* purchaser, the rule being established, with scarcely an exception, that where the identity of the article can be traced, the right of property continues to exist in the original owner. *Strubbee* v. *Cincinnati R. Co.*, 78 *Ky.* 481.—CRITICISING Isle Royale Min. Co. *v.* Hertin, 37 Mich. 332; Heard *v.* James, 49 Miss. 236. REVIEWING Lake Shore & M. S. R. Co. *v.* Hutchins, 32 Ohio St. 571; Wetherbee *v.* Green, 22 Mich. 311.

A person committing a wilful and malicious trespass upon the property of another, under circumstances involving unavoidable injury to persons or property, is responsible to any person injured by such trespass. It is not necessary that he should intend to injure the particular person suffering. So where a person wantonly and maliciously takes out and throws away pins used for coupling cars, for the purpose of injuring the railroad, he is liable for an injury to an employé of the company resulting therefrom. *Munger* v. *Baker*, 65 *Barb.* (*N. Y.*) 539. — QUOTING Vandenburgh *v.* Truax, 4 Den. (N. Y.) 465.

In such case a charge to the jury that if defendant took the pins out, and, in the ordinary use and management of the train, plaintiff while attempting to couple the cars, and without any want of care or attention on his part, or on the part of any person in charge of the train, sustained an injury by reason of such removal of the pins, defendant was liable to him in damages, is substantially correct. *Munger* v. *Baker*, 65 *Barb.* (*N. Y.*) 539. — DISTINGUISHING Ryan *v.* New York C. R. Co., 35 N. Y. 210; Vandenburgh *v.* Truax, 4 Den. (N. Y.) 465; Scott *v.* Shepherd, 2 W. Bl. 892, 3 Wils. 403; Guille *v.* Swan, 19 Johns. (N. Y.) 381.

Plaintiff, an expressman, by direction of the owner took possession of household goods, at her New York residence, for shipment and removal to a residence in the country. After he had removed a portion of the goods from the cars to the residence, the employés of defendant, a rival concern, took possession of the remainder of the goods, and removed the same, against the remonstrance and objection of plaintiff, and after notification by him that the same were in his possession. In an action to recover damages for trespass, defendant was held liable for nominal damages and costs. *Held*, that the judgment should be affirmed. *Matthews* v. *Smith's Exp. Co.*, 1 *Misc.* (*N. Y.*) 238.

A company has no right, for the purpose of repairing its fences, to take timber or poles from the adjoining lands not owned by it. *Carey* v. *Chicago, M. & St. P. R. Co.*, 20 *Am. & Eng. R. Cas.* 469, 61 *Wis.* 71, 20 *N. W. Rep.* 648.

22. Venue. — The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. So where the action is against a railroad for cutting timber, it need not be brought in the county where the land is situate. Mo. Gen. St. 1865, ch. 63, § 3, does not apply to actions of that description, but contemplates those where the suit was in the nature of a proceeding *in rem* affecting the land itself. *Hannibal & St. J. R. Co.* v. *Mahoney*, 42 *Mo.* 467.—REVIEWED IN Sweet *v.* Maupin, 65 Mo. 65.

An action for trespass to personal property (as an elevator on the right of way of a railroad) committed in another state may be maintained in the courts of Missouri. *Gregg* v. *Union Pac. R. Co.*, 48 *Mo. App.* 494.

23. Who may sue. — Children and heirs at law are entitled to sue for damages to land after it has descended to them and is in their possession as heirs of their father, and for damages to crops cultivated on the land. No administration of their father's estate is necessary to enable them to bring suit. *Houston & T. C. R. Co.* v. *Knapp*, 51 *Tex.* 569.

24. Declaration or petition.—A declaration, in an action of trespass or case for the taking of or injury to personal property, which does not contain a description of the property taken or injured is bad on demurrer. *Randlette* v. *Judkins*, 23 *Am. & Eng. R. Cas.* 478, 77 *Me.* 114.

A petition in trespass which alleges the conversion of trees cut and carried away from plaintiff's land sets out a good cause of action at common law, and will be good on demurrer, although it calls for treble damages awarded by the statute and fails to state that the defendant has no interest or right in the trees, or is otherwise insufficient as a statutory pleading; neither is it bad for failing to state in terms that the trees were the property of plaintiff. *Atlantic & P. R. Co.* v. *Freeman*, 61 *Mo.* 80.

25. Defenses. — The owner of the fee cannot maintain trespass against a section man on a railroad for cutting and carrying away the hay and grass growing within the lines of the location, under instructions from the general manager and roadmaster to cut and burn the bushes, grass, and rubbish within his section. *Hayden* v. *Skillings*, 29 *Am. & Eng. R. Cas.* 316, 78 *Me.* 413, 6 *Atl. Rep.* 830. — FOLLOWED IN Lander *v.* Bath, 85 Me. 141.

In trespass for taking goods it appeared that they came to plaintiff's warehouse consigned to one P. and were seized there by defendant under a writ of replevin sued out against P. by one H. P. asserted that he had bought the goods from H., which H. denied, and the judge before whom the case was tried, without a jury, found that the goods belonged to H. *Held*, that defendant, not being a mere wrong-doer, was at liberty to dispute plaintiff's title and set up the title of H. under a plea of not possessed, and that he was therefore entitled to a verdict on the finding. *Great Western R. Co.* v. *McEwan*, 30 *U. C. Q. B.* 559.

26. Evidence.—In an action for damages for trespass and destruction of property by a company, the title to the property may be offered in evidence in aid of the proof of peaceable possession. *Nicol* v. *Illinois C. R. Co.*, 44 *La. Ann.* 816, 11 *So. Rep.* 34.

27. Damages.—The proper measure of damages for taking cordwood is the value of the wood with six per cent. interest from time of taking. *Charles* v. *St. Louis & I. M. R. Co.*, 58 *Mo.* 458.

Timber was cut from lands of B. by trespassers, who, by their labor, converted it into cordwood and railroad ties, increasing its value threefold. It was then sold to an innocent purchaser, who was sued by B. for the value of the wood and ties. *Held*, that whatever might be the rule of damages as against innocent purchasers, B. could not recover the value of the timber as enhanced by the labor of the wrong-doers, after it was severed from the realty. *Lake Shore & M. S. R. Co.* v. *Hutchins*, 32 *Ohio St.* 571.—REVIEWED IN Strubbee *v.* Cincinnati R. Co., 78 Ky. 481.

Hill's Oregon Code, § 338, fairly construed, includes not merely the value of the timber or cut wood, but such damages as accrue to the freehold by their destruction. When the action is for carrying away timber already cut, the damages cannot well go beyond its value; but where standing trees are cut down, the rule of damages should fairly be the amount by which the value of the estate is diminished by their destruction. *Oregon & C. R. Co.* v. *Jackson*, 21 *Oreg.* 360, 28 *Pac. Rep.* 74.

IV. TRESPASS UPON THE PERSON.

28. When an action will lie.—Trespass lies to recover damages for an in-

jury which is the direct and primary or inevitable result of gross or reckless carelessness; but when the injury, though proximate, is secondary or consequential, and is not the necessary result of the act of negligence, an action on the case is the proper remedy. *Bay Shore R. Co.* v. *Harris*, 67 *Ala.* 6.

Trespass *vi et armis* will not lie against a railroad for an injury done by its locomotive, whether such injury be wilful or accidental on the part of the servants of the company, where it does not appear that the particular injury was done by the command or with the assent of the company. *Philadelphia, G. & N. R. Co.* v. *Wilt*, 4 *Whart.* (*Pa.*) 143. — FOLLOWED IN Allegheny Valley R. Co. *v.* McLain, 1 Am. & Eng. R. Cas. 464, 91 Pa. St. 442.

A lad about ten years of age was forcibly put on board a freight train by its brakeman, and against his will was carried for a distance of five miles. He returned home on foot, running most of the way, and was taken sick and became permanently crippled in both legs. *Held*, that the action of the brakeman was a trespass, and if the conductor of the train was present, and directed or consented to the acts of the brakeman, they were joint trespassers, and if the sickness resulted directly from their acts they were liable in an action of trespass. *Drake* v. *Kiely*, 4 *Am. & Eng. R. Cas.* 592, 93 *Pa. St.* 492.

29. Declaration—Venue.— In an action of trespass the plaintiff may join counts for trespass to land, and for trespass to the person, and to personal property: and, each count being an independent cause of action, he may recover upon such counts as are sustained by proof, although he fails as to others. *Reed* v. *Peoria & O. R. Co.*, 18 *Ill.* 403.

Actions for trespass to land are local, and at common law must be brought in the county where the land lies; but actions for trespass to personal property and to the person are transitory, and may be brought wherever the defendant may be found. *Reed* v. *Peoria & O. R. Co.*, 18 *Ill.* 403.

30. Matters of defense.— Inasmuch as the company has the exclusive use of its right of way, it is a serious question whether it is liable for injury to a person found on its right of way in any case, unless its negligence is wanton or wilful. *Lake Erie & W. R. Co.* v. *Zoffinger*, 10 *Ill. App.* 252.—QUOTING Illinois C. R. Co. *v.* Hetherington, 83 Ill. 510; Illinois C. R. Co. *v.* Godfrey, 71 Ill. 500.

The mere entry of a complaint before a trial justice, and the issue thereon of a warrant of arrest, will not render the complaining party or his principal liable in trespass for the acts of the officer in serving the warrant. *Langford* v. *Boston & A. R. Co.*, 30 *Am. & Eng. R. Cas.* 653, 144 *Mass.* 431, 4 *N. Eng. Rep.* 209, 11 *N. E. Rep.* 697.

TRESPASSERS, INJURIES TO.

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I. WHO IS TO BE DEEMED A TRESPASSER.

1. Generally.—One who goes upon a track at a place other than a crossing and where the company is required to fence, there being nothing in the surroundings that would lead the company to suspect his presence, is a trespasser. *Barker* v. *Hannibal & St. J. R. Co.*, 37 *Am. & Eng. R. Cas.* 292, 98 *Mo.* 50, 11 *S. W. Rep.* 254.

And one who goes upon a track at a place other than a highway crossing for his own convenience is a trespasser. *Candelaria* v. *Atchison, T. & S. F. R. Co.*, (*N. Mex.*) 48 *Am. & Eng. R. Cas.* 565, 27 *Pac. Rep.* 497.

One who is killed on railroad property which is no part of a public highway is a trespasser, to whom the company owes no special duty. *Collis* v. *New York C. & H. R. R. Co.*, 24 *N. Y. Supp.* 1090, 55 *N. Y. S. R.* 82, 71 *Hun* 504.

Except at stations and yards and at highway crossings, a company is entitled to the exclusive use of its track, and all persons who go upon the track are trespassers; and no recovery can be had for an injury unless there is such gross negligence on the part of the company as would make it liable for exemplary damages. *Houston & T. C. R. Co.* v. *Boozer*, 2 *Tex. Unrep. Cas.* 452.

2. Persons crossing track.—A track is the exclusive property of the company, on which no unauthorized person has a right to be for any purpose. If a person attempts to cross a track other than at the usual crossings he does so at his own peril, subject to certain qualifications. *Galena & C. U. R. Co.* v. *Jacobs*, 20 *Ill.* 478.

A person who walks upon a track laid along a public street is not a trespasser, and may recover for a negligent injury, if without fault. *Ohio & M. R. Co.* v. *Walker*, 32 *Am. & Eng. R. Cas.* 121, 113 *Ind.* 196, 12 *West. Rep.* 731, 15 *N. E. Rep.* 234.—DISTINGUISHING Ivens *v.* Cincinnati, W. & M. R. Co., 103 Ind. 27. FOLLOWING Louisville, N. A. & C. R. Co. *v.* Phillips, 112 Ind. 59.

A person will not be regarded as a trespasser who is injured while crossing a track where he had been accustomed to cross for a year or more, which was well known and permitted by the company or its agents. *Illinois C. R. Co.* v. *Dick*, 91 *Ky.* 434, 15 *S. W. Rep.* 665.

One injured by a train while crossing a track at a place not a highway, and where no inducement is held out to him by the corporation to cross, cannot maintain an action against the corporation. *Wright* v. *Boston & M. R. Co.*, 2 *Am. & Eng. R. Cas.* 121, 129 *Mass.* 440.—DISTINGUISHED IN Bostwick *v.* Minneapolis & P. R. Co., 2 N. Dak. 440.

The fact that others crossed a track at the place where plaintiff attempted to cross and was injured constitutes no excuse, in the absence of any planking or invitation by the railroad, or proof that the place was known to or acquiesced in by it as a crossing. *Young* v. *Old Colony R. Co.*, 156 *Mass.* 178, 30 *N. E. Rep.* 560.—DISTINGUISHING Warren *v.* Fitchburg R. Co., 8 Allen (Mass.) 227.

One crossing a track in a city at a point 100 feet distant from a street crossing at an opening in a train of cars standing upon the track is a trespasser, there being no evidence that such opening was made for the purpose of allowing pedestrians to pass through. *Dahlstrom* v. *St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 387, 96 *Mo.* 99, 8 *S. W. Rep.* 777, 15 *West. Rep.* 85.

Where a company has acquiesced for a long time in the public generally crossing its track by a trodden pathway, it must use

reasonable care to protect a person who is crossing by such way. Whether the company knew of such use by the public and assented thereto is a question for the jury. *Larkin* v. *New York & N. R. Co.*, 46 *N. Y. S. R.* 658, 19 *N. Y. Supp.* 479; *affirmed in* 138 *N. Y.* 634, 51 *N. Y. S. R.* 935, 33 *N. E. Rep.* 1084.—APPLYING Byrne *v.* New York C. & H. R. R. Co., 104 N. Y. 362, 5 N. Y. S. R. 722; Swift *v.* Staten Island R. T. R. Co., 123 N. Y. 645, 33 N. Y. S. R. 604.

3. Persons walking on track, generally.*—Railroad tracks are not highways for general travel, and persons cannot as matter of right convert them into common thoroughfares except at public crossings, and then only for the purpose of crossing with no undue tardiness. *Mobile & M. R. Co.* v. *Blakely*, 59 *Ala.* 471.

The ordinary rule is that persons who walk upon a track are trespassers. *Cook* v. *Central R. & B. Co.*, 67 *Ala.* 533. *Savannah & W. R. Co.* v. *Meadors*, 95 *Ala.* 137, 10 *So. Rep.* 141. *Toomey* v. *Southern Pac. R. Co.*, 86 *Cal.* 374, 24 *Pac. Rep.* 1074.—QUOTING Philadelphia & R. R. Co. *v.* Hummell, 44 Pa. St. 378, 84 Am. Dec. 457; Mulherrin *v.* Delaware, L. & W. R. Co., 81 Pa. St. 375; Baltimore & O. R. Co. *v.* State, 62 Md. 487, 50 Am. Rep. 233; Palmer *v.* Chicago, St. L. & P. R. Co., 112 Ind. 253.—*Central R. Co.* v. *Brinson*, 19 *Am. & Eng. R. Cas.* 42, 70 *Ga.* 207. *Masser* v. *Chicago, R. I. & P. R. Co.*, 68 *Iowa* 602, 27 *N. W. Rep.* 776.

A passenger is not a trespasser because he walks on the track of his carrier when he sees no train coming. *Central R. Co.* v. *Thompson*, 76 *Ga.* 770.

One walking along a track for his own convenience is a trespasser, and has not the same rights as a passenger, or one who crosses the track at a highway crossing. Mere proof of ordinary negligence will not enable him to recover for an injury. He must show that the injury was wanton or wilful, and that he used extraordinary care for his own safety. And this rule applies though the company has acquiesced in the track being used as a footpath. *Illinois C. R. Co.* v. *Godfrey*, 71 *Ill.* 500.—APPROVED IN Moore *v.* Wabash, St. L. & P. R. Co., 84 Mo. 481. FOLLOWED IN Illinois C. R. Co. *v.* Hetherington, 83 Ill. 510; Masser *v.* Chicago, R. I. & P. R. Co., 68 Iowa 602. QUOTED IN Gothard *v.* Alabama G. S. R. Co., 67 Ala. 114; Cook *v.* Central R. & B. Co., 67 Ala. 533; Central R. Co. *v.* Brinson, 19 Am. & Eng. R. Cas. 42, 70 Ga. 207; Lake Shore & M. S. R. Co. *v.* Bodemer, 139 Ill. 596; Illinois C. R. Co. *v.* Noble, 142 Ill. 578; Lake Erie & W. R. Co. *v.* Zoffinger, 10 Ill. App. 252. REVIEWED IN Illinois C. R. Co. *v.* Houghton, 126 Ill. 233, 18 N. E. Rep. 301, 1 L. R. A. 213; Davis *v.* Chicago & N. W. R. Co., 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am. Rep. 667.

The fact that a company does not enforce its right to keep people from walking upon its tracks does not prevent people walking thereon from being trespassers, or change the relative rights and obligations of such persons and the company. *Blanchard* v. *Lake Shore & M. S. R. Co.*, 126 *Ill.* 416, 18 *N. E. Rep.* 799.

One is not a trespasser on a track who has been accustomed to use it for a long time with the company's tacit permission. *Guenther* v. *St. Louis, I. M. & S. R. Co.*, 108 *Mo.* 18, 18 *S. W. Rep.* 846.—FOLLOWING AND QUOTING Le May *v.* Missouri Pac. R. Co., 105 Mo. 361.

The constitutional declaration that railways are "public highways" does not authorize the use of tracks by foot travelers. *Hyde* v. *Missouri Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 157, 110 *Mo.* 272, 19 *S. W. Rep.* 483.

Plaintiff, having gone upon the track in order to save younger children from danger, was not a trespasser. *Spooner* v. *Delaware, L. & W. R. Co.*, 39 *Am. & Eng. R. Cas.* 599, 115 *N. Y.* 22, 21 *N. E. Rep.* 696, 23 *N. Y. S. R.* 554; *affirming* 41 *Hun* 643, *mem.*, 1 *N. Y. S. R.* 558.—FOLLOWING Eckert *v.* Long Island R. Co., 43 N. Y. 502.

4. —— on track in city or village.—A person who walks along a track, whether in a town or in the country, without regard to its location or surrounding is a trespasser. *Glass* v. *Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215.

When the cross-ties of the spur track of a railway are laid on the surface of an alley in a town and the track is not imbedded in the alley, such track is not a public highway, and a person walking along it without excuse is a trespasser to whom the railroad company owes no duty except to avoid the infliction of wanton injury on him. *Montgomery* v. *Alabama G. S. R. Co.*, 97 *Ala.* 305, 12 *So. Rep.* 170.

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* Use of track as a footpath, see note, 19 AM. & ENG. R. CAS. 90.

One who walks along a track which is not imbedded in, and does not form part of, the public streets of a town is a trespasser, and if he fails to use his sense of sight or hearing to discover the approach of moving trains he is guilty of such contributory negligence as will bar a recovery for damages, unless the negligence of the person in charge of the train which caused the injury was so reckless and wanton as to be the equivalent of wilful or intentional wrong. *Louisville & N. R. Co.* v. *Hairston*, 97 *Ala.* 351, 12 *So. Rep.* 299.

Where a part of a track, not within the limits of a street, is habitually used by the public in approaching a depot, with the knowledge and consent of the company, a person so using it is not a trespasser. *Chicago & E. I. R. Co.* v. *Hedges*, 25 *Am. & Eng. R. Cas.* 550, 105 *Ind.* 398, 7 *N. E. Rep.* 801.

The ownership of a company in its tracks upon a public street crossing is not such as to make a man a trespasser, if he travels squarely across them. *Fehnrich* v. *Michigan C. R. Co.*, 87 *Mich.* 606, 49 *N. W. Rep.* 890.—NOT FOLLOWING Kelly *v.* Michigan C. R. Co., 65 Mich. 186

The rights of the public are not subordinate to those of a company at the crossing of a public street; but where the track runs along the street, the rights of the public are subordinate, and persons walking on the track must keep out of the way of trains. *Zimmerman* v. *Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 191 71 *Mo.* 476.—FOLLOWING Fletcher *v.* Atlantic & P. R. Co., 64 Mo. 484. RECONCILING Continental Imp. Co. *v.* Stead, 95 U. S. 161.

Where the track and right of way of a railroad in a city are habitually used by the public for a way to the city streets, and there are gates in the railroad fence to enable pedestrians to go upon the right of way and track, one walking on such track on his way to a street is not a trespasser. *Lynch* v. *St. Joseph & I. R. Co.*, 111 *Mo.* 601, 19 *S. W. Rep.* 1114.

A line of railway running alongside of a street, and not divided by any fence from the street, is not a road on which foot passengers using it are entitled to the same protection as if they were walking on an ordinary highway. *Held*, that a person who was injured by falling over some planks lying on the track had no action against the company. *Faucher* v. *North Shore R. Co.*, 12 *Quebec L. R.* 88.

5. Persons riding or driving on track.—Persons walking, riding, or driving upon a track between stations and public crossings are trespassers. *Jeffersonville, M. & I. R. Co.* v. *Goldsmith*, 47 *Ind.* 43. *McClaren* v. *Indianapolis & V. R. Co.*, 8 *Am. & Eng. R. Cas.* 217, 83 *Ind.* 319.

6. Persons on bridges or trestles.—A person who attempts to walk across a railroad trestle 100 feet long and 20 feet high is a trespasser. *Central R. & B. Co.* v. *Vaughan*, 93 *Ala.* 209, 9 *So. Rep.* 468.

Any person walking upon the track or bridge of a railway company without consent of the company is there wrongfully and must be considered a trespasser. *Mason* v. *Missouri Pac. R. Co.*, 6 *Am. & Eng. R. Cas.* 1, 27 *Kan.* 83, 41 *Am. Rep.* 405.

Where a bridge has been habitually and constantly used for many years by people in the locality as a foot pathway without any objection, notice, or warning by the company that it should not be so used, persons walking upon it are licensees and not trespassers. *Hooker* v. *Chicago, M. & St. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 498, 76 *Wis.* 542, 44 *N. W. Rep.* 1085.

7. —— or climbing over cars.—Where a company has a right to allow its cars to stand upon a track, and the cars obstruct no public crossing, one who endeavors to climb over the cars in order to make a short cut between two points in the town and is killed is a trespasser, and the railroad company is not liable in damages for his death unless the accident was the result of gross negligence on the part of the company's servants. *Illinois C. R. Co.* v. *Beard*, 49 *Ill. App.* 232.

8. Persons on the right of way.—The right of way of a company is its exclusive property, upon which no unauthorized person has a right to be. Any one who travels upon such right of way as a footway and not for any business with the railroad is a wrong-doer and a trespasser; and the mere acquiescence of the company in such user does not give the right to use the track or create any obligation for special protection. *Baltimore & O. R. Co.* v. *State*, 19 *Am. & Eng. R. Cas.* 83, 62 *Md.* 479, 50 *Am. Rep.* 233.—FOLLOWED IN Masser *v.* Chicago, R. I. & P. R. Co., 68 Iowa 602. QUOTED IN Toomey *v.* Southern Pac. R. Co., 86 Cal. 374.

Where the right of way of a company has been in constant use by travelers on foot for more than twenty years, without objection,

it is for the jury to say whether the company acquiesced in such user. Such a user, while not establishing a public highway upon the company's right of way, would relieve the persons passing over the same from being treated as trespassers by the company. *Davis* v. *Chicago & N. W. R. Co.*, 15 *Am. & Eng. R. Cas.* 424, 58 *Wis.* 646, 17 *N. W. Rep.* 406, 46 *Am. Rep.* 667.— REVIEWING Nicholson *v.* Erie R. Co., 41 N. Y. 525; Sutton *v.* New York C. & H. R. R. Co., 66 N. Y. 243; Johnson *v.* Boston & M. R. Co., 125 Mass. 75; Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 368; Carleton *v.* Franconia I. & S. Co., 99 Mass. 216; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129; Illinois C. R. Co. *v.* Godfrey, 71 Ill. 500; Illinois C. R. Co. *v.* Hetherington, 83 Ill. 510; Murray *v.* McLean, 57 Ill. 378.

9. Persons in depot grounds or yards.—Until notice has been given of the changed character of the place, one passing over a wharf or platform over which the public has been accustomed to pass cannot be deemed a trespasser for so passing, although the use of the wharf or platform for the purpose of passing has been discontinued. *New Orleans, M. & C. R. Co.* v. *Hanning*, 15 *Wall.* (*U. S.*) 649, 4 *Am. Ry. Rep.* 242.

All the property of a company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim a right to enter, except those who have business with the railroad; which class embraces not only passengers, but protectors and friends attendant on their departure, or awaiting their arrival. *Montgomery & E. R. Co.* v. *Thompson*, 77 *Ala.* 448, 54 *Am. Rep.* 72.

If a passenger, being a stranger to the station and surroundings, finds himself, almost immediately after alighting from a train, left in utter darkness by the extinguishment of the station light by the agent, the railroad cannot claim that the passenger is a wrong-doer if he, in his effort to get to a place of safety or for information, crosses other ground of defendant than that upon which the station is actually erected. *Wallace* v. *Wilmington & N. R. Co.*, 8 *Houst.* (*Del.*) 529, 18 *Atl. Rep.* 818.

After waiting a reasonable time for cars blocking the highway to be removed, a pedestrian may turn aside to avoid the obstruction and pass over the company's enclosed grounds. In so doing he will not be a trespasser. *Smith* v. *Savannah, F. & W. R. Co.*, 42 *Am. & Eng. R. Cas.* 105, 84 *Ga.* 698, 11 *S. E. Rep.* 455.

Plaintiff sought shelter from the rain underneath a building belonging to a company, which had formerly been used as a freight house, but not being in use had been permitted to become dilapidated and insecure. While at the freight house he noticed that a portion of the roof was lifted by wind and in danger of falling. While running to escape the falling fragment he was struck by it and injured. *Held*, that plaintiff was a trespasser and could not recover. *Lary* v. *Cleveland, C., C. & I. R. Co.*, 3 *Am. & Eng. R. Cas.* 498, 78 *Ind.* 323, 41 *Am. Rep.* 572. — DISTINGUISHING Lafayette & I. R. Co. *v.* Adams, 26 Ind. 76; Indianapolis & C. R. Co. *v.* McClure, 26 Ind. 370; Gray *v.* Harris, 107 Mass. 492; Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475. QUOTING Pittsburgh, Ft. W. & C. R. Co. *v.* Bingham, 29 Ohio St. 364; Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 368. REVIEWING Hounsell *v.* Smyth, 7 C. B. N. S. 731.

One who is injured while removing freight from a car is not a trespasser because the freight charges had not been paid, where it appears that the company had waived its lien for freight. *Watson* v. *Wabash, St. L. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 114, 66 *Iowa* 164, 23 *N. W. Rep.* 380.

One who is upon a side track seeking employment from a shipper of stock to feed and water his stock is there upon business indirectly connected with the operation of the road, and, having a right to be there, the company owes him a duty of active vigilance. *Shelby* v. *Cincinnati, N. O. & T. P. R. Co.*, 85 *Ky.* 224, 3 *S. W. Rep.* 157.

Plaintiff, while walking between two of defendant's tracks in its switching yard, was struck and seriously injured by a stake running from an engine on one track to cars on the opposite track, and used in moving them. At the time of the accident he was crossing a public street which crossed the tracks, with the intention of proceeding on defendant's right of way to the shop adjoining the tracks where he was employed. It was not yet daylight. He saw the engine and moving cars, but did not see the stake connecting them. The employés in the shop were in the habit of reaching it by this route, but not with defendant's consent, it having warned the

public not to walk on its tracks, and having stationed men at street crossings to prevent such travel. *Held*, that plaintiff was a trespasser, and that the court erred in instructing the jury that upon this state of facts, in the absence of contributory negligence, plaintiff was entitled to recover. *Kelly* v. *Michigan C. R. Co.*, 28 *Am. & Eng. R. Cas.* 633, 65 *Mich.* 186, 31 *N. W. Rep.* 904.—NOT FOLLOWED IN Fehnrich *v.* Michigan C. R. Co., 87 Mich. 606.

A person who is engaged in unloading his freight from a car on a railway track to his wagon has no right so to place his wagon as to obstruct another railway track on which cars are being operated, when, though this may be a matter of convenience to him, it is not necessary for him to occupy that position—he is a trespasser. *Heiter* v. *East St. Louis Con. R. Co.*, 53 *Mo. App.* 331. —REVIEWING Illinois C. R. Co. *v.* Godfrey, 71 Ill. 500; Illinois C. R. Co. *v.* Hetherington, 83 Ill. 510.

Under Pa. Act of April 4, 1868, any one not a passenger who enters a depot takes the risk upon himself. *Gerard* v. *Pennsylvania R. Co.*, 12 *Phila.* (*Pa.*) 394.—FOLLOWING Kirby *v.* Pennsylvania R. Co., 76 Pa. St. 506; Mulherrin *v.* Delaware, L. & W. R. Co., 81 Pa. St. 366.

10. Where people habitually walk on track.—A person who walks on a track is a trespasser, and the fact that persons in the neighborhood are in the habit of walking on it, without objection on the part of the company, does not change or affect the character of the act as a trespass. *Glass* v. *Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215. *Eggmann* v. *St. Louis, A. & T. H. R. Co.*, 47 *Ill. App.* 507.

A person traveling upon the track of a railroad company is a trespasser, and the fact that other persons residing in the locality where the accident occurred have been in the habit of traveling upon the right of way of defendant, and that no measures have been taken to prevent them, does not change the relative rights or obligations of such person or the railroad company. (Walker and Dickey, JJ., dissenting.) *Illinois C. R. Co.* v. *Hetherington*, 83 *Ill.* 510.—FOLLOWING Illinois C. R. Co. *v.* Godfrey, 71 Ill. 500.—FOLLOWED IN Eggmann *v.* St. Louis, A. & T. H. R. Co., 47 Ill. App. 507. REVIEWED IN Davis *v.* Chicago & N. W. R. Co., 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am. Rep. 667.

The fact that people have often trespassed on a track and the company has not stopped them does not imply consent so to use the track, and will not create any right in the public to use it. *Spicer* v. *Chesapeake & O. R. Co.*, 34 *W. Va.* 514, 12 *S. E. Rep.* 553.

One has no legal right to be on a railroad track; the track at that place not being a crossing or any part of a public highway is private property; it was not built to be walked upon by the public, and the fact that persons do walk upon it, however frequently and however commonly, does not change the proposition of law. *Finlayson* v. *Chicago, B. & Q. R. Co.*, 1 *Dill.* (*U. S.*) 579.

11. Persons on premises or track under implied license.—One taking a train at a place where the company permits passengers to take trains, though it is not a depot, is not a trespasser. *Dewire* v. *Boston & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 57, 148 *Mass.* 343, 2 *L. R. A.* 166, 19 *N. E. Rep.* 523.

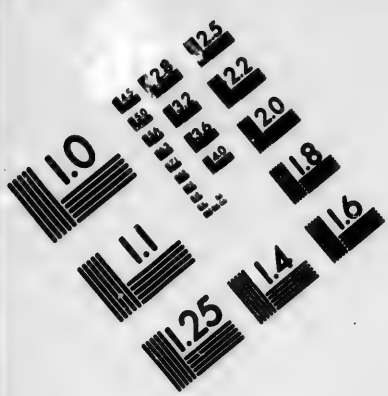
One is not a trespasser on a company's tracks who for a long time and with its tacit permission has been accustomed to use the tracks for towing sand boats; the fact of such use is some evidence of notice thereof to the company, and is a sufficient basis for an instruction on the question of notice. *LeMay* v. *Missouri Pac. R. Co.*, 105 *Mo.* 361, 16 *S. W. Rep* 1049.—FOLLOWING Williams *v.* Kansas City, S. & M. R. Co., 37 Am. & Eng. R. Cas. 329, 96 Mo. 275. —FOLLOWED AND QUOTED IN Guenther *v.* St. Louis, I. M. & S. R. Co., 108 Mo. 18.

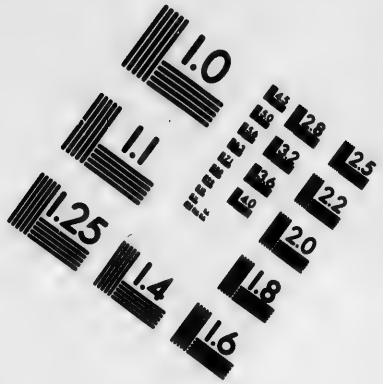
12. Persons on trains, generally.*—When the yard master of a private corporation which was organized for mining coal and ore and owns a railroad used exclusively for transporting such productions, without authority from the officers of such corporation, permits an excursion train belonging to another corporation to go over its road, the persons on such excursion train are trespassers, and the owner of such road is not responsible for injuries received by a passenger on such train that were caused by simple negligence of its employés. *Vormus* v. *Tennessee C., I. & R. Co.*, 97 *Ala.* 326, 12 *So. Rep.* 111.

In such case, if it is shown that at the time the yard master gave permission for the train to go over defendant's road, it had escaped his recollection that one of defend-

* See also *post*, §§ 1-90.

Duty of company to trespassers on train, see note, 35 AM. ST. REP. 660.





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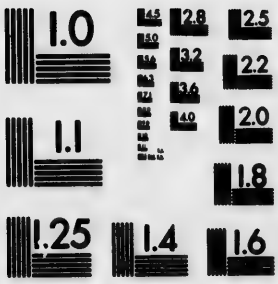

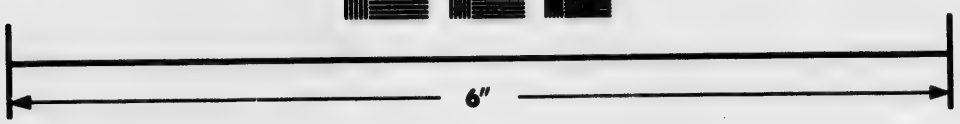

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ant's trains was running on the same track, that he did all in his power to have the excursion train return to a place of safety in time for the collision to have been avoided, but that the negligence of the officers of the excursion train caused the accident, it is properly left to the jury to decide whether the yard master was guilty of wanton or intentional misconduct. *Vormus* v. *Tennessee C., I. & R. Co.*, 97 *Ala.* 326, 12 *So. Rep.* 111.

Where it appears that plaintiff, having a pass over defendant's railway to Troy, hearing the call "All out for Troy" got on the train, which moved to a water tank in the opposite direction for water for the engine, and was injured before the train returned to the station, the relation which plaintiff occupied to the railroad, whether as passenger or trespasser, will depend on his reasonable belief that the train was about to depart for Troy, justified by some conduct on the part of defendant's officers or servants having control of the movements of the train. *Brown* v. *Scarboro*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

A passenger who immediately gets on a car again after having been put off is a trespasser. If the first expulsion was unlawful he should submit to it, and depend on recovering damages. *North Chicago St. R. Co.* v. *Olds*, 40 *Ill. App.* 421.

A complaint showed that plaintiff, who was casually passing, at the request of a train employé got upon a car that was moving slowly on a switch and applied the brakes, and while so employed was injured by other employés carelessly causing other cars to run down the track against the one plaintiff was on. *Held*, that plaintiff was a mere intermeddler, to whom the company owed no duty, either as employé, passenger, or traveler on an intersecting highway, and that the complaint was bad on demurrer. *Everhart* v. *Terre Haute & I. R. Co.*, 4 *Am. & Eng. R. Cas.* 599, 78 *Ind.* 292, 41 *Am. Rep.* 567. — DISTINGUISHED IN Sloan *v.* Central Iowa R. Co., 11 Am. & Eng. R. Cas. 145, 62 Iowa 728. REVIEWED IN Darwin *v.* Charlotte, C. & A. R. Co., 23 So. Car. 531, 55 Am. Rep. 32.

A boy twelve years of age was allowed to ride in an exposed and dangerous position on a train, with the knowledge and by the implied permission of those in charge. *Held*, that he could not be treated as a trespasser. *Ecliff* v. *Wabash, St. L. & P. R. Co.*, 64 *Mich.* 196, 31 *N. W. Rep.* 180.

One upon a train with the consent or permission of the conductor, though not a passenger in the ordinary sense of the term, is not a trespasser, and may maintain an action for injuries received by reason of the negligence of those in charge of the train; at least in the absence of proof that the conductor was without authority to give such permission. *Gradin* v. *St. Paul & D. R. Co.*, 11 *Am. & Eng. R. Cas.* 644, 30 *Minn.* 217, 14 *N. W. Rep.* 881.

The fact that a conductor of a freight train did not eject a person after discovering him in the caboose does not constitute him a passenger. *Atchison, T. & S. F. R. Co.* v. *Headland*, 18 *Colo.* 477, 33 *Pac. Rep.* 185.—REVIEWING Elkins *v.* Boston & M. R. Co., 23 N. H. 275.

Who is not a trespasser on a train. *Lake Shore & M. S. R. Co.* v. *Rosenzweig*, 26 *Am. & Eng. R. Cas.* 489, 113 *Pa. St.* 519, 6 *Atl. Rep.* 545.

Plaintiff boarded a train on defendant's road to make a return trip with the return coupon of a round-trip ticket, good for a limited time only, and that time had expired. When called upon for his ticket by the conductor, he offered the coupon, which was refused; he then offered to pay the difference between its redeemable value and full fare, which was also refused, and he was expelled from the train at a dangerous place near other railroad tracks, where he was struck by a passing train and severely injured. *Held*: (1) that no irrebuttable presumption arises that plaintiff was familiar with the rules of the company prohibiting him from riding on his expired coupon by paying to the conductor the difference between its redeemable value and full fare. If he supposed that he was entitled to passage on such terms, he was not to be regarded as a trespasser, but merely as a passenger who had made a mistake. The question as to which capacity he occupied should be submitted to the jury. (2) Even though he was a trespasser, he should not have been ejected without a reasonable regard for his safety, and whether such regard was used or not was a question for the jury. *Arnold* v. *Pennsylvania R. Co.*, 28 *Am. & Eng. R. Cas.* 189, 115 *Pa. St.* 135, 8 *Atl. Rep.* 213.—QUOTED IN Newhard *v.* Pennsylvania R. Co., 153 Pa. St. 417.

A woman entered a passenger car falsely representing herself to be the wife of a man holding a pass over the road, for the pur-

pose of avoiding paying the fare. While riding she was injured by the cars being thrown from the track. *Held*, that the company owed her no duty except that it should abstain from intentional injury, or that it should not be guilty of gross negligence. *Handley* v. *Houston & T. C. R. Co.*, 2 *Tex. Unrep. Cas.* 282.

Where a passenger has full knowledge that a railroad schedule has been changed so that one train each way will not stop at all stations, and that there are other trains giving ample accommodation, but where he persists in entering the train which does not stop at the station at which he wishes to get off, it is proper to instruct the jury, in a suit by him for being carried past the station, that the regulation of the company was reasonable and one which the company had a right to make, and that if plaintiff entered the train with knowledge and refused to leave after notice that it would not stop at his station, he was a trespasser, and was not entitled to recover for a failure to stop, and that he was not entitled to recover for injury to his feelings if he unnecessarily took offense at the language of the conductor in telling him that the train would not stop. *Texas & P. R. Co.* v. *White*, 4 *Tex. App.* (*Civ. Cas.*) 451, 17 *S. W. Rep.* 419.

13. On freight train or engine.* — A person riding by permission of the conductor, without paying fare, is not a trespasser, though the train is not intended and operated for the carriage of passengers, and though the conductor has no authority to permit such person to ride. *Alabama G. S. R. Co.* v. *Yarbrough*, 83 *Ala.* 238, 3 *Am. St. Rep.* 715, 3 *So. Rep.* 447.

The failure of those in charge of a train on which a person had wrongfully taken passage to warn him to get off cannot be construed into a permission to become a passenger on the train. *Brown* v. *Scarboro*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

The conductor of a freight train refused to carry deceased, a crippled applicant for free transportation, but some time after the train had started found him in the caboose. It being late at night and out in the country, the conductor, from motives of humanity, forbore to eject him, and he was killed by a subsequent collision. *Held*, that the deceased was not a passenger within Mills's Ann. St. § 1508, furnishing a right of action where the death of a passenger results from the defect or deficiency of a railroad. *Atchison, T. & S. F. R. Co.* v. *Headland*, 58 *Am. & Eng. R. Cas.* 4, 18 *Colo.* 477, 33 *Pac. Rep.* 185. *Hendryx* v. *Kansas City, Ft. S. & G. R. Co.*, 45 *Kan.* 377, 25 *Pac. Rep.* 893.

A person riding unlawfully on a freight car of a railroad train is not a passenger, and the railroad corporation, as a common carrier, owes no duty to him. *Plant* v. *Boston & A. R. Co.*, 157 *Mass.* 377, 32 *N. E. Rep.* 356.

An offer to pay the fare on the train to an employé unauthorized to receive the same is not an offer to the company, and in such case does not entitle the person to a place as a passenger on a freight train. *Cleveland, C. & C. R. Co.* v. *Bartram*, 11 *Ohio St.* 457. —APPROVED IN Whitehead *v.* St. Louis, I. M. & S. R. Co., 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.

A person who has purchased no ticket and paid no fare, who goes to a caboose attached to a frieght train and, without the knowledge of those in charge of such train, attempts to get into said car at a place where the company is not accustomed to receive passengers, is not a passenger, and if he is injured in such attempt to board the train, and those in charge of it have no knowledge of his presence, the company is not liable for the injury. *Haase* v. *Oregon R. & N. Co.*, 44 *Am. & Eng. R. Cas.* 360, 19 *Oreg.* 354, 24 *Pac. Rep.* 238.

If a person is informed by the conductor that the company's rules prohibit passengers from traveling upon freight trains, and such person nevertheless enters the train, he is not a passenger, and cannot recover for injuries sustained, although subsequently to the refusal of the conductor to carry him a brakeman may have told him to get on the train. *Gulf, C. & S. F. R. Co.* v. *Campbell*, 41 *Am. & Eng. R. Cas.* 100, 76 *Tex.* 174, 13 *S. W. Rep.* 19.

One riding on an engine after notice that such is forbidden by rules of the company is a wrong-doer and a trespasser, even though he rides with the consent of the engineer. *Robertson* v. *New York & E. R. Co.*, 22 *Barb.* (*N. Y.*) 91. *Virginia Midland R. Co.* v. *Roach*, 34 *Am. & Eng. R. Cas.* 271, 83 *Va.* 375, 5 *S. E. Rep.* 175. *Chicago & A. R. Co.* v. *Michie*, 83 *Ill.* 427. See also *Files* v.

* Liability of company for injuries to a boy stealing a ride on a freight car, see 28 AM. & ENG. R. CAS. 594, *abstr.*

Boston & A. R. Co., 149 *Mass.* 204, 21 *N. E. Rep.* 311.

Where by special contract for the transportation of horses one person is allowed to ride free with them to take care of them, such person, though not in strictness a passenger, is no trespasser or intruder, and the company owes him the duty to carry him safely by the exercise of reasonable care. *Lawson* v. *Chicago, St. P., M. & O. R. Co.*, 21 *Am. & Eng. R. Cas.* 249, 64 *Wis.* 447, 24 *N. W. Rep.* 618, 54 *Am. Rep.* 634.

Where a person, by giving a tip or bribe to the conductor of a train not intended for the conveyance of ordinary passengers, as he had reason to know, induces the conductor to permit him to travel contrary to the regulations of the company, he does so at his own risk; and if, while so traveling, he is injured by a collision, he is not entitled to be indemnified by the company for any damage to person or property sustained by him. *Canadian Pac. R. Co.* v. *Johnson*, 6 *Montr. L. R.* 213.

14. On pay train.—A company providing sufficient trains and cars to accommodate all the traveling public over its line has the legal right to run special trains for the purpose of carrying provisions and paying its employés, and to prohibit any person from traveling on such trains, and if plaintiff enters a car attached to the same, knowing its character, without the consent of the corporation or its agent, he becomes a trespasser. *Southwestern R. Co.* v. *Singleton*, 66 *Ga.* 252.

15. On timber train.—Plaintiff, without invitation or payment of fare, was traveling upon a timber train, forbidden to carry passengers, upon defendant's road. In a collision brought about by the negligence of defendant's servants in operating this timber train plaintiff, in leaping from the train, was injured. *Held*, that he was a trespasser and not entitled to recover damages, except for wilful, wanton, or intentional injury by defendant, and the court should have so instructed the jury. *Illinois C. R. Co.* v. *Meacham*, 91 *Tenn.* 428, 19 *S. W. Rep.* 232.

16. On velocipede.—A person riding on a railroad velocipede, without having obtained the company's consent, is a trespasser, and, in the event of injury resulting therefrom, no action can be maintained against the company, unless wilful negligence on its part, which could have been avoided, is proven. *Craig* v. *Mt. Carbon Co.*, 45 *Fed. Rep.* 448.

No action can be maintained in such case where permission was asked for and given by the company so to use the track at plaintiff's own risk, unless defendant was guilty of wilful negligence. *Craig* v. *Mt. Carbon Co.*, 45 *Fed. Rep.* 448.

Mere acquiescence on the part of the company to such use of the track gives no right, but in such case the person so using is a trespasser, and no action can be maintained, unless defendant was guilty of wilful negligence. *Craig* v. *Mt. Carbon Co.*, 45 *Fed. Rep.* 448.

17. On trains after refusal to pay fare.*—One who, having entered a train as a passenger, persistently refuses to pay his fare, and becomes boisterous and uses profane and obscene language, is a trespasser, not a passenger. *Louisville & N. R. Co.* v. *Johnson*, 47 *Am. & Eng. R. Cas.* 611, 92 *Ala.* 204, 9 *So. Rep.* 269.

A person traveling on a free pass issued to a different person, which is not transferable, and passing himself as the person therein named, is guilty of such fraud as to bar his right to recover for a personal injury, except for gross negligence on the part of the company amounting to wilful injury. *Toledo, W. & W. R. Co.* v. *Beggs*, 85 *Ill.* 80. — DISTINGUISHED IN Robostelli *v.* New York, N. H. & H. R. Co., 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796. QUOTED IN Way *v.* Chicago, R. I. & P. R. Co., 64 Iowa 48, 52 Am. Rep. 431.

The instant one in a car refuses to pay his full fare and to comply with the reasonable rules of the company he becomes a trespasser. *Lake Erie & W. R. Co.* v. *Mays*, 4 *Ind. App.* 413, 30 *N. E. Rep.* 1106.

Where a person purchases a ticket for a designated station, without making any inquiries or ascertaining what train stops at the station to which he desires to go, and subsequently takes his seat in a train which, according to the regulations of the company, does not stop at the station for which he has the ticket, and such person refuses to pay his fare, on demand of the conductor, to the next station at which the train is to stop, and also refuses to leave the train when requested to do so after it has been stopped at a suitable place for that purpose,

* Trespasser on train not a passenger, see note, 13 AM. & ENG. R. CAS. 58.

such person is a trespasser. *Atchison, T. & S. F. R. Co.* v. *Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608, 17 *Pac. Rep.* 54.

Plaintiff, at M., desiring to go to W., entered one of defendant's regular passenger trains about to start for the latter place. Before he learned that he could get no seat the train was going at a high rate of speed. He asked the conductor to provide him a seat, but the conductor refused. On his fare being demanded, plaintiff offered to pay it if a seat were provided him, but refused to pay it unless a seat were provided. *Held*, that plaintiff had a right so to refuse to pay the fare, and he did not thereby become a trespasser, for a passenger has a right to be provided with a seat. *Hardenbergh* v. *St. Paul, M. & M. R. Co.*, 34 *Am. & Eng. R. Cas.* 359, 39 *Minn.* 3, 38 *N. W. Rep.* 625, 12 *Am. St. Rep.* 610.—REVIEWING Maples *v.* New York & N. H. R. Co., 38 Conn. 557.

One who enters a passenger coach without a ticket becomes, on refusing to pay his fare, a trespasser *ab initio*. *Moore* v. *Columbia & G. R. Co.*, 58 *Am. & Eng. R. Cas.* 493, 38 *So. Car.* 1, 16 *S. E. Rep.* 781.

18. Dazed passenger on track.—Where a passenger injured by a fall from a train, and in a dazed state, is knowingly left by the carrier upon the track, he will not be regarded as a trespasser. *Cincinnati, I., St. L. & C. R. Co.* v. *Cooper*, 120 *Ind.* 469, 22 *N. E. Rep.* 340, 6 *L. R. A.* 241.

19. Employes — Postal clerks.*— Where, by mutual consent, two companies having their tracks adjacent and parallel, on some of which cars in large numbers are habitually left standing, permit the watchmen employed by the companies respectively to walk and stand upon the unoccupied tracks of each other, including the main lines, for the purpose of examining the standing cars with a view to taking and reporting the initials and numbering inscribed thereon, a watchman while so employed and deporting himself in the usual way, recognized as fit and proper by both companies, is not a trespasser. *Watts* v. *Richmond & D. R. Co.*, 89 *Ga.* 277, 15 *S. E. Rep.* 365.

The fact that a postal clerk does extra work on a train, while not on his regular run, does not make him a trespasser, nor affect the liability of the company for damages sustained by reason of the company's negligence. *Cleveland, C., C. & St. L. R. Co.* v. *Ketcham*, 133 *Ind.* 346, 33 *N. E. Rep.* 116.

If the deceased, and other employés of the company which he served, had, for a considerable time prior to the accident, been accustomed to use the track of defendant at and near the place of the accident, for the purpose of giving signals, with the acquiescence of the defendant, then the deceased was not a t passer on the track. *McMarshall* v. *Chic , R. I. & P. R. Co.*, 80 *Iowa* 757, 45 *N. W. Rep.* 1065.

A company constructed its tracks across a private way, which connected two public ways of a city, and over which there was much travel. At the crossing it put up a sign, upon which was the following: "This is not a public way, and is dangerous." *Held*, in an action against the corporation by a person injured at the crossing by being struck by a locomotive engine, that the corporation was not entitled to a ruling, as matter of law, that this sign was a denial of the right of crossing, and that a person crossing did so at his own risk. *O'Connor* v. *Boston & L. R. Corp.*, 15 *Am. & Eng. R. Cas.* 362, 135 *Mass.* 352.

The deceased was, and for a long time had been, in the employ of defendant as foreman in a paint-shop, and lived about a mile south of the shop. In going to his home and coming therefrom he was accustomed to walk upon the track, it being much the shortest distance to travel, and this he did with the knowledge and permission of defendant. *Held*, that he was not a trespasser. *Baumeester* v. *Grand Rapids & I. R. Co.*, 28 *Am. & Eng. R. Cas.* 476, 63 *Mich.* 557, 30 *N. W. Rep.* 337.—DISTINGUISHED IN O'Donnell *v.* Duluth, S., S. & A. R. Co., 89 Mich. 174.

Plaintiff, a grader in the employment of defendant, was injured by an accident which occurred while he was riding upon a gravel train. The graders had returned to the camp during the day and were informed that they would not be required to go out again during that day. Plaintiff went upon the gravel train for the purpose of getting his coat, which he had left at the place where he worked, and was returning when the accident happened. The company was in the habit of transporting employés on the train daily, and the conductor had consented to plaintiff's riding upon it on the particular occasion. *Held*, that plaintiff

* See also CARRIAGE OF MAILS, **17, 18**; CARRIAGE OF PASSENGERS, **54**.

was not a mere trespasser upon the train, and that defendant was responsible for defects in the track causing the accident. *Rosenbaum* v. *St. Paul & D. R. Co.*, 34 *Am. & Eng. R. Cas.* 274, 38 *Minn.* 173, 36 *N. W. Rep.* 447.

II. DUTIES AND LIABILITIES OF COMPANY TO TRESPASSERS.

1. *Trespassers on Track and Premises.*

a. In General.

20. Company's right to a clear track.*—Except at street crossings, where the public has a right of way, a company has the right to a clear track, and it owes no duty to trespassers, whether they be adults, minors, or children of tender years. *Cauley* v. *Pittsburgh, C. & St. L. R. Co.*, 2 *Am. & Eng. R. Cas.* 4, 95 *Pa. St.* 398.

Where there is reason to apprehend that the track may not be clear, the persons in charge of a railway train cannot act on the presumption that the track is clear without the company being responsible for the consequences, and this is true notwithstanding the company's right to have a clear track. *Fiedler* v. *St. Louis, I. M. & S. R. Co.*, 54 *Am. & Eng. R. Cas.* 162, 107 *Mo.* 645, 18 *S. W. Rep.* 847.—FOLLOWING Barker *v.* Hannibal & St. J. R. Co., 98 Mo. 50; Dunkman *v.* Wabash, St. L. & P. R. Co., 95 Mo. 232; Williams *v.* Kansas City, S. & M. R. Co., 96 Mo. 275.

The servants of a company operating its trains in the country at night have a right to assume that the track is clear, and are under no obligations to provide for the safety of persons who may be on it. Even if they know the track is used as a footpath, this will not exonerate any one so using it from the duty of taking proper care to avoid injury. *Yarnall* v. *St. Louis, K. C. & N. R. Co.*, 10 *Am. & Eng. R. Cas.* 726, 75 *Mo.* 575.—FOLLOWED IN Newport News & M. V. Co. *v.* Howe, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121.

21. —— to exclusive use of track and premises.—A company has the undoubted right to the exclusive use of its roadway, except at public crossings, for the unimpeded passage of its trains; but notwithstanding this right the company is still bound to use ordinary care to avoid injury to persons who may be upon or near the track. *Kansas Pac. R. Co.* v. *Ward*, 4 *Colo.* 30.—DISTINGUISHED IN Colorado C. R. Co. *v.* Holmes, 8 Am. & Eng. R. Cas. 410, 5 Colo. 197.

A company has exclusive right to occupy, use, and enjoy its tracks, trestlework, and bridges, and any person walking upon a track, or bridge, or any part of the same, without the consent of the company, is there wrongfully, and therefore is a trespasser; and in case of an injury from the movement or operation of cars, he is without remedy unless it be proved by affirmative evidence that the injury resulted from negligence so gross as to amount to wantonness. *Mason* v. *Missouri Pac. R. Co.*, 6 *Am. & Eng. R. Cas.* 1, 27 *Kan.* 83, 41 *Am. Rep.* 405.

The right of a company to use its track is exclusive of the public, except where the public have the right to cross it, or where the use of the road in a reckless or improper manner must necessarily endanger the lives of those whose proximity to it requires the exercise of care and caution. *Louisville & N. R. Co.* v. *Howard*, 19 *Am. & Eng. R. Cas.* 98, 82 *Ky.* 212.—FOLLOWED IN Louisville & N. R. Co. *v.* Schuster, (Ky.) 35 Am. & Eng. R. Cas. 407, 7 S. W. Rep. 874.

A company is entitled to the exclusive use of its grounds, except at lawful crossings of public and private ways. Without a breach of legal duty, it is not guilty of actionable negligence. *Omaha & R. V. R. Co.* v. *Martin*, 19 *Am. & Eng. R. Cas.* 236, 14 *Neb.* 295, 15 *N. W. Rep.* 696.—QUOTING Pittsburgh, Ft. W. & C. R. Co. *v.* Bingham, 29 Ohio St. 364.

The use of a track, cutting, or embankment, except at lawful crossings of public roads or highways, is exclusively for the company and its employés. Hence, where want of ordinary care is not shown, a railroad company is not liable for an injury to a person on the road, where he had no right to be. *Philadelphia & R. R. Co.* v. *Hummell*, 44 *Pa. St.* 375.—DISTINGUISHED IN Smith *v.* Atchison, T. & S. F. R. Co., 4 Am. & Eng. R. Cas. 554, 25 Kan. 738; Keffe *v.* Milwaukee & St. P. R. Co., 21 Minn. 207; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; Pennsylvania R. Co. *v.* Lewis, 79 Pa. St. 33. FOLLOWED IN Tanner *v.* Louisville & N. R. Co., 60 Ala. 621. QUOTED IN Candelaria *v.* Atchison, T. & S. F. R. Co., (N. Mex.) 48 Am. & Eng. R. Cas. 565, 27 Pac. Rep. 497; St. Louis, I. M. & S. R. Co. *v.* Monday, 31 Am. & Eng. R. Cas. 424, 49 Ark. 257, 4 S. W.

* Duty of company to trespassers and licensees on track, see 31 AM. & ENG. R. CAS. 373, *abstr.*

Rep. 782; Toomey *v.* Southern Pac. R. Co., 86 Cal. 374; Jeffersonville, M. & I. R. Co. *v.* Goldsmith, 47 Ind. 43; Solen *v.* Virginia & T. R. Co., 13 Nev. 106; Fredericks *v.* Northern C. R. Co., 157 Pa. St. 103; Davis *v.* Chicago & N. W. R. Co., 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am. Rep. 667.

22. Assumption of risk by trespasser. — Between stations and public crossings a track belongs exclusively to the company, and all persons who walk, ride, or drive thereon are trespassers; and if such persons so walk, ride, or drive thereon at the sufferance or with the permission of the company, they do so subject to all the risks incident to so hazardous an undertaking, and if they are injured by a train the company is not liable, unless the injury was wantonly or intentionally inflicted. *Jeffersonville, M. & I. R. Co.* v. *Goldsmith*, 47 *Ind.* 43, 8 *Am. Ry. Rep.* 315.—FOLLOWING Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129. QUOTING Philadelphia & R. R. Co. *v.* Hummell, 44 Pa. St. 375; Sherlock *v.* Alling, 44 Ind. 184. — DISTINGUISHED IN Louisville, N. A. & C. R. Co. *v.* Head, 4 Am. & Eng. R. Cas. 619, 80 Ind. 117.—*McClaren* v. *Indianapolis & V. R. Co.*, 8 *Am. & Eng. R. Cas.* 217, 83 *Ind.* 319. — FOLLOWED IN Masser *v.* Chicago, R. I. & P. R. Co., 68 Iowa 602.

It is impracticable to keep trespassers off an open track, and all who go upon it do so at their own risk. *Sturgis* v. *Detroit, G. H. & M. R. Co.*, 72 *Mich.* 619, 40 *N. W. Rep.* 914.

One who goes upon the tracks of a company at a place not a highway crossing, for his own convenience, becomes a trespasser and assumes the risk of his conduct. The company owes to such a person no duty to facilitate his trespass or to render it safe; it is only liable for the negligence of its servants after the presence of such trespasser on the track has been discovered. *Candelaria* v. *Atchison, T. & S. F. R. Co.*, (*N. Mex.*) 48 *Am. & Eng. R. Cas.* 565, 27 *Pac. Rep.* 497.—QUOTING Philadelphia & R. R. Co. *v.* Hummel, 44 Pa. St. 378.

23. Company's duty, generally.*— There can be no recovery for the death of a person killed while negligently on a track where the trainmen neither knew of his perilous position in time to avoid the accident, nor were reckless or wantonly negligent in not so knowing it. Simple negligence in failing to see him will not authorize a recovery when plaintiff was guilty of contributory negligence. *Nave* v. *Alabama G. S. R. Co.*, 54 *Am. & Eng. R. Cas.* 151, 96 *Ala.* 264, 11 *So. Rep.* 391.—QUOTING Glass *v.* Memphis & C. R. Co., 94 Ala. 581, 10 So. Rep. 218; Savannah & W. R. Co. *v.* Meadors, 95 Ala. 137, 10 So. Rep. 142.

Plaintiff was walking on a track which had been used generally as a pathway for many years, and upon hearing a coming train stepped some eight or nine feet from the track, near an embankment several feet high. He testified that just as the train passed, at a rate of sixty miles an hour, he saw the shadow of something in the air and was felled to the ground. A severe wound was found on the side of his head, made by some blunt instrument. Afterwards a piece of wood similar to that used on the locomotive was found embedded in the bank where he stood, but there was no direct evidence that the wood was thrown or fell from the train or that it struck him. *Held*, that as there was no contractual relation between plaintiff and the company, there was not sufficient evidence to raise a presumption of negligence. *Lucas* v. *Richmond & D. R. Co.*, 40 *Fed. Rep.* 566.

A company owes no duty to a trespasser other than not to injure him if it knows of his presence or sees him in time to prevent injury. *Rome R. Co.* v. *Tolbert*, 85 *Ga.* 447, 11 *S. E. Rep.* 849. *Chicago & E. I. R. Co.* v. *Hedges*, 25 *Am. & Eng. R. Cas.* 550, 105 *Ind.* 398, 7 *N. E. Rep.* 801.—DISTINGUISHED IN Dennis *v.* Louisville, N. A. & C. R. Co., 35 Am. & Eng. R. Cas. 141, 116 Ind. 42, 15 West. Rep. 547, 18 N. E. Rep. 179, 1 L. R. A. 448.—*Masser* v. *Chicago, R. I. & P. R. Co.*, 68 *Iowa* 602, 27 *N. W. Rep.* 776. *Conley* v. *Cincinnati, N. O. & T. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 537, 89 *Ky.* 402, 12 *S. W. Rep.* 764.

One who goes upon a track at a place other than a crossing, where the company is required to fence its road, and has so fenced it, there being nothing in the surroundings that would naturally or reasonably lead the company's servants to suspect his presence, is a trespasser, and the company owes him no duty except not to injure him wantonly,

* Duty that company owes to trespassers on track, see notes, 30 AM. ST. REP. 53; *Id.* 687; 4 AM. & ENG. R. CAS. 572; 6 *Id.* 17; 19 *Id.* 111; 23 *Id.* 467; 31 *Id.* 373; 34 *Id.* 55; 48 *Id.* 559; 6 L. R. A. 243; 10 *Id.* 139; 11 *Id.* 385; 13 *Id.* 248; 52 AM. REP. 434.

wilfully, or with gross negligence, and is not in duty bound to look out for him. *Barker* v. *Hannibal & St. J. R. Co.*, 37 *Am. & Eng. R. Cas.* 292, 98 *Mo.* 50, 11 *S. W. Rep.* 254.—DISTINGUISHED IN Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36. FOLLOWED IN Fiedler *v.* St. Louis, I. M. & S. R. Co., 107 Mo. 645.

The duty which a company owes to a person crossing its tracks at a point other than a public highway may not be precisely that owed to a person crossing at the latter point, still there is an obligation on the part of the company to use ordinary care and prudence to protect him from injury. *Winslow* v. *Boston & A. R. Co.*, 11 *N. Y. S. R.* 831. —QUOTING Barry *v.* New York C. & H. R. R. Co., 92 N. Y. 289; Byrne *v.* New York C. & H. R. R. Co., 104 N. Y. 362, 5 N. Y. S. R. 722.

Railway companies are bound to exercise their dangerous business with due care to avoid injury to others, and when they fail to do so they are liable in damages for injury resulting even to a trespasser who has not been guilty of contributory negligence. *Houston & T. C. R. Co.* v. *Sympkins*, 6 *Am. & Eng. R. Cas.* 11, 54 *Tex.* 615.

24. Distinguished from duty to passenger.— A company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it. *Reary* v. *Louisville, N. O. & T. R. Co.*, 34 *Am. & Eng. R. Cas.* 277, 40 *La. Ann.* 32, 8 *Am. St. Rep.* 497, 3 *So. Rep.* 390. —APPLIED IN O'Connor *v.* Illinois C. R. Co., 44 La. Ann. 339.

Its duty to strangers is governed by the general principles of law that every one is obliged, upon considerations of humanity and justice, to conform his conduct to the rights of others, and, in the prosecution of his lawful business, to use every reasonable precaution to avoid their injury. *Snyder* v. *Natchez, R. R. & T. R. Co.*, 44 *Am. & Eng. R. Cas.* 278, 42 *La. Ann.* 302, 7 *So. Rep.* 582.—APPLIED IN O'Connor *v.* Illinois C. R. Co., 44 La. Ann. 339.

The obligation of a company for the safe transportation of a passenger is one arising from contract imposing duties growing out of the relation between the parties, involving trust and confidence, and requiring the exercise of the utmost diligence and care, while towards a stranger no such relation exists; each party, being in the lawful pursuit of his own business or the lawful exercise of his own rights, is not bound by the same rigorous rule, but is required to exercise such reasonable care to avoid injuring the other as ordinary prudence suggests. *Baltimore & O. R. Co.* v. *Breinig*, 25 *Md.* 378. —APPROVING Brand *v.* Schenectady & T. R. Co., 8 Barb. (N. Y.) 376. REVIEWING Baltimore & O. R. Co. *v.* Worthington, 21 Md. 275.

The amount or degree of care which the above rule requires must vary according to circumstances, and should be commensurate with the risk or danger of inflicting injury upon others. *Baltimore & O. R. Co.* v. *Breinig*, 25 *Md.* 378.

While common carriers of passengers for hire must exercise the highest degree of care toward passengers who pay, ordinary care is sufficient toward trespassers. *Higley* v. *Gilmer*, 3 *Mont.* 90. — DISTINGUISHING Columbus, C. & I. C. R. Co. *v.* Powell, 40 Ind. 37; Philadelphia & R. R. Co. *v.* Derby, 14 How. (U. S.) 483; Wilton *v.* Middlesex R. Co., 107 Mass. 108; Nolton *v.* Western R. Corp., 15 N. Y. 444; Daley *v.* Norwich & W. R. Co., 26 Conn. 591.

25. Distinguished from duty to persons lawfully on premises.— One who walks upon a track, not at a road crossing, is a trespasser; and while the road would be liable for a wanton or wilful wrong of its agents, acting within the scope of their duty, or for gross negligence or carelessness, evincing reckless disregard of the safety of others, or where they perceive the danger of a party in time, and make no effort to avoid it, still, the company is under no such obligation to a trespasser as to those who are properly and lawfully upon its premises, either for the purpose of transacting legitimate business with it, or in furtherance of rights reserved to them by law. *Central R. Co.* v. *Brinson*, 19 *Am. & Eng. R. Cas.* 42, 70 *Ga.* 207.— QUOTING Illinois C. R. Co. *v.* Godfrey, 71 Ill. 506.

While the obligation of a company to a trespasser on its track may not be the same as to passengers, employés, or other persons having business with it and whose presence there is authorized, or even to persons who are there by its consent as a favor or gratuity, still, one who places himself upon its road, even in violation of the statute, does not forfeit all right to have its agents regard his personal security or life, or exempt it from liability for injury, if, by the exer-

cise of proper precaution on its part, the casualty could have been avoided. *Savannah, F. & W. R. Co.* v. *Stewart*, 71 *Ga.* 427.

26. Degree of care required, generally.*—The fact that a train was, at the time of an accident, passing near (not through) a small village or collection of houses containing about 200 inhabitants, from which it was separated by a fence, is not a special reason calling for greater diligence towards trespassers walking on the track. *Carrington* v. *Louisville & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 543, 88 *Ala.* 472, 6 *So. Rep.* 910.

The fact that the point where one is injured while walking upon the company's right of way and between its tracks is used as a public crossing will not impose upon the company any increase of duty to such person. *Richards* v. *Chicago, St. P. & K. C. R. Co.*, 45 *Am. & Eng. R. Cas.* 54, 81 *Iowa* 426, 47 *N. W. Rep.* 63.

The measure of duty that a company owes to one on the track where it is laid on the company's right of way is different from what it would be if he was at a crossing. In such case the company is not bound to exercise a high degree of care, even though it be in the corporate limits of a city. *Lake Erie & W. R. Co.* v. *Zoffinger*, 10 *Ill. App.* 252.

A company is as much bound to prevent injury to a person on its track, by using all the facilities that experience has provided for the purpose, as the person on the track is bound to use all the means in his power to escape the injury, when he is aware that it is impending. *Costello* v. *Syracuse, B. & N. Y. R. Co.*, 65 *Barb.* (*N. Y.*) 92; *appeal dismissed* (*?*) 55 *N. Y.* 641, *mem.* —QUOTED IN Zimmer *v.* New York C. & H. R. R. Co., 7 Hun (N. Y.) 552.

In operating their engines upon their yards railway companies are not held to the same degree of care, so far as strangers are concerned, as is required at public crossings. *Texas & P. R. Co.* v. *Harrington*, 21 *Am. & Eng. R. Cas.* 571, 62 *Tex.* 597.

The fact that pedestrians are accustomed to travel on a railroad at a particular place makes it the duty of the company to exercise greater caution and prudence at that place. *Nugum* v. *Pittsburgh, C. & St. L. R. Co.*, 30 *W. Va.* 228, 4 *S. E. Rep.* 242.

27. In passing through city or village. — The right of a company to the use of its track is exclusive of the public, save where the public has a right to cross or use it, or where its use in a reckless manner would endanger the lives of those whose nearness to it requires the exercise of care and caution. Greater care must be exercised in the running of trains through a town or city than is required upon a portion of the road where persons have no license to be. *John* v. *Louisville & N. R. Co.*, (*Ky.*) 10 *S. W. Rep.* 417.

28. Liability for want of ordinary care.—One who crosses a track in a city at a point 100 feet distant from the street crossing, at an opening in a train, there being no evidence that such opening was made for pedestrians to pass through, or that it was ever used for that purpose, is a trespasser; and the railroad owes him no duty except not to injure him if, by the exercise of ordinary care, it could either have discovered his peril in time to avoid the accident, or, after discovering it, could have prevented the accident. *Dahlstrom* v. *St Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 387, 96 *Mo.* 99, 15 *West. Rep.* 85, 8 *S. W. Rep.* 777.

Although one may be improperly or unlawfully on a track, that fact will not discharge the company or its employés from the observance of due care; and where he is run over by a train and killed, the company will be responsible if its officers could have avoided the accident by the exercise of ordinary caution and watchfulness. *Isabel* v. *Hannibal & St. J. R. Co.*, 60 *Mo.* 475.—DISTINGUISHED IN Lary *v.* Cleveland, C., C. & I. R. Co., 3 Am. & Eng. R. Cas. 498, 78 Ind. 323, 41 Am. Rep. 572; Frick *v.* St. Louis, K. C. & N. R. Co., 5 Mo. App. 435; O'Donnell *v.* Missouri Pac. R. Co., 7 Mo. App. 190. FOLLOWED IN Werner *v.* Citizens' R. Co., 81 Mo. 368. QUOTED IN Scoville *v.* Hannibal & St. J. R. Co., 81 Mo. 434.

A railroad engineer must exercise ordinary diligence and care to avoid injury to a trespasser upon the track. *Remer* v. *Long Island R. Co.*, 1 *N. Y. Supp.* 124, 48 *Hun* 352, 15 *N. Y. S. R.* 884; *affirmed in* 113 *N. Y.* 669, 23 *N. Y. S. R.* 994, *mem.*, 21 *N. E. Rep.* 1116, *mem.*

A trespasser is not prevented from recovering for an injury received on a track, if the company could by ordinary care have prevented it. *Lay* v. *Richmond & D. R.*

* Duty owed by a company to trespassers on track. Liability where trespasser is not seen, see 45 AM. & ENG. R. CAS. 43, *abstr.*

Co., 42 *Am. & Eng. R. Cas.* 110, 106 *N. Car.* 404, 11 *S. E. Rep.* 412.

A person using a track as a footpath for his own convenience elsewhere than at a lawful crossing, and injured by a train while so doing, cannot recover of the company, unless it be guilty of wanton or gross negligence. *Spicer* v. *Chesapeake & O. R. Co.*, 45 *Am. & Eng. R. Cas.* 28, 34 *W. Va.* 514, 12 *S. E. Rep.* 553.—DISTINGUISHING Nuzum *v.* Pittsburgh, C. & St. L. R. Co., 30 W. Va. 228; Hawker *v.* Baltimore & O. R. Co., 15 W. Va. 629.—FOLLOWED IN Christy *v.* Chesapeake & O. R. Co., 35 W. Va. 117.—*Christy* v. *Chesapeake & O. R. Co.*, 35 *W. Va.* 117, 12 *S. E. Rep.* 1111.—FOLLOWING Spicer *v.* Chesapeake & O. R. Co., 34 W. Va. 514.

29. Liability for wanton or wilful misconduct.—Where a person voluntarily walked upon a railroad track, and was injured by a passing train—*held*, that he was not entitled to recover damages for the injury, in the absence of wilful, wanton, or reckless conduct on the part of the company or its agents. *Little Rock, M. R. & T. R. Co.* v. *Haynes*, 28 *Am. & Eng. R. Cas.* 572, 47 *Ark.* 497, 1 *S. W. Rep.* 774.—FOLLOWED IN Sibley *v.* Ratliffe, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477.—*Patterson* v. *Philadelphia, W. & B. R. Co.*, 4 *Houst.* (*Del.*) 103, 7 *Am. Ry. Rep.* 207. *Lake Shore & M. S. R. Co.* v. *Bodemer*, 54 *Am. & Eng. R. Cas.* 177, 139 *Ill.* 596, 29 *N. E. Rep.* 692; *affirming* 33 *Ill. App.* 479. *Eggmann* v. *St. Louis, A. & T. H. R. Co.*, 47 *Ill. App.* 507.—FOLLOWING Illinois C. R. Co. *v.* Hetherington, 83 Ill. 510.—*Terre Haute & I. R. Co.* v. *Graham*, 12 *Am. & Eng. R. Cas.* 77, 95 *Ind.* 286, 48 *Am. Rep.* 719.—REVIEWING Pennsylvania Co. *v.* Sinclair, 62 Ind. 301; Indianapolis & V. R. Co. *v.* McClaren, 62 Ind. 566.—FOLLOWED IN Palmer *v.* Chicago, St. L. & P. R. Co., 31 Am. & Eng. R. Cas. 364, 112 Ind. 250, 11 West. Rep. 676, 14 N. E. Rep. 70.—*Chicago & E. I. R. Co.* v. *Hedges*, 25 *Am. & Eng. R. Cas.* 550, 105 *Ind.* 398, 7 *N. E. Rep.* 801. *Gregory* v. *Cleveland, C., C. & I. R. Co.*, 31 *Am. & Eng. R. Cas.* 440, 112 *Ind.* 385, 14 *N. E. Rep.* 228. *Palmer* v. *Chicago, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 364, 112 *Ind.* 250, 11 *West. Rep.* 676, 14 *N. E. Rep.* 70.—FOLLOWING Terre Haute & I. R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719.—QUOTED IN Toomey *v.* Southern Pac. R. Co., 86 Cal. 374; Chicago, St. L. & P. R. Co. *v.* Nash, 1 Ind. App. 298.—*Kentucky C. R. Co.* v. *Gastineau*, 83 *Ky.* 119.—FOLLOWED IN Shelby *v.* Cincinnati, N. O. & T. P. R. Co., 85 Ky. 224, 3 S. W. Rep. 157; Givens *v.* Kentucky C. R. Co., 89 Ky. 231.—*Snyder* v. *Natchez, R. R. & T. R. Co.*, 44 *Am. & Eng. R. Cas.* 278, 42 *La. Ann.* 302, 7 *So. Rep.* 582. *Wright* v. *Boston & A. R. Co.*, 28 *Am. & Eng. R. Cas.* 652, 142 *Mass.* 296, 7 *N. E. Rep.* 866.—FOLLOWED IN Daniels *v.* New York & N. E. R. Co., 154 Mass. 349.—*Dillon* v. *Connecticut River R. Co.*, 154 *Mass.* 478, 28 *N. E. Rep.* 899. *McCreary* v. *Boston & M. R. Co.*, 156 *Mass.* 316, 31 *N. E. Rep.* 126. *Dooley* v. *Mobile & O. R. Co.*, 69 *Miss.* 648, 12 *So. Rep.* 956. *Heiter* v. *East St. Louis Connecting R. Co.*, 53 *Mo. App.* 331. *Houston & T. C. R. Co.* v. *Sympkins*, 6 *Am. & Eng. R. Cas.* 11, 54 *Tex.* 615.

A reckless disregard of consequences may be so great as to imply a willingness to inflict an injury, and as to entitle a trespasser to recover, although there is no actual intent to harm him. *Palmer* v. *Chicago, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 364, 112 *Ind.* 250, 11 *West. Rep.* 676, 14 *N. E. Rep.* 70.—QUOTING Pennsylvania Co. *v.* Sinclair, 62 Ind. 301.

Plaintiff stopped at an intermediate station on defendant's road to meet her son, who was coming in on another road, intending to resume her journey on the same ticket later in the day. She went to a house and waited until near train time on the other road. She undertook to make a near cut across defendant's track, when she might have crossed at streets provided with gates, but was struck by a train in attempting to cross. *Held*, that the fact that she held a ticket would not make her a passenger at the time, and in going on the track for the purpose that she had she assumed all risks, and could not recover for the injury, in the absence of evidence that it was wilfully inflicted. *Johnson* v. *Boston & M. R. Co.*, 125 *Mass.* 75.—FOLLOWED IN Daniels *v.* New York & N. E. R. Co., 154 Mass. 349. REVIEWED IN Davis *v.* Chicago & N. W. R. Co., 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am. Rep. 667.

30. Liability for wrongful or tortious acts.—While a company is not bound to the same degree of care, in regard to mere strangers, who are unlawfully upon its premises, that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries

arising from its negligence or from its tortious acts. *Sioux City & P. R. Co.* v. *Stout*, 17 *Wall.* (*U. S.*) 657. — DISAPPROVED IN Catlett *v.* St. Louis, I. M. & S. R. Co., 54 Am. & Eng. R. Cas. 113, 57 Ark. 461, 21 S. W. Rep. 1062. DISTINGUISHED IN Ostertag *v.* Pacific R. Co., 64 Mo. 421. NOT FOLLOWED IN Daniels *v.* New York & N. E. R. Co., 154 Mass. 349; Frost *v.* Eastern R. Co., 64 N. H. 220.

Though a person walking upon a track be technically a trespasser, if he uses due care to avoid injury from the wrongful act of the company he may recover for injuries thus sustained. *Troy* v. *Cape Fear & Y. V. R. Co.*, 34 *Am. & Eng. R. Cas.* 13, 99 *N. Car.* 298, 6 *S. E. Rep.* 77, 6 *Am. St. Rep.* 521.—QUOTING Vicksburg & M. R. Co. *v.* McGowan, 62 Miss. 682.

31. What amounts to actionable negligence.—It appeared that the decedent was passing along a double track in a westerly direction within the limits of a city, when he discovered a train coming toward him, and stepped from the track upon which he was walking to the one immediately north. Before he had taken more than two or three steps he was struck and killed by a train going west. The accident did not occur in a public street, and the train was not running at an unusual rate of speed, or in violation of any ordinance of the city. *Held*, that a demurrer to the evidence was properly sustained. *Tennis* v. *Inter-State Con. R. T. R. Co.*, 45 *Kan.* 503, 25 *Pac. Rep.* 876. — QUOTING Mulherrin *v.* Delaware, L. & W. R. Co., 81 Pa. St. 366.

To turn cars loose at night, to move by their own momentum, without an engine attached, and without a light in front to warn persons on the track of their approach, is negligence even as to a trespasser on the track. *Conley* v. *Cincinnati, N. O. & T. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 537, 89 *Ky.* 402, 12 *S. W. Rep.* 764.—FOLLOWED AND QUOTED IN Louisville & N. R. Co. *v.* Potts, 92 Ky. 30.

Running engine and tender backward through the country, where people are not expected, and have no right, to be on the track, cannot be regarded of itself as an act of negligence. *State* v. *Baltimore & O. R. Co.*, 69 *Md.* 494, 16 *Atl. Rep.* 210.

The fact that an old highway had existed a number of years before at the place where a person was injured on a railroad track will not entitle him to recover for his injuries on the ground that the company had failed to construct a suitable crossing over it, especially where it appears that the injured person was not crossing but was walking along the track. *Candelaria* v. *Atchison, T. & S. F. R. Co.*, (*N. Mex.*) 48 *Am. & Eng. R. Cas.* 565, 27 *Pac. Rep.* 497.

32. Necessity of actually striking with train.—A child was walking upon a railroad bridge, and fell therefrom as a train was passing and was killed. *Held*, that it was not necessary in order to recover for the death to prove that the child was struck by the train. The company was liable if the fall was occasioned by the negligent acts of the train employés, in the absence of negligence on the part of the child. *McMillan* v. *Burlington & M. R. Co.*, 46 *Iowa* 231, 16 *Am. Ry. Rep.* 239.

b. Speed; Signals; Flagmen.*

33. Rate of speed, generally.—As applicable to an injury to a trespasser, the rate of speed at which a train was run is not material, unless there be something making it evidence of an intentional or wilful act. *Palmer* v. *Chicago, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 364, 112 *Ind.* 250, 11 *West. Rep.* 676, 14 *N. E. Rep.* 70.

34. High or unusual rate of speed.—To run a train at a high rate of speed where it is known that persons are using the track, although without legal right, may be wanton, for which wantonness resulting in an injury there may be a recovery; while if run at the same rate of speed without such conditions being known, there can be no liability for such accident. *Illinois C. R. Co.* v. *Beard*, 49 *Ill. App.* 232.

As to a trespasser on the track, the driving of a train at night outside the limits of a city or town at a very high rate of speed cannot be deemed wilful negligence. The engineer has a right to presume that no one will be on the track at such time and place. *Louisville & N. R. Co.* v. *Howard*, 19 *Am. & Eng. R. Cas.* 98, 82 *Ky.* 212.

The unusual speed of a train is not neglect as to one who voluntarily places himself upon the track where he has no right to be. In such cases the company is not liable, unless those in charge of the train, after discovering the danger, could,

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **45-189.**

by the exercise of proper care, have avoided the injury. *Shackleford* v. *Louisville & N. R. Co.*, 28 *Am. & Eng. R. Cas.* 591, 84 *Ky.* 43, 4 *Am. St. Rep.* 189.

35. Rate of speed prohibited by ordinance. — The fact that a train was run at a speed in excess of that allowed by ordinance will not authorize a recovery for injuries received by one who, although aware of the approach of the train, rode up an embankment and got upon the track immediately in front of it at a place where he had no right to be, where it is shown that the engineer after discovering him used every means in his power to avert the accident. *Prewitt* v. *Eddy*, 54 *Am. & Eng. R. Cas.* 138, 115 *Mo.* 283, 21 *S. W. Rep.* 742.— QUOTING Harlan *v.* St. Louis, K. C. & N. R. Co., 64 Mo. 480; Guenther *v.* St. Louis, I. M. & S. R. Co., 34 Am. & Eng. R. Cas. 47, 95 Mo. 289. REVIEWING Fiedler *v.* St. Louis, I. M. & S. R. Co., 107 Mo. 645; Boyd *v.* Wabash Western R. Co., 105 Mo. 371.

In an action for the death of plaintiff's daughter, fifteen years old, the evidence tended to show that, although the deceased was a trespasser on defendant's tracks, yet many people habitually walked on the tracks along the place of the accident, and that the train was running more than six miles an hour, in violation of the city ordinance. The engineer saw the girl when about 600 feet distant, and sounded the alarm whistle when within about 35 feet of her, but did not check the speed of the train, although the deceased gave no indication of hearing the signal. *Held*, that a verdict for plaintiff would not be disturbed. *Fiedler* v. *St. Louis, I. M. & S. R. Co.*, 54 *Am. & Eng. R. Cas.* 162, 107 *Mo.* 645, 18 *S. W. Rep.* 847. — REVIEWED IN Prewitt *v.* Eddy, 54 Am. & Eng. R. Cas. 138, 115 Mo. 283, 21 S. W. Rep. 742.

36. Duty to give signals, generally.*—A company is not bound to furnish any particular kind of machinery or appliances for the benefit of a trespasser, or (when not aware of his presence) to give cautionary signals to warn him of the approach of its trains, and its omission to do so is not negligence. *Toomey* v. *Southern Pac. R. Co.*, 86 *Cal.* 374, 24 *Pac. Rep.* 1074. —APPROVING Tennenbrock *v.* South Pac. Coast R. Co., 59 Cal. 269. EXPLAINING Needham *v.* San Francisco & S. J. R. Co., 37 Cal. 410.

A company is not liable for a failure to give the usual signals where a person is injured by a backing train, while attempting to cross the track at an unfrequented place, and unseen by the persons in charge of the train. *Woodyard* v. *Kentucky C. R. Co.*, (*Ky.*) 15 *S. W. Rep.* 178.

In signaling the movement of a train it is not necessary to ring the bell of the locomotive continuously. If the ringing of the bell upon starting is sufficient "under usual existing circumstances" to give to passers by reasonable warning of the train's approach, nothing more is required. *Illinois C. R. Co.* v. *Dick*, 91 *Ky.* 434, 15 *S. W. Rep.* 665.

A railroad is required to ring the bell and sound the whistle of its locomotive only when approaching a crossing. *Dahlstrom* v. *St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 387, 96 *Mo.* 99, 15 *West. Rep.* 85, 8 *S. W. Rep.* 777.

37. Approaching sharp curves. — A person walking upon a track at night, at a place where there was a high embankment near a sharp curve, was run over and killed by a passing engine running irregularly. In an action to recover damages, a rule of the company was offered in evidence, requiring the whistle to be sounded before approaching all sharp curves. *Held*, that the rule in question was adopted for the safety of passengers and the proper running of trains, and to notify those who had a right to use the road, and that it was not intended to protect persons in the position of plaintiff; therefore, it was error for the court to charge that it was the duty of the engineer to blow the whistle. *Louisville & N. R. Co.* v. *Howard*, 19 *Am. & Eng. R. Cas.* 98, 82 *Ky.* 212.

38. When person is seen on track. —Negligence is a question of fact for the jury. The court has the right to charge that it is the duty of those operating a train to ring the bell or blow the whistle as soon as they see a man on the track ahead; but it is error, as upon the weight of evidence, to charge that a failure on their part so to

*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **91-98.**

Failure to observe statutory precautions, see note, 19 AM. & ENG. R. CAS. 41; 31 *Id.* 447.

Rule requiring signals not intended for trespassers, see note, 19 AM. & ENG. R. CAS. 102.

Trespasser on track cannot complain of omission of precautions required at crossings or for safety of passengers, see note, 45 AM. & ENG. R. CAS. 36.

do would constitute negligence. *Texas & P. R. Co.* v. *Roberts*, 2 *Tex. Civ. App.* 111, 20 *S. W. Rep.* 960.

30. —— but not in time to prevent accident.—It is not negligence for those in charge of a train to fail to warn one who is trespassing on the track at a point where persons are not in the habit of going, where the trespasser is not discovered in time to have averted an accident. *Oatts* v. *Cincinnati, N. O. & T. P. R. Co.*, (*Ky.*) 22 *S. W. Rep.* 330.

40. Statutory signals.*—A company is not required to give the statutory signal warnings to one walking on the track. *Eggmann* v. *St. Louis, A. & T. H. R. Co.*, 47 *Ill. App.* 507.

Where a person goes upon a railroad track between stations, at a place where he has no right to be, without looking or listening for approaching trains, and is injured, he cannot recover against the company, in the absence of wilfulness, notwithstanding a failure to give the signals required by law. *Ivens* v. *Cincinnati, W. & M. R. Co.*, 23 *Am. & Eng. R. Cas.* 258, 103 *Ind.* 27, 2 *N. E. Rep.* 134.

41. —— at public crossings.—A statutory provision requiring the bell to be rung or whistle blown on approaching a crossing is for the benefit of those who use the crossing, and not for the benefit of trespassers at other points, and such trespassers cannot complain of the omission to comply with the statute, even though had the signals been given they would have heard and been warned thereby. *Toomey* v. *Southern Pac. R. Co.*, 86 *Cal.* 374, 24 *Pac. Rep.* 1074. *Louisville & N. R. Co.* v. *Howard*, 19 *Am. & Eng. R. Cas.* 98, 82 *Ky.* 212. *Shackleford* v. *Louisville & N. R. Co.*, 28 *Am. & Eng. R. Cas.* 591, 84 *Ky.* 43, 4 *Am. St. Rep.* 189. *Prendegast* v. *New York C. & H. R. R. Co.*, 58 *N. Y.* 652, *mem. Spicer* v. *Chesapeake & O. R. Co.*, 45 *Am. & Eng. R. Cas.* 28, 34 *W. Va.* 514, 12 *S. E. Rep.* 553. *Christy* v. *Chesapeake & O. R. Co.*, 35 *W. Va.* 117, 12 *S. E. Rep.* 1111. *Casey* v. *Canadian Pac. R. Co.*, 37 *Am. & Eng. R. Cas.* 172, 15 *Ont.* 574.

A woman living at a section house belonging to appellee, as a servant of the occupant, who was a section boss of the company, was, while crossing the track to reach the milk yard belonging to the house, struck by a passing train and killed. The train was running twenty-five or thirty miles per hour. No signal was given of its approach to a public crossing a mile distant, or to a neighborhood crossing near by, or to the section house. *Held*, that the woman was a trespasser and that there was no negligence upon the part of the company as to her. *Shackleford* v. *Louisville & N. R. Co.*, 28 *Am. & Eng. R. Cas.* 591, 84 *Ky.* 43, 4 *Am. St. Rep.* 189.

42. Under Tennessee statute.*—Tenn. Code, § 1166, requiring the engineer to sound the whistle and to put on brakes and use every effort to stop the train when any person appears upon the track, must be obeyed in its severest literality, whether the precautions seem necessary or not, and the engineer cannot suppose that a person upon the track will get off on the near approach of the engine. *Hill* v. *Louisville & N. R. Co.*, 9 *Heisk.* (*Tenn.*) 823, 19 *Am. Ry. Rep.* 400.—APPROVED IN Chesapeake, O. & S. W. R. Co. *v.* Foster, 88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428. QUOTED IN Chicago, St. L. & P. R. Co. *v.* Fenn. 3 Ind. App. 250.

But if, after a person could have been seen on the track by the lookout on the engine, it was impossible to sound the whistle or put down the brakes, the company is not liable for the failure to do so. *East Tenn. & V. R. Co.* v. *Swaney*, 5 *Lea* (*Tenn.*) 119.—APPROVING East Tenn., V. & G. R. Co. *v.* Scales, 2 Lea 688.—DISTINGUISHED IN Chesapeake, O. & S. W. R. Co. *v.* Foster, 88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428.

43. Duty to station flagmen at crossings.—A requirement of a company to keep a flagman at a public street crossing in a large city, to give warning of the approach of trains, is intended for the protection of persons crossing the tracks at such crossing, and not for the benefit of persons walking along the track, employing it as a footpath. To the latter the company does not owe the duty in respect to a flagman. *Chicago, R. I. & P. R. Co.* v. *Eininger*, 114 *Ill.* 79, 29 *N. E. Rep.* 196.

A company is not bound to furnish a flagman, or give other signals, for the benefit of trespassers on the track, but only for those about to cross a track. The liability to trespassers is only for wilful or wanton injuries,

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **99-167.**

* See also *post*, **46.**

or for such as result from an extreme degree of negligence. *Roden* v. *Chicago & G. T. R. Co.*, 133 *Ill.* 72, 24 *N. E. Rep.* 425; *affirming* 30 *Ill. App.* 354.

c. Lookout.*

44. Ordinarily no duty to keep lookout.—A company is under no obligation to keep a special lookout for intruders or trespassers on its track, except at public crossings and within the limits of towns or cities, and is only bound to reasonable diligence after they are, or ought to be, discovered. *Columbus & W. R. Co.* v. *Wood*, 86 *Ala.* 164, 5 *So. Rep.* 463. *Bentley* v. *Georgia Pac. R. Co.*, 86 *Ala.* 484, 6 *So. Rep.* 37. *Carrington* v. *Louisville & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 543, 88 *Ala.* 472, 6 *So. Rep.* 910. *Louisville & N. R. Co.* v. *Black*, 45 *Am. & Eng. R. Cas.* 38, 89 *Ala.* 313, 8 *So. Rep.* 246. *Glass* v. *Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215.—FOLLOWING Memphis & C. R. Co. *v.* Womack, 84 Ala. 149; Ensley R. Co. *v.* Chewning, 93 Ala. 24. OVERRULING South & N. Ala. R. Co. *v.* Donovan, 84 Ala. 141.

A railroad company has a right to the use of its track, and may ordinarily presume that no one is upon it to be injured. It owes to persons wrongfully there no duty to look out for them that they may not be injured. Whatever duty it owes to such persons arises after, and because, they have been discovered there by its servants. *Benson* v. *Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 126, 98 *Cal.* 45, 32 *Pac. Rep.* 809, 33 *Pac. Rep.* 206.

Where a track passes over ground not used by any person save employés of the company, such as ground used for yard tracks, some distance from a station, and where no streets intersect, and an engineer has no reason to apprehend the presence of plaintiff or any other person upon such track, a failure on his part to take precautions to discover such presence is not negligence. *Illinois C. R. Co.* v. *Frolka*, 9 *Ill. App.* 605.

Persons in charge of a train are not bound to keep a lookout for trespassers on the track. They are not bound to anticipate such intrusion, and are not liable for an injury occurring in consequence thereof without their knowledge. The liability of the company in such case is only measured by the conduct of its employés after they become aware of the trespasser. *Terre Haute & I. R. Co.* v. *Graham*, 12 *Am. & Eng. R. Cas.* 77, 95 *Ind.* 286, 48 *Am. Rep.* 719. *Masser* v. *Chicago, R. I. & P. R. Co.*, 68 *Iowa* 602, 27 *N. W. Rep.* 776.—FOLLOWING Gaynor *v.* Old Colony & N. R. Co., 100 Mass. 214; Illinois C. R. Co. *v.* Godfrey, 71 Ill. 500; McClaren *v.* Indianapolis & V. R. Co., 8 Am. & Eng. R. Cas. 217, 83 Ind. 319; Baltimore & O. R. Co. *v.* State, 19 Am. & Eng. R. Cas. 83, 62 Md. 479; Chicago, R. I. & P. R. Co. *v.* Houston, 95 U. S. 702.—*State* v. *Baltimore & O. R. Co.*, 69 *Md.* 494, 16 *Atl. Rep.* 210. *Scheffler* v. *Minneapolis & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 173, 32 *Minn.* 518, 21 *N. W. Rep.* 711.—DISTINGUISHED IN Indianapolis, P. & C. R. Co. *v.* Pitzer, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387.—*Williams* v. *Kansas City, S. & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 329, 96 *Mo.* 275, 9 *S. W. Rep.* 573.

But having notice of the presence of trespassers, and that they are in danger, the company's servants are bound to use reasonable care to avert injury. *Hepfel* v. *St. Paul, M. & M. R. Co.*, 49 *Minn.* 263, 51 *N. W. Rep.* 1049.

And a company will be liable if it discovered the trespasser on the track, and failed to use reasonable diligence to prevent the train from running over him. *Galveston, H. & S. A. R. Co.* v. *Ryon*, 34 *Am. & Eng. R. Cas.* 30, 70 *Tex.* 56, 7 *S. W. Rep.* 687.—REVIEWING Texas & P. R. Co. *v.* O'Donnell, 58 Tex. 42.—APPLIED IN Artusy *v.* Missouri Pac. R. Co., 37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177.

45. Rule requiring a reasonable lookout to be kept.—Railways are bound to use ordinary prudence, foresight, and caution to avoid injury to persons or property on or near their tracks; and ordinary care varies with the circumstances and the subject-matter endangered, and is such care as persons of ordinary prudence would use in similar circumstances. *St. Louis, I. M. & S. R. Co.* v. *Freeman*, 4 *Am. & Eng. R. Cas.* 608, 36 *Ark.* 41.—FOLLOWED IN Sibley *v.* Ratliffe, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477.

The duty of keeping a reasonable lookout is imposed upon those who have charge of trains; and a failure to do so will render the company liable, though the person in-

* See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **164-167.**

jured was a trespasser, if he did nothing else to contribute to the injury. *Troy* v. *Cape Fear & Y. V. R. Co.*, 34 *Am. & Eng. R. Cas.* 13, 99 *N. Car.* 298, 6 *S. E. Rep.* 77, 6 *Am. St. Rep.* 521. — DISTINGUISHING Parker *v.* Wilmington & W. R. Co., 86 N. Car. 221. QUOTING Houston & T. C. R. Co. *v.* Sympkins, 54 Tex. 615.

A reasonable lookout, varying according to the danger and all the surrounding circumstances, is a duty always devolving on those in charge of a train in motion. *Houston & T. C. R. Co.* v. *Sympkins*, 6 *Am. & Eng. R. Cas.* 11, 54 *Tex.* 615. — QUOTED IN Troy *v.* Cape Fear & Y. V. R. Co., 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521.

A company is bound to keep a reasonable lookout for trespassers on its track, and to exercise such care as the circumstances require, to prevent injury to them. If a trespasser is an adult, and apparently possesses his faculties, the company has a right to presume that he will exercise his senses and remove himself from the track; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of wilful negligence on its part, no remedy against it for the injury. *Norfolk & W. R. Co.* v. *Harman*, 83 *Va.* 553, 8 *S. E. Rep.* 251. *Tyler* v. *Sites*, 88 *Va.* 470, 13 *S. E. Rep.* 978. —QUOTING Norfolk & W. R. Co. *v.* Harman, 83 Va. 553.

46. Under requirements of Tennessee statute.*—Tenn. St. §§ 1166–68 evidently mean that some person shall be so situated on the lookout that he can see ahead. If the engineer cannot see, the fireman must; if the fireman cannot, the engineer must. *Nashville & C. R. Co.* v. *Nowlin*, 1 *Lea* (*Tenn.*) 523.

Tenn. Code, § 1166, provides that "every railroad company shall keep the engineer, fireman, or some other person on the locomotive always on the lookout ahead, and when any person, animal, or other obstruction appears on the road the alarm whistle shall be sounded and the brakes put down." *Held*, that the obstruction ought to appear to the person on the lookout, as an obstruction not appearing or visible to him would not come under the statute, provided he was properly on the lookout. *East Tenn., V. & G. R. Co.* v. *White*, 8 *Am. & Eng. R. Cas.* 65, 5 *Lea* (*Tenn.*) 540.

In such case the lookout ought to be in such position on the locomotive as to enable him to see ahead, and he ought to be vigilant and watchful. If not in such position, the statute will not be complied with; but if in proper position, and from that position the object is visible, and yet not seen, the jury will be warranted in finding that the person was not on the lookout, that is, that he was not vigilant, otherwise the object would have been seen. *East Tenn., V. & G. R. Co.* v. *White*, 8 *Am. & Eng. R. Cas.* 65, 5 *Lea* (*Tenn.*) 540.

A lookout who does not see what, with due care and vigilance, should have been seen, is not in the discharge of his duty. So it is competent to ask an engineer whether, from his position on the engine as the train was approaching, plaintiff could have been seen where he was lying on the track. *East Tenn., V. & G. R. Co.* v. *White*, 8 *Am. & Eng. R. Cas.* 65, 5 *Lea* (*Tenn.*) 540.

The above statute does not require more of railroad companies than is required by the common law, except that it shifts the burden of proof. It never was the law that a company would not be responsible if it saw a person on its track, even a trespasser, and rode over him when it might have avoided doing so. It never was the legal right of a company to refuse all possible means to stop its train and avoid an accident when any person, animal, or other obstruction appeared on the track. *East Tenn., V. & G. R. Co.* v. *Humphreys*, 15 *Am. & Eng. R. Cas.* 472, 12 *Lea* (*Tenn.*) 200. *East Tenn., V. & G. R. Co.* v. *Pratt*, 85 *Tenn.* 9, 1 *S. W. Rep.* 618.

Under the statute, a judgment against a company for running over a person on the track is properly rendered where it appears that the engineer should have seen the person in time to avoid the injury. *East Tenn., V. & G. R. Co.* v. *Humphreys*, 15 *Am. & Eng. R. Cas.* 472, 12 *Lea* (*Tenn.*) 200.

47. For trespassers in yards. — A company is not bound to look and watch for a person trespassing in its yard where there are many tracks as it is for one of its own employés, and as it is for a person on its main line. *Rome R. Co.* v. *Tolbert*, 85 *Ga.* 447, 11 *S. E. Rep.* 849.

The place where the accident happened was not at a street, or highway, or crossing place. Defendant was entitled to a clear, unobstructed track, and could not presume that any one would intrude thereon. There

*See also *ante*, **42**.

was no evidence that the deceased had any right to go upon the track. *Held*, that even assuming that there was some evidence that the cars had no brakeman on them while being run upon the siding, that fact would be no ground for charging the defendant with culpable negligence. *State* v. *Baltimore & O. R. Co.*, 10 *Am. & Eng. R. Cas.* 723, 58 *Md.* 221.

The only duty incumbent on a company in case of a trespasser is not to injure wantonly or with reckless carelessness; this, however, does not require it to be on the lookout for trespassers in switch yards. *Williams* v. *Kansas City, S. & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 329, 96 *Mo.* 275, 9 *S. W. Rep.* 573.—QUOTING Morissey *v.* Eastern R. Co., 126 Mass. 377. REVIEWING Frick *v.* St. Louis, K. C. & N. R. Co., 75 Mo. 595; Kelley *v.* Hannibal & St. J. R. Co., 75 Mo. 138.

48. Lookout on trains moving backward. — Defendant company was backing its train in a city, pushing passenger and box cars ahead of the engine, so that no person on the engine could see ahead of the train. There was no brakeman or other person on the box cars, or stationed elsewhere to keep a lookout ahead. Plaintiff's intestate, walking on the track in the direction the train was moving, was overtaken by the train, run over, and killed. *Held*, that this fixed the charge of negligence on the company. *Savannah & M. R. Co.* v. *Shearer*, 58 *Ala.* 672. *South & N. Ala. R. Co.* v. *Sullivan*, 59 *Ala.* 272.

But the above rule of liability does not apply to a section of cars which, being on a down grade on a side track, is set in motion by another section with which the engineer is attempting to make a connection, and if the rule were applicable, the duty would be performed by having a watchman, as in this case, standing by the cars with which he was attempting to couple his own. *East Tenn., V. & G. R. Co.* v. *King*, 31 *Am. & Eng. R. Cas.* 385, 81 *Ala.* 177, 2 *So. Rep.* 152.

As to the care which railroad companies should observe generally in moving trains, and in giving signals, and in keeping a lookout to avoid injuries to persons crossing the track, see *Chicago, B. & Q. R. Co.* v. *Triplett*, 38 *Ill.* 483. *Baltimore & O. R. Co.* v. *State*, 36 *Md.* 366. *Brown* v. *Hannibal & St. J. R. Co.*, 50 *Mo.* 461. *Beisiegel* v. *New York C. R. Co.*, 34 *N. Y.* 622; *reversing* 33 *Barb.* 429.

49. While running through cities, villages, etc.—It is the duty of railroad employés running a train within the corporate limits of a city or town, where necessity may compel or usage sanction walking upon the track at places other than at public crossings, to keep a vigilant outlook, even for trespassers. *South & N. Ala. R. Co.* v. *Donovan*, 36 *Am. & Eng. R. Cas.* 151, 84 *Ala.* 141, 4 *So. Rep.* 142.—DISTINGUISHED IN Memphis & C. R. Co. *v.* Womack, 37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. Rep. 618. OVERRULED IN Glass *v.* Memphis & C. R. Co., 94 Ala. 581. REAFFIRMED IN Savannah & W. R. Co. *v.* Meadors, 95 Ala. 137.

But a railroad track cannot be converted into a road for ordinary travel, and one who undertakes to make such use of it is a trespasser. *Savannah & W. R. Co.* v. *Meadors*, 95 *Ala.* 137, 10 *So. Rep.* 141.—QUOTING Ensley R. Co. *v.* Chewning, 93 Ala. 24. REAFFIRMING South & N. Ala. R. Co. *v.* Donovan, 84 Ala. 146. REVIEWING Memphis & C. R. Co. *v.* Womack, 84 Ala. 150.

Although ordinarily train hands are not bound to look out for trespassers, yet, where a train is running through a city or town, and the people thereof habitually cross the track at any and all hours at such points as may be convenient, and the train hands have reason to know that such is the habit, it is their duty to look out for such persons and to take reasonable precaution, by ringing the bell, etc., not to run over them. *Conley* v. *Cincinnati, N. O. & T. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 537, 89 *Ky.* 402, 12 *S. W. Rep.* 764.

In an action against a railroad for causing the death of a person walking on its track in a city at a place where people habitually walked, it is proper to instruct the jury that they may find for plaintiff not only if defendant's servants saw the deceased in time to avoid the injury by the exercise of ordinary care, but also if they, by the exercise of ordinary care, might have seen him in time to avoid the injury, and failed to exercise such care. *Lynch* v. *St. Joseph & I. R. Co.*, 111 *Mo.* 601, 19 *S. W. Rep.* 1114.—FOLLOWING Guenther *v.* St. Louis, I. M. & S. R. Co., 108 Mo. 18; Fiedler *v.* St. Louis, I. M. & S. R. Co., 107 Mo. 645.

A company is bound to provide for a careful lookout in the direction in which a train is moving, in places where people,

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and especially where children, are likely to be upon the track. *Townley* v. *Chicago, M. & St. P. R. Co.*, 4 *Am. & Eng. R. Cas.* 562, 53 *Wis.* 626, 11 *N. W. Rep.* 55.—QUOTED IN Whalen *v.* Chicago & N. W. R. Co., 41 Am. & Eng. R. Cas. 558, 75 Wis. 654, 44 N. W. Rep. 849.

50. Suspicion or notice that track is not clear.—The general doctrine is that a company is entitled to a clear track; but if there is reason to apprehend that the track may not be clear, those operating a train must not act upon the assumption that it is clear. If they do, the company will be responsible for the consequences. *Frick* v. *St. Louis, K. C. & N. R. Co.*, 8 *Am. & Eng. R. Cas.* 280, 75 *Mo.* 595

An engineer is not bound, as a rule, to foresee the wrongful presence of persons on the track or cars, but cases may arise where, though the company is entitled to a clear track, it cannot fairly presume that it is clear. It then becomes its duty to look out for persons on the track, and its liability in such case is not limited to want of care after discovery of the danger of the person injured. *Williams* v. *Kansas City, S. & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 329, 96 *Mo.* 275, 9 *S. W. Rep.* 573.—FOLLOWED IN LeMay *v.* Missouri Pac. R. Co., 105 Mo. 361; Fiedler *v.* St. Louis, I. M. & S. R. Co., 107 Mo. 645.

The fact that persons are liable to be upon a track at a particular locality where a train is to pass, if known to the managers of the train, or if they have reasonable grounds to expect it, whether such persons are there rightfully or wrongfully, would impose a duty of watchfulness upon them that they would not ordinarily be under. *Cassida* v. *Oregon R. & N. Co.*, 14 *Oreg.* 551, 13 *Pac. Rep.* 438.

51. Sufficiency of performance of the duty. — The engineer of a moving train, approaching a trestle on a curve in a cut four or five feet deep, is under no duty to withdraw his attention from the track in front of him, and look across the country to see whether any one is on the trestle; and the fact that he might have seen a person on the trestle by looking across the intervening land before entering the curve, at a distance of 400 yards, is not relevant or admissible as evidence on the question of negligence in failing to keep a proper lookout. *Central P. & B. Co.* v. *Vaughan*, 93 *Ala.* 209, 9 *So. Rep.* 468.

A failure to comply with Ill. Rev. St. ch. 114, § 90, requiring the rear brakeman of a train to remain in his place, is not such negligence as to render the company liable to a trespasser on the track. It does not amount to recklessness or wantonness. *Eggmann* v. *St. Louis, A. & T. H. R. Co.*, 47 *Ill. App.* 507.

It is not negligence for train employés not to look constantly in front of the engine at a place where there is no crossing, and where they have no reason to expect that persons will be on or along the track. *Houston & T. C. R. Co.* v. *Smith*, 77 *Tex.* 179, 13 *S. W. Rep.* 972.

d. Duty after Discovery of Trespasser.

52. Liability limited to negligence after discovery.*—The liability of a company to a trespasser on its track must be measured by the conduct of its employés after they become aware of his presence there, and not by their negligence in failing to discover him; for as to such negligence the contributory negligence of the trespasser will defeat a recovery. *St. Louis, I. M. & S. R. Co.* v. *Monday*, 31 *Am. & Eng. R. Cas.* 424, 49 *Ark.* 257, 4 *S. W. Rep.* 782. *Brown* v. *St. Louis, I. M. & S. Co.*, 52 *Ark.* 120, 12 *S. W. Rep.* 203.

A company should always be vigilant to prevent accidents, but it owes no duty to run trains so as to prevent accidents to persons unnecessarily and unlawfully on its tracks. But the law requires that engineers shall, after the danger of an accident is discovered, do all they can to prevent it. *Nolan* v. *New York, N. H. & H. R. Co.*, 25 *Am. & Eng. R. Cas.* 342, 53 *Conn.* 461, 4 *Atl. Rep.* 106.—APPLIED IN Fritts *v.* New York & N. E. R. Co., 62 Conn. 503.

Persons in control of trains have a right to presume that men of experience will act reasonably in all given contingencies. They are not bound to anticipate and provide against extraordinary, unusual, and improbable conditions, which involve inattention on the part of others, and their duty to persons thus situated only begins when they have good reason to suppose that such persons are unconsciously in peril or disabled from avoiding it. *Cincinnati, I., St. L. & C. R. Co.* v. *Long*, 31 *Am. & Eng. R. Cas.* 138, 112 *Ind.* 166, 11 *West. Rep.* 322, 13 *N. E. Rep.* 659.

* Duty of engineer when person is seen crossing railroad track, see notes, 3 L. R. A. 683; 5 *Id.* 786; 54 AM. & ENG. R. CAS. 155, *abstr.*

53. —— after discovery in perilous position.—In the country, and in villages, the liability of a company is limited to negligence and want of care occurring after the exposed and dangerous position of the injured party came to the knowledge of the servants charged with the want of care. *Dunkman* v. *Wabash, St. L. & P. R. Co.*, 95 *Mo.* 232, 10 *West. Rep.* 396, 4 *S. W. Rep.* 670. —QUOTING AND DISTINGUISHING Rine *v.* Chicago & A. R. Co., 88 Mo. 392.—REVIEWED IN Prewitt *v.* Eddy, 115 Mo. 283. — *Rine* v. *Chicago & A. R. Co.*, 41 *Am. & Eng. R. Cas.* 555, 100 *Mo.* 228, 12 *S. W. Rep.* 640.

54. Right to assume that person will leave track.*— When an engineer sees a grown person walking along the track 300 yards or more in advance of an approaching train, he may reasonably presume such person to be in the possession of his faculties, and is not required to check his train until it becomes apparent that the trespasser is not aware of its approach, or is unable to extricate himself from his perilous condition; nor is he guilty of culpable negligence because he fails to discover such person on emerging from a curve at a distance of 300 yards. *Frazer* v. *South & N. Ala. R. Co.*, 28 *Am. & Eng. R. Cas.* 565, 81 *Ala.* 185, 1 *So. Rep.* 85. — REVIEWED IN Georgia Pac. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. Rep. 621.

A trespasser on a track is there at his own peril, and cannot recover unless he shows that he was wilfully injured by the company's agents, or unless they, knowing his perilous situation and that he was not apprised of his peril, recklessly ran the train on him. The servants of the company have the right to presume that he will get off the track in time to avoid injury, unless there is something in his situation to warn them that he will not; they are not bound to check the speed of the train unless they discover that there is; and an omission to sound the whistle or ring the bell must have been wilful and reckless to warrant a recovery. *Sibley* v. *Ratliffe*, 37 *Am. & Eng. R. Cas.* 295, 50 *Ark.* 477, 8 *S. W. Rep.* 686.—FOLLOWING St. Louis, I. M. & S. R. Co. *v.* Monday, 49 Ark. 257; St. Louis, I. M. & S. R. Co. *v.* Fairbairn, 48 Ark. 491; Little Rock, M. R. & T. R. Co. *v.* Haynes, 47 Ark. 497; St. Louis, I. M. & S. R. Co. *v.* Wilkerson, 46 Ark. 513; St. Louis, I. M. & S. R. Co. *v.* Ledbetter, 45 Ark. 249; Little Rock & Ft. S. R. Co. *v.* Pankhurst, 36 Ark. 371; St. Louis, I. M. & S. R. Co. *v.* Freeman, 36 Ark. 41.—*St. Louis, I. M. & S. R. Co.* v. *Monday*, 31 *Am. & Eng. R. Cas.* 424, 49 *Ark.* 257, 4 *S. W. Rep.* 782.—QUOTING Little Schuylkill N. R. & C. Co. *v.* Norton, 24 Pa. St. 469; Philadelphia & R. R. Co. *v.* Hummell, 44 Pa. St. 378; Mulherrin *v.* Delaware, L. & W. R. Co., 81 Pa. St. 375.—FOLLOWED IN Gulf, C. & S. F. R. Co. *v.* Johnson, 54 Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A. 447; Sibley *v.* Ratliffe, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477.—*Terre Haute & I. R. Co.* v. *Graham*, 12 *Am. & Eng. R. Cas.* 77, 95 *Ind.* 286, 48 *Am. Rep.* 719. *Palmer* v. *Chicago, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 364, 112 *Ind.* 250, 11 *West. Rep.* 676, 14 *N. E. Rep.* 70. *Norwood* v. *Raleigh & G. R. Co.*, 111 *N. Car.* 236, 16 *S. E. Rep.* 4. *Houston & T. C. R. Co.* v. *Smith*, 52 *Tex.* 178. *International & G. N. R. Co.* v. *Garcia*, 75 *Tex.* 583, 13 *S. W. Rep.* 223.

And the above rule applies especially to adults, in full possession of the faculties of mind and body. *Indianapolis & V. R. Co.* v. *McClaren*, 62 *Ind.* 566.—REVIEWED IN Terre Haute & I. R. Co. *v.* Graham, 12 Am. & Eng. R. Cas. 77, 95 Ind. 286, 48 Am. Rep. 719. —*Baltimore & O. R. Co.* v. *State*, 69 *Md.* 551, 18 *Md. L. J.* 824, 16 *Atl. Rep.* 212. *Maloy* v. *Wabash, St. L. & P. R. Co.*, 84 *Mo.* 270. *McAdoo* v. *Richmond & D. R. Co.*, 41 *Am. & Eng. R. Cas.* 524, 105 *N. Car.* 140, 11 *S. E. Rep.* 316. *Syme* v. *Richmond & D. R. Co.*, 113 *N. Car.* 558, 18 *S. E. Rep.* 114.

A company whose train is approaching a man walking lengthwise upon its track, if the bell is rung and the whistle sounded in time to enable him to get off, is not liable for an injury which happens to him under such circumstances. *Finlayson* v. *Chicago, B. & Q. R. Co.*, 1 *Dill.* (*U. S.*) 579.

An engineer has a right to presume that a person seen sitting upon the track about a thousand yards ahead is awake and will move, and to act upon such presumption until the engine is within eighty or ninety yards of him; he will not be negligent in not stopping the train or whistling sooner. *Sims* v. *Macon & W. R. Co.*, 28 *Ga.* 93.

But the presumption that a person will leave the track may not be justified under

*See also CROSSINGS, INJURIES TO PERSONS, ETC., AT, **12**.

Engineer may presume that trespasser has ordinary faculties; duty when he knows that he has not, see note, 19 AM. & ENG. R. CAS. 24.

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some circumstances, as in case of a person intoxicated, asleep, or otherwise off his guard. *Central R. Co.* v. *Brinson*, 19 *Am. & Eng. R. Cas.* 42, 70 *Ga.* 207.—REVIEWED IN Western & A. R. Co. *v.* Meigs, 74 Ga. 857.

And if employés see a man on the track at a place where, or under such circumstances that he cannot readily leave it in time to avoid injury, or if they discover that for any cause he is unaware of his peril, then they are bound to stop the train if it can be done; but a company is not responsible for injury resulting to a person on account of its employés not seeing him when he is in a place where he has no right to be. *Mobile & O. R. Co.* v. *Stroud*, 31 *Am. & Eng. R. Cas.* 443, 64 *Miss.* 784, 2 *So. Rep.* 171.

Where a person is killed while walking on a track in front of a moving engine, and alongside of an engine on another track which is hauling a heavy train, negligence cannot be imputed to the company by assuming that the engineer whose engine does the killing must have seen the other train, and have known that the engine was exhausting so heavily as to make it impossible for the person to hear the approach of the engine behind him. *Syme* v. *Richmond & D. R. Co.*, 113 *N. Car.* 558, 18 *S. E. Rep.* 114.

Whether railway operatives, after blowing the whistle or ringing the bell, may presume that a person upon the track will leave it in time depends upon the facts of each particular case, and the court should not charge absolutely that they may so presume. *Texas & P. R. Co.* v. *Roberts*, 2 *Tex. Civ. App.* 111, 20 *S. W. Rep.* 960.

55. Where it appears that he cannot or will not leave track. — The liability of a company for injuries to a trespasser on the track does not commence when he is first seen on the track, but when it is first discovered that he is ignorant of the approaching danger, or cannot extricate himself from it; and if this is not discovered until it is too late to prevent the injury by the use of all proper appliances, the railroad company is not liable. *Louisville & N. R. Co.* v. *Black*, 45 *Am. & Eng. R. Cas.* 38, 89 *Ala.* 313, 8 *So. Rep.* 246.

Those operating trains are under no obligation to keep a lookout for persons on the track at unexpected places, and they may assume that persons at such places will quit the track in time to avoid danger, unless, after such trespassers are discovered, it is apparent that they do not hear the approaching train, or will not quit the track in time. *France* v. *Louisville & N. R. Co.*, (*Ky.*) 22 *S. W. Rep.* 851.

While plaintiff's intestate was walking with his wife on defendant's tracks across a bridge, and when about the middle thereof, he was struck and killed by the locomotive of a passenger train. The bridge was 115 feet long, 8 feet wide, and 18 feet above a stream. The track was straight for 2000 feet, and there was nothing to obstruct the engineer's vision. *Held*, that if intestate was in such a position that he could not safely get off the track, and the engineer saw his situation, the engineer was bound to make a reasonable effort to avoid running him down, and that the facts shown, without explanation, entitled plaintiffs to go to the jury, and it was error to nonsuit. *White* v. *New York C. & H. R. R. Co.*, 47 *N. Y. S. R.* 174, 20 *N. Y. Supp.* 6.

As a rule, an engineer has the right to assume that a person walking upon the track is in possession of all his faculties, yet, where his conduct is such as to excite a doubt of this, the engineer is bound to use greater caution and to stop the train if necessary to secure his safety. *Clark* v. *Wilmington & W. R. Co.*, 48 *Am. & Eng. R. Cas.* 546, 109 *N. Car.* 430, 14 *S. E. Rep.* 43.—DISTINGUISHED IN High *v.* Carolina C. R. Co., 112 N. Car. 385.

56. Care required after discovery of peril, generally.—In an action by a trespasser, it is immaterial whether or not he used proper diligence to discover approaching trains before he entered on the track, or while he continued to walk along it; and it is equally immaterial whether the men in charge of the train might, by the exercise of due diligence, have discovered him on the track in time to avoid the injury. The only inquiry is, whether they exercised due diligence after they discovered him. *Glass* v. *Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215.

Even if plaintiff, when injured while crossing defendant's track at a footpath, not at a public highway, was upon the track without right or license, this did not relieve the company from the duty of exercising proper care to avoid injury. *Clampit* v. *Chicago, St. P. & K. C. R. Co.*, 49 *Am. & Eng. R. Cas.* 468, 84 *Iowa* 71, 50 *N. W. Rep.* 673.

57. Ordinary care. — If two men are seen on the track in front of a train, one risk-

ing his own safety in an effort to signal the foremost man to leave the track, the engineer is guilty of a wilful wrong if, seeing the signals, he fails to use ordinary care to stop the train; but it is otherwise if he does not see the signals. *Palmer* v. *Chicago, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 364, 112 *Ind.* 250, 11 *West. Rep.* 676, 14 *N. E. Rep.* 70.

A company is liable for injuries inflicted on a trespasser for want of ordinary care after the perilous position of the party is discovered. *Whitehead* v. *St. Louis, I. M. & S. R. Co.*, 39 *Am. & Eng. R. Cas.* 410, 99 *Mo.* 263, 11 *S. W. Rep.* 751.

Although one is struck and killed while walking on a track, the company will still be liable if deceased was in imminent peril, and its employés knew of such peril in time to have, by the exercise of ordinary care, avoided the accident, or if the employés, by the exercise of ordinary care, could have become aware of the peril in time to have done so and failed in that regard, and owing to such failure the deceased was killed. *Guenther* v. *St. Louis, I. M. & S. R. Co.*, 108 *Mo.* 18, 18 *S. W. Rep.* 846.—FOLLOWED IN Lynch *v.* St. Joseph & I. R. Co., 111 Mo. 601. QUOTED IN Prewitt *v.* Eddy, 115 Mo. 283.—*Reardon* v. *Missouri Pac. R. Co.*, 114 *Mo.* 384, 21 *S. W. Rep.* 731.

Notwithstanding a person may trespass upon a track, it is the duty of the engineer to exercise ordinary diligence and care to avoid killing him. *Remer* v. *Long Island R. Co.*, 48 *Hun* 352, 15 *N. Y. S. R.* 884, 1 *N. Y. Supp.* 124; *affirmed in* 113 *N. Y.* 669, *mem.*, 21 *N. E. Rep.* 1116, *mem.*, 23 *N. Y. S. R.* 994, *mem.*

58. Reasonable diligence. — In the absence of statutory regulations, a company is under no obligation to maintain a special lookout for intruders or trespassers on its track, but is only bound to the exercise of reasonable diligence after they are or ought to be discovered, and is only liable for injuries caused by wanton, reckless, or intentional negligence. *Georgia Pac. R. Co.* v. *Blanton*, 84 *Ala.* 154, 4 *So. Rep.* 621.—REVIEWING Memphis & C. R. Co. *v.* Womack, 84 Ala. 149; Frazer *v.* South & N. Ala. R. Co., 81 Ala. 185.

Except at public crossings, and within the limits of cities or towns, a company is under no obligation to maintain a special lookout for intruders or trespassers on its track, and is only bound to the exercise of reasonable diligence after they are or ought to be discovered. (Stone, C. J., dissenting.) *Memphis & C. R. Co.* v. *Womack*, 37 *Am. & Eng. R. Cas.* 308, 84 *Ala.* 149, 4 *So. Rep.* 618. — DISTINGUISHING Savannah & M. R. Co. *v.* Shearer, 58 Ala. 672; South & N. Ala. R. Co. *v.* Sullivan, 59 Ala. 272; South & N. Ala. R. Co. *v.* Donovan, 84 Ala. 141.—FOLLOWED IN Glass *v.* Memphis & C. R. Co., 94 Ala. 581. REVIEWED IN Savannah & W. R. Co. *v.* Meadors, 95 Ala. 137; Georgia Pac. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. Rep. 621.

The fact that a person is wrongfully on a track will not relieve employés in charge of a train from the duty of using reasonable care to avoid a collision; but that duty only arises from the time that the person is discovered by such employés to be in peril. *State* v. *Baltimore & O. R. Co.*, 69 *Md.* 494, 16 *Atl. Rep.* 210.

In an action for the death of plaintiff's son, it appeared that he, in going from a street to a depot 500 feet distant, walked upon the main track about 50 feet to a switch, and then walked on a side track on which cars were standing which had recently been left there. The engine, which was returning, was at the time from 90 to 150 feet distant. The engineer was at his proper place and could have seen deceased before he got on the track, but not after that, except by going to the other side of the cab. The fireman was on the top of the tender breaking coal, and could have seen deceased at any time after the latter went upon the main track after the road crossing. The engineer and fireman were not called as witnesses. *Held*, that the accident happened at a depot where the employés should, in the discharge of their ordinary duties, be on the watch, the evidence was sufficient to show that the engineer and fireman knew that the deceased was on the track, and by the exercise of reasonable care could have avoided injuring him. *Rine* v. *Chicago & A. R. Co.*, 41 *Am. & Eng. R. Cas.* 555, 100 *Mo.* 228, 12 *S. W. Rep.* 640.

59. All reasonable efforts and means. — The liability of a company for injuring a trespasser on the track depends on whether those in charge of the train, after discovering that he was not going to leave the track, used all the means in their power to stop the train before it struck him. *Saldana* v. *Galveston, H. & S. A. R.*

Co., 43 *Fed. Rep.* 862.—QUOTING Baltimore & P. R. Co. *v.* Jones, 95 U. S. 441; Missouri Pac. R. Co. *v.* Weisen, 65 Tex. 447.

While a company is under no legal obligation to look out for trespassers on its track, or to anticipate their presence there, yet when servants of the company, in charge of a train, discover that a trespasser on the track has placed himself in peril, it is their duty to use all reasonable means at their command to save his life, and the company is liable for their failure to do so. *Louisville & N. R. Co.* v. *Coleman*, 31 *Am. & Eng. R. Cas.* 390, 86 *Ky.* 556, 6 *S. W. Rep.* 438, 8 *S. W. Rep.* 875.—APPROVING Louisville & N. R. Co. *v.* Howard, 82 Ky. 212.—*State* v. *Baltimore & O. R. Co.*, 35 *Am. & Eng. R. Cas.* 412, 69 *Md.* 339, 14 *Atl. Rep.* 688, 12 *Cent. Rep.* 890. *Mobile & O. R. Co.* v. *Watly*, 69 *Miss.* 145, 13 *So. Rep.* 825.

60. —— consistent with safety of train and persons thereon. — When persons in charge of a train discover the peril of a person on the track, or are in a position where they ought to have discovered it—a position in which the circumstances, movements, or condition of the person injured would manifest to a vigilant observer that such person is unaware of it, or is unable to extricate himself—a culpable omission to use the means in hand to prevent an accident, when a prompt resort thereto might have prevented it, without endangering the freight or passengers being transported on the train, will be regarded as reckless or intentional negligence. But the rule does not apply where the manifestation of the peril and the catastrophe are so close in point of time as to leave no room for preventative effort. *Fraser* v. *South & N. Ala. R. Co.*, 28 *Am. & Eng. R. Cas.* 565, 81 *Ala.* 185, 1 *So. Rep.* 85.

The servants of a company owe to a trespasser on its trestle only the duty, so soon as he is discovered on the track, of promptly using all efforts within their power, consistent with the safety of the train and of those upon it, to avoid injuring him. *Shaw* v. *Missouri Pac. R. Co.*, 104 *Mo.* 648, 16 *S. W. Rep.* 842. *Reardon* v. *Missouri Pac. R. Co.*, 114 *Mo.* 384, 21 *S. W. Rep.* 731.

The ordinary care required of an engineer in such case is that care which an ordinarily prudent person would have used under similar circumstances, having due regard to his own safety and to the safety of the other persons on the train, and making due allowance for the fact that he was required to form his judgment and to act instantaneously. *Prewitt* v. *Eddy*, 115 *Mo.* 283, 21 *S. W. Rep.* 742.

Although it is the duty of an engineer, after discovering the peril of even a trespasser on the track, to do everything consistent with safety to prevent an accident, yet such rule does not apply to a case where the engineer sees such person putting himself out of all apparent danger and had no reason to believe that his train might leave the track while passing such person and fall upon him. *McKenna* v. *Missouri Pac. R. Co.*, 54 *Mo. App.* 161.

61. Duty to check speed. — When an engineer sees, or can by proper watchfulness discover, that a traveler has placed himself in peril on a trestle or bridge, he should act upon the supposition that the person may be drunk or bereft of reason from sudden terror, and use all of the means at his command, consistent with safety, to diminish the speed of his train. *Clark* v. *Wilmington & W. R. Co.*, 48 *Am. & Eng. R. Cas.* 546, 109 *N. Car.* 430, 14 *S. E. Rep.* 43.—REVIEWING Cook *v.* Central R. & B. Co., 67 Ala. 533.

62. —— and put on brakes. — The engineer of a train on a main track, seeing the danger of a trespasser on a side track by reason of the approach of a detached flat car, blew his alarm whistle and called in a loud voice to the man on the side track to get off the track, but his warning was not heeded. Thereupon the conductor, who was on the rear end of the detached car, standing at the brake, ran to the front end of the car and called in a loud voice to the man to get off the track, but he failed to heed the call, which he doubtless did not hear by reason of the noise at the time, was struck by the car before the conductor could get back to the brake, and killed. *Held*, that there was sufficient evidence to justify the jury in concluding that the conductor was guilty of ordinary negligence in not at once putting on the brakes when he saw that the deceased did not heed the engineer's warning. *Louisville & N. R. Co.* v. *Coleman*, 31 *Am. & Eng. R. Cas.* 390, 86 *Ky.* 556, 6 *S. W. Rep.* 438, 8 *S. W. Rep.* 875.

63. Duty to reverse engine.—Notwithstanding the negligence of a person in going on a track, the train employés have no right to run over him, and a decisive

question in such case is whether, after discovering his position, and that he did not move at the sound of the alarm whistle, the engineer did everything in his power to avoid a collision; but where the engineer seems to have been competent, and had to act promptly, the company is not chargeable with negligence because he blew the whistle instead of reversing the engine, where it seems that he could not do both at the same time, and where he testified that it was not usual under such circumstances to reverse the engine, as it was attended by some danger. *Bell* v. *Hannibal & St. J. R. Co.*, 4 *Am. & Eng. R. Cas.* 580, 72 *Mo.* 50.

The evidence tended to show that plaintiff stepped on defendant's track in its yard, that almost immediately the engineer of an approaching locomotive sounded the danger whistle, when plaintiff turned his head and looked back in the direction of the engine and at once fell backward on the track and seemed to be struggling to get off; that the train was running from seven to twelve miles an hour and could have been stopped in a distance varying from 75 to 400 feet, but that the engineer did not reverse the engine nor apply the sand box, and ran over plaintiff's leg. *Held*, that even if plaintiff was a trespasser, it was for the jury to determine whether the company's servants used ordinary care, after plaintiff's peril became known, to avert the accident. *Reardon* v. *Missouri Pac. R. Co.*, 114 *Mo.* 384, 21 *S. W. Rep.* 731.

64. Duty to stop train. — The presence of persons on a track does not require employés to stop their trains or even check them, unless the circumstances show that their approach is not observed, or that the person is unable to leave the track. *Mobile & M. R. Co.* v. *Blakely*, 59 *Ala.* 471.—FOLLOWED IN Memphis & C. R. Co. *v.* Copeland, 61 Ala. 376.

When a person of adult years is seen on a railroad track, in advance of an approaching train, and shows by his actions that he is aware of its approach, and is using the proper efforts to get out of its way, the person in charge of the train is not required to stop it, nor ordinarily even to check its speed; but if the person is on horseback, on a high embankment, or in a deep cut from which he probably cannot escape in time, or is suddenly thrown from his horse and cannot escape, it is the duty of the engineer promptly to use all means in his power to avoid injury, and the company is liable if he fails to do so. *Tanner* v. *Louisville & N. R. Co.*, 60 *Ala.* 621. —FOLLOWING Philadelphia & R. R. Co. *v.* Hummell, 44 Pa. St. 375.—*Cook* v. *Central R. & B. Co.*, 67 *Ala.* 533.

A company, if not aware of the position of danger of a person upon or near its track, owes such person no duty to take any particular precaution, and is not guilty of negligence if injury results from the running of its cars in the ordinary way; but if the danger is known to the employés of the company, they are bound to use care, and if they discovered it in time to have stopped the train and to have avoided the accident, they are guilty of negligence in failing to do so. *Esrey* v. *Southern Pac. Co.*, 88 *Cal.* 399, 26 *Pac. Rep.* 211.

The servants of a company in charge of a moving train are not bound to stop the same because a person ahead is walking near the track and in a line nearly parallel with it; or because a vehicle is seen slowly approaching the track, or standing a few yards from it; and should such person suddenly get upon the track and be injured or killed the fault will not be that of the company or its agents, unless their conduct is so grossly careless that the exercise of proper and reasonable caution, by the party injured or killed, could not have protected him. *Chicago, R. I. & P. R. Co.* v. *Austin*, 69 *Ill.* 426.

It is error to instruct the jury to find for defendant, in an action against a railroad for killing a person who was sitting on the track at a place where he had no right to be, where it appears that the train could be stopped on a space of 400 to 500 feet, and that he was discovered by the trainmen when from 462 to 1287 feet away, they having apprehended that he would not get off, though the alarm was given and an effort made to stop the train. *Wren* v. *Louisville, St. L. & T. R. Co.*, (*Ky.*) 20 *S. W. Rep.* 215.

Where employés in charge of a train have given all the usual and proper signals to warn persons of their approach, they are not required to stop the train on discovering a person on the track unless they have reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals. *Frech* v. *Philadelphia, W. & B. R. Co.*, 39 *Md.* 574, 10 *Am. Ry. Rep.* 474.

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Where the engineer sees a man on the track nearly a mile ahead, who does not get off on the whistle being blown repeatedly and the bell rung, it is the duty of the engineer to slow down, and even to stop the train, in order to avoid killing such man. *Bowmeester* v. *Grand Rapids & I. R. Co.*, 28 *Am. & Eng. R. Cas.* 476, 63 *Mich.* 557, 30 *N. W. Rep.* 337.

A locomotive engineer is not bound to stop his train or slacken its speed on seeing a person at considerable distance away on a trestle, when he cannot tell precisely whether the person is on or near the trestle. He has a right to suppose that neither the vision nor hearing of the person is impaired, and that he will get off the track before the train reaches him. *Maloy* v. *Wabash, St. L. & P. R. Co.*, 84 *Mo.* 270. *Reardon* v. *Missouri Pac. R. Co.*, 114 *Mo.* 384, 21 *S. W. Rep.* 731.

Plaintiff's intestate, a boy of fifteen, got on the step of an outgoing train, and after riding some distance either fell off or jumped off, and lay in the space between the two tracks. The engineer on a train going in the opposite direction, thinking he lay clear of the train, made no effort to stop; but after the engine and some of the cars had passed the boy moved so that the wheel of the last car ran over him. *Held*, that the engineer was not negligent in failing to stop when he first saw the boy. And the company could not be held liable unless the engineer intentionally, wantonly, or recklessly ran over him. *McKenna* v. *New York C. & H. R. R. Co.*, 8 *Daly* (*N. Y.*) 304.

The duty of one in charge of a train to stop its progress on account of the proximity to the track of one in advance of the train does not arise until it becomes manifest that such person intends to go upon the track in front of the train. *International & G. N. R. Co.* v. *Kuehn*, 35 *Am. & Eng. R. Cas.* 421, 70 *Tex.* 582, 8 *S. W. Rep.* 484.

65. Unavoidable accidents. — Though an engineer sees one lying upon the track at a distance before him, yet if he honestly mistakes him for some inanimate object until it is too late to avoid running over him, the company is not liable for the mistake and injury. *Little Rock, M. R. & T. R. Co.* v. *Haynes*, 28 *Am. & Eng. R. Cas.* 572, 47 *Ark.* 497, 1 *S. W. Rep.* 774.

A company is not necessarily liable for a personal injury because the engineer could have seen a person on the track where plaintiff was injured, where the evidence fails to show that the train could have been checked in time to prevent the injury. *Chicago, B. & Q. R. Co.* v. *Van Patten*, 64 *Ill.* 510.

Where a person walking on the track catches his foot in a cattle-guard and is so injured by a passing train that death results, no negligence can be imputed to those in charge of the train where there is not sufficient evidence to authorize the jury in finding that they saw the deceased in time to stop the train. *Louisville & N. R. Co.* v. *Kellem*, (*Ky.*) 21 *S. W. Rep.* 230.

Plaintiff was injured while attempting to remove a small child from the track. The brakes were applied as soon as plaintiff attempted to go on the track, but it was too late to stop the train before a collision occurred, the alarm whistle having been previously sounded. The company was charged with negligence in that the engineer should have seen the child and stopped the train. *Held*, not sufficient proof of negligence. The engineer might assume that the person on the track would get off; and he was not bound to expect helpless infants on the track. *Burnes* v. *Staten Island R. T. R. Co.*, 44 *N. Y. S. R.* 271, 63 *Hun* 628, *mem.*, 17 *N. Y. Supp.* 741.

66. — person coming suddenly on track. — A brakeman who is at his place on a car has a right to presume, even if he sees the deceased approaching the track, that the latter either sees or hears the approach of the car and will not recklessly place himself in front of it, and this is particularly the case where the stepping of the deceased on the track and the collision are simultaneous, so that it is impossible to stop the car after deceased has put himself in peril. *Yancey* v. *Wabash, St. L. & P. R. Co.*, 93 *Mo.* 433, 6 *S. W. Rep.* 272.

If a trespasser comes upon the track just as a passenger train is about to pass, and is run over and killed, the engineer doing all in his power to check his train but failing to do so in the distance of 450 feet, there is no liability for damages. *Case of Atlantic, M. & O. R. Co.*, 4 *Hughes* (*U. S.*) 157.

e. Duty to Children, Helpless, Deaf, Idiotic, Intoxicated, or Sleeping Trespassers.

67. Generally.* — If an engineer discovers, or, by reasonable watchfulness, may

* Duty to person lying on the track, see note, 19 AM. & ENG. R. CAS. 97.

discover, a person lying upon the track asleep, or drunk, or sees upon the track a human being who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, it is his duty to resolve all doubts in favor of the preservation of life, and immediately to use every available means, short of imperiling the lives of passengers, to stop the train. *Deans* v. *Wilmington & W. R. Co.*, 45 *Am. & Eng. R. Cas.* 45, 107 *N. Car.* 686, 12 *S. E. Rep.* 77.

In such a case, the jury were at liberty to exercise their own common sense, and to use the knowledge acquired by their observation and experience, without direct testimony from expert witnesses, in determining how many feet or yards of the track the engine must have traversed before the engineer could have put a complete stop to its movement without danger to those who were on the train. *Deans* v. *Wilmington & W. R. Co.*, 45 *Am. & Eng. R. Cas.* 45, 107 *N. Car.* 686, 12 *S. E. Rep.* 77.

68. On track in helpless condition. — If a person appears upon a track in a helpless condition, and the engineer and his assistants discover him in time to stop the train before reaching him, but recklessly, or even incautiously, neglect to do so, the company will be liable, in proportion to its own default and that of the other party. *Savannah, F. & W. R. Co.* v. *Stewart*, 71 *Ga.* 427.

69. —— in an unconscious condition.—At the time of the injury, plaintiff was lying in an unconscious condition by the side of defendant's track, and while there was run over by a train. The negligence was claimed to consist in the failure of the engineer to use ordinary diligence in stopping the train after seeing plaintiff. *Held*, on a review of the evidence, that there was no negligence shown on the part of defendant or its employés. *Williams* v. *Southern Pac. R. Co.*, 28 *Am. & Eng. R. Cas.* 578, 72 *Cal.* 120, 13 *Pac. Rep.* 219.

Where a party is injured while lying on a track in an unconscious condition, in the absence of proof of gross negligence on the part of those in charge of the train injuring him there can be no recovery, whether such unconsciousness was the result of intoxication, or sickness, or some other uncontrollable circumstance. *Missouri Pac. R. Co.* v. *Brown*, (*Tex.*) 18 *S. W. Rep.* 670.—FOLLOWING International & G. N. R. Co. *v.* Garcia, 75 Tex. 583, 13 S. W. Rep. 223.

69a. Children.* — A company is not bound, in the absence of a statute, to fence its road so as to keep children from getting on its tracks. A company does not owe to a child seven years of age any duty that would not otherwise exist. *Nolan* v. *New York, N. H. & H. R. Co.*, 25 *Am. & Eng. R. Cas.* 342, 53 *Conn.* 461, 4 *Atl. Rep.* 106.

A boy, aged about seven years, was injured while trying to climb up the ladder of a freight car that was moving along a public street in a city. It appeared that the train was not being run at an unlawful rate of speed, it moving not faster than four miles an hour, that it was properly manned, with every employé at his station, and that it was under perfect control, and being run with the greatest care and caution. *Held*, that the company was not liable. *Chicago, B. & Q. R. Co.* v. *Stumps*, 69 *Ill.* 409.

Where a car was left on a grade in such a position that when the brake was unfastened it would move down the track at the rate of ten miles per hour, and there was a rule against persons entering the car before a certain time, the company was guilty of negligence in not locking the car doors and in not securing the brakes so that they could not be unfastened by a boy eight years of age. *Western Md. R. Co.* v. *Herold*, 74 *Md.* 510, 22 *Atl. Rep.* 323.

A company is not liable for running over a child who is using the track as a playground, unless the act was done maliciously or with gross and reckless carelessness. *Morrissey* v. *Eastern R. Co.*, 126 *Mass.* 377. *Wright* v. *Boston & A. R. Co.*, 28 *Am. & Eng. R. Cas.* 652, 142 *Mass.* 296, 7 *N. E. Rep.* 866.

An eight-year-old boy trespassing on the premises of a company got on the step of an engine and was ordered off by a fireman, and as he jumped he fell. The engine was started at the moment and the tender passed over his leg. He was a boy of more than average intelligence and had been warned against going on the premises or riding on the engine. *Held*, that the company was not liable, unless it should appear that those in charge of the engine knew that

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* Liability for injury to children playing on unguarded turntables and at other dangerous places, see notes, 31 AM. REP. 206; 59 *Id.* 23; 14 L. R. A. 781; 31 AM. & ENG. R. CAS. 415; 37 *Id.* 329, *abstr.*

Negligence of parent, see note, 15 AM. & ENG. R. CAS. 406.

the boy was in the way, or that they were reckless or negligent in the management of the engine, or could have anticipated the injury. *Chicago & N. W. R. Co.* v. *Smith*, 4 *Am. & Eng. R. Cas.* 535, 46 *Mich.* 504.

Where a child about seven years old is injured by a street-car, not from any defect in the car, nor any negligence in its management, but from the sudden and unexpected act of the child in attempting to mount the front platform while the driver, who was also conductor, is on the rear platform, the company is not liable. *Hestonville Pass. R. Co.* v. *Connell*, 88 *Pa. St.* 520.

A boy was permitted by a conductor to ride on a train to sell newspapers, in violation of the rules of the company, and was killed by an accident. *Held*, that the boy was a trespasser, and that the company was not liable. *Duff* v. *Allegheny Valley R. Co.*, 2 *Am. & Eng. R. Cas.* 1, 91 *Pa. St.* 458, 36 *Am. Rep.* 675.

A child of tender years may be a trespasser and be subject to the consequences of his trespass, so that it may preclude a recovery for an injury even though negligence be not imputable to him. *Rodgers* v. *Lees*, 140 *Pa. St.* 475, 21 *Atl. Rep.* 399.

70. Deaf persons.* — The rule that contributory negligence will not defeat a recovery for personal injuries where defendant's negligence was gross and wilful applies where a partially deaf person walking on the track in the daytime, in full view of the enginemen for 400 yards, is run over by defendant's train, no signal, by whistle or bell, or otherwise, having been given, and no effort made to check speed until about the time of the disaster. *Central R. & B. Co.* v. *Denson*, 84 *Ga.* 774, 11 *S. E. Rep.* 1039.

Ordinarily those operating a train have a right to assume that one walking on the track, in the direction the train is going, will step from the track in time to avoid injury, yet if the person on the track be deaf, and that fact be known to those operating the train, they cannot act on such assumption, but they are then required to use such diligence as will best protect him from injury. *International & G. N. R. Co.* v. *Smith*, 19 *Am. & Eng. R. Cas.* 21, 62 *Tex.* 252.—FOLLOWED IN Gulf, C. & S. F. R. Co. *v.* Fossett, 66 Tex. 338.

A company is not liable for the failure of its train employés to stop a train in time to avoid killing a person seen on the track, there being nothing to indicate that he was not able to take care of himself, and where they made every effort to stop the train after it was apparent that he would not leave the track. *Artusy* v. *Missouri Pac. R. Co.*, 37 *Am. & Eng. R. Cas.* 288, 73 *Tex.* 191, 11 *S. W. Rep.* 177.—REVIEWING Galveston City R. Co. *v.* Hewitt, 67 Tex. 475; Houston & T. C. R. Co. *v.* Boozer, 70 Tex. 531.

71. Deaf mutes. — It appeared that deceased was a full-grown man, but was deaf and dumb, and at the time of the accident was walking on the track in the same direction as the train moved that killed him. The court instructed the jury that if those in charge of the train saw plaintiff's intestate in time, by the use of the means in their power, to have saved his life by checking the train or by blowing the whistle and ringing the bell, and they wilfully failed to use such means to avoid the killing, they must find for plaintiff. *Held*, erroneous. The jury should have been told that defendant's employés, being ignorant of the physical infirmity of deceased, had a right to believe that he would do what a man possessed of his ordinary faculties would have done, viz., step off the track in time to avoid danger, when he heard the approaching train, and that hence they were not in fault for failing to stop the train. *Louisville & N. R. Co.* v. *Cooper*, (*Ky.*) 6 *Am. & Eng. R. Cas.* 5.

Semble, that if knowledge of the physical infirmities of the deceased had been brought home to said employés they would have been held to a stricter measure of duty, and that a failure on their part to discharge that duty would have constituted either absolute intentional killing or wilful neglect, for which the company would have been held liable. *Louisville & N. R. Co.* v. *Cooper*, (*Ky.*) 6 *Am. & Eng. R. Cas.* 5.

If an engineer, on observing a person on the track, at a place where he has no right to be, rings the bell and blows the whistle, so that any ordinary person must be aware of the approach of the train, he has a right to expect the trespasser to leave the track; and the company will not be liable for his death, even though the engineer when he first saw him had time to stop the train, and the trespasser was a deaf mute. *Nichols* v. *Louisville & N. R. Co.*, (*Ky.*) 34 *Am. & Eng. R. Cas.* 37, 6 *S. W. Rep.* 339.

* Injury to deaf persons, see note, 34 AM. & ENG. R. CAS. 38.

A deaf-mute slave, who was walking on a track from the direction of an approaching train, was killed. It did not appear that the engineer knew of the slave's infirmity, but it did appear that the usual warning was given by the steam whistle for one endowed with hearing to have made his escape. *Held*, that the company was not liable for the loss. *Poole* v. *North Carolina R. Co.*, 8 *Jones* (*N. Car.*) 340.

72. Idiots. — An idiot, under the influence of liquor, crossed a railroad track at a usual place of crossing in or near a populous town, and was struck and injured by a passenger train running at about the usual speed of twenty or twenty-five miles an hour. Owing to standing cars upon another railroad, he could not have seen the train until within six feet of the track he was crossing. It did not appear how near the train was to him, nor whether the engineer saw or could have seen him in time to have stopped. *Held*, that plaintiff could not recover in any view of the case. *Daily* v. *Richmond & D. R. Co.*, 42 *Am. & Eng. R. Cas.* 124, 106 *N. Car.* 301, 11 *S. E. Rep.* 320.

Even if the engineer had seen him crossing the track in time to stop the train, and did not know of his infirmity, he was justified in assuming that he would get off in time to avert danger, and he was not bound to check the speed of the train. If the engineer carelessly refrained from checking speed, when he might, without injury to the passengers, have averted the injury, he was guilty of negligence even though the party injured was guilty of contributory negligence. *Daily* v. *Richmond & D. R. Co.*, 42 *Am. & Eng. R. Cas.* 124, 106 *N. Car.* 301, 11 *S. E. Rep.* 320.

73. Intoxicated persons.*—A company owes no higher duty to a drunken trespasser than to a sober one, when it is without the means of determining whether he is sober or drunk. *Columbus & W. R. Co.* v. *Wood*, 86 *Ala.* 164, 5 *So. Rep.* 463.—FOLLOWING Memphis & C. R. Co. *v.* Womack, 84 Ala. 149.

If a person in a state of helpless intoxication lies down on a railroad track, the company will not be justified in running a train over him if it can be avoided in the exercise of reasonable care after the person is discovered in his exposed position. *Williams* v. *Southern Pac. R. Co.*, (*Cal.*) 9 *Pac. Rep.* 152. *Williams* v. *Southern Pac. R. Co.*, (*Cal.*) 11 *Pac. Rep.* 849.

If a person in a drunken, helpless condition appears on a track, and the train employés discover him in time to stop the train before reaching him, but recklessly or incautiously fail to do so, the company is liable for the resulting injury; but where the party does not appear to be drunk and continues on the track until he approaches a trestle, where he is struck, a verdict against the company cannot be sustained, where it appears that the engineer gave warning and made every effort to stop the train. *Savannah, F. & W. R. Co.* v. *Stewart*, 71 *Ga.* 427.

Where the injury is the result of intoxication or drunkenness the rule seems to be that the company is not liable, unless the injury was wanton or wilful. *Illinois C. R. Co.* v. *Hutchinson*, 47 *Ill.* 408. *Mulherrin* v. *Delaware, L. & W. R. Co.*, 81 *Pa. St.* 366. *Herring* v. *Wilmington & R. R. Co.*, 10 *Ired.* (*N. Car.*) 402, 51 *Am. Dec.* 395.

If one who has rendered himself incapable of self-protection by reason of a voluntary use of intoxicants enters a train without right, and without the knowledge of the conductor, the company does not owe to him any duty beyond ordinary care to protect him from injury while upon the train, and to leave him in reasonably safe condition, voluntary intoxication being no excuse for a failure on the part of the traveler to exercise the duty of self-protection. *Missouri Pac. R. Co.* v. *Evans*, 37 *Am. & Eng. R. Cas.* 144, 71 *Tex.* 361, 9 *S. W. Rep.* 325.—REVIEWING Houston & T. C. R. Co. *v.* Devainy, 63 Tex. 172; International & G. N. R. Co. *v.* Gilbert, 64 Tex. 540; Texas & P. R. Co. *v.* Cole, 66 Tex. 562.

Defendant company's night trackwalker found plaintiff's intestate asleep on a track, and aroused him and warned him that a train was approaching. He raised himself on his elbow and signified his comprehension of the situation, and not appearing to be disabled by intoxication, the trackwalker passed on; but intestate did not leave the track and was killed. *Held*, that the company was not liable. The trackwalker had a right to presume that intestate would take measures to protect himself. *Virginia*

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* Liability of company for injuries to drunken persons, children, and others trespassing on track, see note, 38 AM. REP 637.

Duty of company to drunken trespasser on track, see note, 19 AM. & ENG R. CAS. 326.

Liability of company for killing or injuring intoxicated persons on track, see 37 AM. & ENG. R. CAS. 312, *abstr.*

Midland R. Co. v. *Boswell*, 82 *Va.* 932, 7 *S. E. Rep.* 383.

74. Persons asleep upon track.—It appeared that a slave was asleep on the track, that the cars were going with their usual speed and at the usual hour, and that the engineer, when within a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels, but was unable to do so in time. *Held*, that there was not such negligence as to subject the company to damages. *Herring* v. *Wilmington & R. R. Co.*, 10 *Ired.* (*N. Car.*) 402.—QUOTED IN Case of Atlantic, M. & O. R. Co., 4 Hughes (U. S.) 157. REVIEWED IN Jones *v.* North Carolina R. Co., 67 N. Car. 122; Richardson *v.* Wilmington & M. R. Co., 8 Rich. (So. Car.) 120.

Plaintiff's slave, a lad eight years of age, was asleep on defendant's track, and might have been seen from the locomotive one quarter of a mile as it approached him; but upon the supposition that the object in the road was the coat of one of the laborers, no signal was given, and no effort was made to slacken the speed of the cars, whereby the child was overrun and killed. *Held*, that the company was liable for the value of the slave. *East Tenn. & G. R. Co.* v. *St. John*, 5 *Sneed* (*Tenn.*) 524.

If a person lying asleep upon a track is seen by those managing an approaching train in time, and they are aware of his danger, and by ordinary care they can avoid injury, they are bound to do so. *Rozwadosfskie* v. *International & G. N. R. Co.*, 1 *Tex. Civ. App.* 487, 20 *S. W. Rep.* 872.

f. Duty to Keep Premises in Safe Condition.

75. Generally.*—The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of idlers, bare licensees, or others who come upon them, not by invitation, either express or implied, but for their own convenience or pleasure. *Union S. Y. & T. Co.* v. *Rourke*, 10 *Ill. App.* 474.—QUOTING Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 368; Hardcastle *v.* South Yorkshire R. & R. D. Co., 4 H. & N. 67.

A landowner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not raise a duty. *Frost* v. *Eastern R. Co.*, 64 *N. H.* 220, 4 *N. Eng. Rep.* 527, 9 *Atl. Rep.* 790.—APPROVED IN Daniels *v.* New York & N. E. R. Co., 154 Mass. 349. DISAPPROVED IN Barrett *v.* Southern Pac. Co., 48 Am. & Eng. R. Cas. 532, 91 Cal. 296.

76. Risk of danger assumed by trespasser.—A trespasser ordinarily assumes all risk of danger from the condition of the premises, and in order to recover must show that an injury was wantonly inflicted, or that the owner, being present, might have prevented the injury by the exercise of reasonable care after discovering the danger. *Frost* v. *Eastern R. Co.*, 64 *N. H.* 220, 4 *N. Eng. Rep.* 527, 9 *Atl. Rep.* 790.—NOT FOLLOWED IN Sioux City & P. R. Co. *v.* Stout, 17 Wall. (U. S.) 657.

77. Dangerous buildings.—Plaintiff, without invitation, and as a mere intruder, entered upon the uninclosed premises of defendant company, upon which was a building in a state of visible decay. While there a storm blew a fragment from the building against plaintiff, injuring him. The building had once been used as a freight house, but had been long since abandoned so far as any public use was concerned, and was not situated so as to endanger travel on any public highway. *Held*, that plaintiff could not recover. *Lary* v. *Cleveland, C., C. & I. R. Co.*, 3 *Am. & Eng. R. Cas.* 498, 78 *Ind.* 323, 41 *Am. Rep.* 572.—DISTINGUISHING Lafayette & I. R. Co. *v.* Adams, 26 Ind. 76; Indianapolis & C. R. Co. *v.* McClure, 26 Ind. 370; Gray *v.* Harris, 107 Mass. 492; Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475. QUOTING Pittsburgh, Ft. W. & C. R. Co. *v.* Bingham, 29 Ohio St. 364; Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 368. REVIEWING Hounsell *v.* Smyth, 7 C. B. N. S. 731.

Plaintiff's intestate was in the employ of defendant company, and was injured by the falling of a sliding door in its storehouse. *Held*, that if he was in the building as a trespasser or by sufferance, no duty with respect to him rested on the master, except to refrain from acts wilfully injurious; he assumed all the ordinary risks incident to the character of the place, and is without remedy. *Collyer* v. *Pennsylvania R. Co.*, 49 *N. J. L.* 59, 6 *Atl. Rep.* 437.

78. Dangerous machinery and instruments.—The possessor of lands or

* Failure to fence track as affecting trespassers, see note, 31 AM. & ENG. R. CAS. 423.

tenements is not at liberty to plant in them dangerous instruments which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and therefore he is not liable to trespassers for injuries they may receive from defects, not amounting to traps, in such premises. *O'Connor* v. *Illinois C. R. Co.*, 44 *La. Ann.* 339, 10 *So. Rep.* 678.—APPROVING Coombs *v.* New Bedford Cordage Co., 102 Mass. 572; Illinois C. R. Co. *v.* Carraher, 47 Ill. 333; Central Branch U. P. R. Co. *v.* Henigh, 23 Kan. 347.

The owner of land or other property may properly inclose dangerous machinery upon his own premises, such machinery being an essential industrial factor; and a trespasser who meddles with such machinery cannot recover damages for the injuries that his meddlesomeness has brought upon him. *O'Connor* v. *Illinois C. R. Co.*, 44 *La. Ann.* 339, 10 *So. Rep.* 678. — DISTINGUISHING Westerfield *v.* Levis, 43 La. Ann. 64; Sioux City & P. R. Co. *v.* Stout, 17 Wall. (U. S.) 657.

79. Torpedoes on track. — A company is not liable for the death of a man caused by the explosion of a torpedo with which he meddled while walking on the track, and which had been placed there by the company as a danger signal to approaching trains. *Carter* v. *Columbia & G. R. Co.*, 15 *Am. & Eng. R. Cas.* 414, 19 *So. Car.* 20, 45 *Am. Rep.* 754.—DISTINGUISHED IN Harriman *v.* Pittsburgh, C. & St. L. R. Co., 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11. QUOTED IN Darwin *v.* Charlotte, C. & A. R. Co., 23 So. Car. 531, 55 Am. Rep. 32; Guess *v.* South Carolina R. Co., 30 So. Car. 163, 9 S. E. Rep. 18.

80. Pool of water. — Where a company builds its road across a short bend in a stream on an embankment, so as to cause a deep pool of water to form, it is not guilty of negligence in not fencing it or taking other means to prevent persons from falling into the water, where it had neither invited nor forbidden persons to walk on the embankment. *So held*, where a little girl fell from a path across the embankment to the water and was drowned. *Hooper* v. *Johnstown, G. & K. H. R. Co.*, 35 *N. Y. S. R.* 503, 13 *N. Y. Supp.* 151, 59 *Hun* 121; *affirmed in* 128 *N. Y.* 613, *mem.*, 38 *N. Y. S. R.* 1013, 28 *N. E. Rep.* 252.

2. *Trespassers on Trains.**

a. In General.

81. Company's care and liability. —In the absence of wantonness or wilfulness on the part of the servants of a company, it is not liable for injury to trespassers, whether in its train or on its track. *Richmond & D. R. Co.* v. *Burnsed*, 70 *Miss.* 437, 12 *So. Rep.* 958.—REVIEWING Vicksburg & M. R. Co. *v.* Phillips, 64 Miss. 693.

Even if a person knows he is on a train in violation of the company's rules, still, being there with the consent of the master of the train, the company owes him at least ordinary care, and for a breach of that duty it is liable in damages. *Whitehead* v. *St. Louis, I. M. & S. R. Co.*, 39 *Am. & Eng. R. Cas.* 410, 99 *Mo.* 263, 11 *S. W. Rep.* 751.

Defendants were engaged under a contract with the aqueduct commissioners of a city in excavating a tunnel, which required them to furnish facilities for inspecting the work. Plaintiff's intestate was a civil engineer in the employ of the commissioners, and it was his duty to inspect the work. Defendants employed dump cars for the purpose of removing material, which cars were run on a track in the shaft, being hauled out by a cable and returned by gravitation, their speed being regulated by a brake. The intestate was riding on the outside of one of the cars down the shaft, and through the neglect of a brakeman was thrown from the car and killed. It appeared that there was plenty of room to go up and down the shaft on foot, and there was nothing to prevent one from doing it; but the intestate had been accustomed to ride down with the consent of the brakeman, but it did not appear that he had authority to give such consent, or that defendants knew it. *Held*, that defendants were under no obligation to transport the intestate or to allow him to ride on the cars, and if he did ride, to manage the car so as not to injure him; that no license could be implied by the former use of the cars, and the decedent took upon himself the risk both of the condition of the car and the care of the brakeman, and a nonsuit should have been awarded. *Morris* v. *Brown*, 111 *N. Y.* 318, 18 *N. E. Rep.* 722, 19 *N. Y. S. R.* 355; *reversing* 4 *N. Y. S. R.* 832. — REVIEWING Sutton *v.* New York C. & H. R.

*See also *ante*, 12-19.

R. Co., 66 N. Y. 243; Gillshannon *v.* Stony Brook R. Corp., 10 Cush. (Mass.) 228; Eaton *v.* Delaware, L. & W. R. Co., 57 N. Y. 382.

A company owes no duty to an intruder upon its train engaged otherwise than in transportation of passengers, except to refrain from wilfully, wantonly, or intentionally injuring him. It is not liable for injury resulting incidentally to such intruder from the mistake, inadvertence, or negligence of its servants in operating such train. *Illinois C. R. Co.* v. *Meacham*, 91 *Tenn.* 428, 19 *S. W. Rep.* 232.

82. —— confined to wilfulness and wantonness.—If a person, while attempting to obtain a free ride, without the consent of the company or its agents, receives a personal injury, he cannot recover therefor, unless the company was guilty of such gross negligence as amounts to wilful misconduct. *Chicago, B. & Q. R. Co.* v. *Mehlsack*, 41 *Am. & Eng. R. Cas.* 60, 131 *Ill.* 61, 22 *N. E. Rep.* 812; *reversing* 33 *Ill. App.* 221.—DISTINGUISHED IN North Chicago St. R. Co. *v.* Williams, 140 Ill. 275. QUOTED IN Chicago, B. & Q. R. Co. *v.* Mehlsack, 44 Ill. App. 124.

Only necessary force can be used to remove trespassers from trains. If the employés act in a wilful, wanton, or malicious manner, and injury results, the company is liable. *Kansas City, Ft. S. & G. R. Co.* v. *Kelly*, 36 *Kan.* 655, 14 *Pac. Rep.* 172. *Atchison, T. & S. F. R. Co.* v. *Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608, 17 *Pac. Rep.* 54.

Where a person clandestinely enters a box car of a freight train to beat his way over the road, he becomes a trespasser, and the only duty the company owes to him is not to injure him wantonly. *Hendryx* v. *Kansas City, Ft. S. & G. R. Co.*, 45 *Kan.* 377, 25 *Pac. Rep.* 893.

Although a person riding unlawfully on a freight car is a trespasser, the servants of the railroad have no right recklessly and wantonly to inflict an injury upon him. *Plans* v. *Boston & A. R. Co.*, 157 *Mass.* 377, 32 *N. E. Rep.* 356.

The only duty the company owes to a trespasser stealing a ride is not wilfully or recklessly to injure him after discovering him on the train. *Farber* v. *Missouri Pac. R. Co.*, 116 *Mo.* 81, 22 *S. W. Rep.* 631.

83. —— distinguished from liability to passenger.—While a company cannot be said to owe no duty to one who unlawfully intrudes himself upon its engines or cars, it does not owe to him the same duty that it owes to a passenger or even to one of its employés. *Darwin* v. *Charlotte, C. & A. R. Co.*, 23 *So. Car.* 531, 55 *Am. Rep.* 32.—LIMITING Duff *v.* Allegheny Valley R. Co., 91 Pa. St. 458, 36 Am. Rep. 675; Cauley *v.* Pittsburgh, C. & St. L. R. Co., 95 Pa. St. 398, 40 Am. Rep. 664.

84. Person riding on pilot of engine. — When a trespasser places himself upon the pilot of an engine, and is permitted by the engineer, in violation of the rules of the company, to remain there, and is killed, the company is not liable. *Darwin* v. *Charlotte, C. & A. R. Co.*, 23 *So. Car.* 531, 55 *Am. Rep.* 32.—QUOTING Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251; New Orleans, J. & G. N. R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356. REVIEWING Eaton *v.* Delaware, L. & W. R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Everhart *v.* Terre Haute & I. R. Co., 78 Ind. 292, 41 Am. Rep. 567.

Plaintiff's intestate got on an engine and went with the engineer down the road for a supply of water. On the return he was riding on the pilot, when it collided with a car and he was killed. The evidence showed that he had no duty to perform on the engine, and was merely riding at the sufferance of the engineer. *Held*, that an action could not be maintained against the company. *Darwin* v. *Charlotte, C. & A. R. Co.*, 23 *So. Car.* 531, 55 *Am. Rep.* 32.—QUOTING Carter *v.* Columbia & G. R. Co., 19 So. Car. 20.

b. Ejection from Trains.

85. Right to eject* — Manner of ejection. — Where a boy trespasses on a train the conductor only has a right to remove him in a prudent manner, so as to not endanger his personal safety. If the conductor does not act prudently, and the boy is injured, the company cannot avoid liability on the ground that the boy was also in the wrong in entering the car. *Kline* v. *Central Pac. R. Co.*, 37 *Cal.* 400. — APPROVED IN Perkins *v.* Missouri, K. & T. R. Co., 55 Mo. 201. QUOTED IN Louisville, C.

* Expulsion of trespassers on trains, see note, 15 AM. & ENG. R. CAS. 424.

Rights of trespasser on train. Ejecting passenger, see note, 3 L. R. A. 733.

Right of company to remove trespasser from train, see note, 5 L. R. A. 820.

& L. R. Co. *v.* Sullivan, 16 Am. & Eng. R. Cas. 390, 81 Ky. 624.

The removal of trespassers from cars is within the implied authority of the company's servants on the train, and the fact that they acted illegally in removing a party while the train was in motion does not exonerate the company. *Hoffman* v. *New York C. & H. R. R. Co.*, 4 *Am. & Eng. R. Cas.* 537, 87 *N. Y.* 25, 41 *Am. Rep.* 337; *affirming* 14 *J. & S.* 526. — APPLIED IN Corbett *v.* Twenty-third St. R. Co., 42 Hun 587, 4 N. Y. S. R. 535.

Where the conductor of a train, acting in the line of his duty, ejects from the platform of a car a person who has no right thereon, the company is liable if he has done it in a careless, negligent, or reckless manner, but not if he maliciously ejects the trespasser therefrom. *Pennsylvania Co.* v. *Toomey*, 1 *Am. & Eng. R. Cas.* 461, 91 *Pa. St.* 256.

86. Ejection from train in motion.* —The jury found that plaintiff got upon one of defendant's trains while drunk, and not as a passenger, and was violently ejected therefrom by the conductor while the train was in motion, whereby he was injured. The verdict was for plaintiff. *Held*, that there was evidence to support the verdict and that the same would not be disturbed. *Louisville, N. A. & C. R. Co.* v. *Dunkin*, 15 *Am. & Eng. R. Cas.* 422, 92 *Ind.* 601.

Removing a trespasser from a train while it is in motion, but moving very slowly, is not negligence or wantonness *per se*. *Southern Kan. R. Co.* v. *Sanford*, 47 *Am. & Eng. R. Cas.* 615, 45 *Kan.* 372, 25 *Pac. Rep.* 891.

In such cases the question of negligence or wantonness is for the jury. *Southern Kan. R. Co.* v. *Sanford*, 47 *Am. & Eng. R. Cas.* 615, 45 *Kan.* 372, 25 *Pac. Rep.* 891.

The complaint alleged that plaintiff was a passenger on defendant's train, and that the agents of defendant in charge of the train wilfully, maliciously, forcibly, and violently, and while the train was running at a rapid rate of speed, kicked and ejected him from the steps of a car, whereby he was injured. *Held*, that the cause of action was one in tort, the gravamen of the complaint being an intentional and personal assault and battery. The fact that the evidence tended to show that plaintiff was a trespasser and not a passenger constituted neither a failure of proof nor a material variance. *Mykleby* v. *Chicago, St. P., M. & O. R. Co.*, 34 *Am. & Eng. R. Cas.* 387, 39 *Minn.* 54, 38 *N. W. Rep.* 763.

A boy eleven years old climbed on a freight train, and not getting off upon being told to do so, while the train was moving at the rate of ten miles per hour, a brakeman threw coal at him, and when he was about to jump hit him on the head with a large lump, causing him to fall, and to be caught under the wheels of the train. *Held*, that the company was liable. *Lang* v. *New York, L. E. & W. R. Co.*, 22 *N. Y. S. R.* 110, 4 *N. Y. Supp.* 565, 51 *Hun* 603; *affirmed in* 123 *N. Y.* 656, *mem.*, 25 *N. E. Rep.* 955.

A boy thirteen years old climbed on the front platform of the caboose of a freight train, and while standing there a stream of water was turned on him, and he either jumped or fell from the train and was so injured as to necessitate amputation of a limb. *Held*, that the boy being a trespasser, the company's employés had a right to remove him, but they had no right to subject him to unnecessary danger. *Clark* v. *New York, L. E. & W. R. Co.*, 2 *N. Y. S. R.* 249, 40 *Hun* 605; *affirmed in* 113 *N. Y.* 670, *mem.*, 21 *N. E. Rep.* 1116.

87. —— running at dangerous rate of speed. — The servants of a company, put in charge of a switching engine used to place cars, have implied authority from the company to remove trespassers from the engine, and if in doing so the trespasser be injured, not in consequence of negligence merely, but because of the reckless manner of doing it, evincing an indifference to consequences, the company is liable. *Carter* v. *Louisville, N. A. & C. R. Co.*, 22 *Am. & Eng. R. Cas.* 360, 98 *Ind.* 552, 49 *Am. Rep.* 780.—DISTINGUISHING Towanda Coal Co. *v.* Heeman, 86 Pa. St. 418; Marion *v.* Chicago, R. I. & P. R. Co., 59 Iowa 428, 44 Am. Rep. 687. NOT FOLLOWING Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418. QUOTING Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103. RECONCILING Hoffman *v.* New York C. & H. R. R. Co., 87 N. Y. 25, 41 Am. Rep. 337; Benton *v.* Chicago, R. I. & P. R. Co., 55 Iowa 496; Cauley *v.* Pittsburgh, C. & St. L. R. Co., 4 Am. & Eng. R. Cas. 533, 98 Pa. St. 498. REVIEWING Rounds *v.* Delaware, L. & W. R. Co., 64 N. Y. 129, 21 Am. Rep. 597.

88. Thrown from top of moving car.—Plaintiff sued for an injury by being

* Liability of company for forcing trespassers off moving train, see note, 21 L. R. A. 354.

thrown from the top of a moving freight train. Plaintiff's evidence showed that he was riding on top of a car without having paid fare, and that he was ordered by a person carrying a lantern, whom he assumed to be a brakeman, to get off; that plaintiff replied that he would get off if the train would stop, but thereupon the person seized him and threw him off. *Held*, that an order directing a verdict for defendant was proper. There should have been some evidence showing the scope of the alleged brakeman's authority. *Corcoran* v. *Concord & M. R. Co.*, 56 *Fed. Rep.* 1014.

89. Ejection second time without unnecessary force. — Where a party is once ejected from a train, he should submit, and rely on recovering damages, if the ejection was unlawful, and there can be no recovery where he is ejected a second time without the use of unnecessary force and suffers an injury therefrom. *North Chicago St. R. Co.* v. *Olds*, 40 *Ill. App.* 421.—DISTINGUISHING Chicago, M. & St. P. R. Co. *v.* West, 125 Ill. 320; North Chicago City R. Co. *v.* Gastka, 27 Ill. App. 518; Chicago City R. Co. *v.* Pelletier, 134 Ill. 120.

90. At what place may be ejected. — The conductor and trainmen have the right to eject a trespasser from the train at any suitable place, but in doing so they should not use unnecessary force or excessive violence; if, however, such a person forcibly resists ejection, he cannot recover for the force used in overcoming his resistance, where such force is without intention on the part of the conductor or trainmen to commit unnecessary injury. In such a case the company is only liable for such unnecessary force or excessive violence as is wilful, wanton, or malicious. *Atchison, T. & S. F. R. Co.* v. *Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608, 17 *Pac. Rep.* 54.

III. CONTRIBUTORY NEGLIGENCE OF TRESPASSER.

91. Generally.* — A person who unnecessarily walks upon a railroad track, taking no precautions to guard against danger, is guilty of gross negligence, and cannot recover unless the injury was wantonly or recklessly inflicted by the defendant. (Walker and Dickey, JJ., dissenting.) *Illinois C. R. Co.* v. *Hetherington*, 83 *Ill.* 510.—DISTINGUISHING Indianapolis & St. L. R. Co. *v.* Galbreath, 63 Ill. 436. — NOT FOLLOWED IN Cook *v.* Central R. & B. Co., 67 Ala. 533. QUOTED IN Lake Shore & M. S. R. Co. *v.* Clemens, 5 Ill. App. 77; Chicago W. D. R. Co. *v.* Klaubler, 9 Ill. App. 613: Lake Erie & W. R. Co. *v.* Zoffinger, 10 Ill. App. 252. REVIEWED IN Wabash, St. L. & P. R. Co. *v.* Thompson, 10 Ill. App. 271.

It is not contributory negligence, *per se*, for a person receiving an injury from the negligence of a company to be on the track at a place where he has no right to be; and he may be guilty of such negligence though he be at a place on the railroad where he may lawfully be, as at a crossing. If in either situation the person neglect to use ordinary and reasonable care, considering the time, place, and circumstances, to avoid the injury, he is guilty of contributory negligence. *Vicksburg & M. R. Co.* v. *McGowan*, 62 *Miss.* 682.

Plaintiff, a man in full possession of his senses, chose to walk on a track between the rails, when he knew cars were constantly passing, as it was his habit to walk on the track in going to and from his work. *Held*, that he could not recover for injuries caused by being struck by the tender of a locomotive. *O'Donnell* v. *Missouri Pac. R. Co.*, 7 *Mo. App.* 190.—APPLYING Michigan C. R. Co. *v.* Campau, 35 Mich. 468. DISTINGUISHING Frick *v.* St. Louis, K. C. & N. R. Co., 5 Mo. App. 435; Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475.

Railroad companies are bound to exercise their dangerous business with due care to avoid injuries to others, even as to a trespasser, but if the injured party has by his own negligence contributed to the injury, he cannot recover damages. *International & G. N. R. Co.* v. *Jordan*, 10 *Am. & Eng. R. Cas.* 301, 1 *Tex. App.* (*Civ. Cas.*) 494.

92. Care required of trespasser — Degree.—Because one is unlawfully on a track the trainmen are not authorized to run him down; but he being on private property, on a track which is used for a purpose which is dangerous to human life, well known to him; being in a place where he ought not to be, he is bound to use every precaution, every diligence, every care, against the possibility or probability of any

* Contributory negligence of trespassers on track, see notes, 19 AM. & ENG. R. CAS. 41; 45 *Id.* 59; 48 *Id.* 586.

As to how far injured party being a trespasser constitutes contributory negligence, see note, 55 AM. DEC. 674.

danger which might happen to him there. *Finlayson* v. *Chicago, B. & Q. R. Co.*, 1 *Dill.* (*U. S.*) 579.

Where one chooses to walk on a track for his own personal convenience, without regard to constantly moving trains, the company has a right to suppose the track free, and pursue its ordinary course of business. *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.*, 26 *Fed. Rep.* 896.

Where a person not an employé, without permission of a company and against its will and without its knowledge, goes into a yard covered and interlaced by tracks, which are being used in switching, drilling, and changing cars, such person is bound to use diligence commensurate with the peril in which he has placed himself; and if he fails to do this, he cannot recover for any injury that he may sustain from the running of engines and cars. *Rome R. Co.* v. *Tolbert*, 85 *Ga.* 447, 11 *S. E. Rep.* 849.

A person walking upon a track, though near a public crossing, must use that degree of care to protect himself from danger which any prudent man uses under similar perilous circumstances. *Georgia R. & B. Co.* v. *Daniel*, 89 *Ga.* 463, 15 *S. E. Rep.* 538.

A party trespassing upon grounds where he has no right to be is held to the exercise of a higher degree of care and vigilance for his own safety than would be exacted of him if he were there in the exercise of a legal right. *Lake Shore & M. S. R. Co.* v. *Blanchard*, 15 *Ill. App.* 582.

Trespassers on the yards of a company which by law are not required to be fenced are charged with the danger necessarily incident to the place, and are required to exercise the greatest prudence and care. *Houston & T. C. R. Co.* v. *Booser*, 2 *Tex. Unrep. Cas.* 452.

93. Proximate cause. — Leaving a span of horses unhitched in close proximity to a railroad, at a time when a train usually passes, is negligence; and if the owner afterwards, when the train arrives, and when the horses have moved to the track, attempts to rescue them, and is injured, he is guilty of additional negligence, which proximately contributes to his injury, and he cannot recover damages. *Deville* v. *Southern Pac. R. Co.*, 50 *Cal.* 383, 12 *Am. Ry. Rep.* 180. — FOLLOWED IN Fernandes *v.* Sacramento City R. Co., 52 Cal. 45. QUOTED IN Louisville & N. R. Co. *v.* Eves, 1 Ind. App. 224.

The mere fact that one is nominally trespassing upon railroad premises at the time of his injury will not bar a recovery, if his trespass does not involve negligence on his part which substantially contributes to the injury. *Daley* v. *Norwich & W. R. Co.*, 26 *Conn.* 591.—DISTINGUISHED IN Higley *v.* Gilmer, 3 Mont. 90.

A person injured by a train cannot recover therefor where the direct and immediate cause of the accident is his own stumbling and falling in the way of the train. *Barkley* v. *Missouri Pac. R. Co.*, 96 *Mo.* 367, 9 *S. W. Rep.* 793.

If, after plaintiff's intestate went upon the trestle, defendant's servant could, by proper watchfulness, have discovered his danger in time to avert it, without jeopardy to the persons or property on the train, and neglected to do so, the negligence of the two was not concurrent or contemporaneous. *Clark* v. *Wilmington & W. R. Co.*, 48 *Am. & Eng. R. Cas.* 546, 109 *N. Car.* 430, 14 *S. E. Rep.* 43.

94. Standing on track. — One who stands on a track on a narrow space between two stationary cars, talking with a person on one of the cars, cannot recover for an injury caused by the other car moving against her in an effort to couple it, where there is nothing to show negligence on the part of the engineer, or that he or other employés knew that plaintiff was on the track, or could have been seen by them. *East Tenn., V. & G. R. Co.* v. *King*, 31 *Am. & Eng. R. Cas.* 385, 81 *Ala.* 177, 2 *So. Rep.* 152.

One is bound to know that standing or walking upon a track is attended with danger; and that whatever privilege he was, by implied license, permitted to enjoy, in so using the track, was a privilege to be exercised at his own risk, so far, at least, as to require him to exercise it with great care. *Donaldson* v. *Milwaukee & St. P. R. Co.*, 21 *Minn.* 293, 20 *Am. Ry. Rep.* 15.—FOLLOWED IN Brown *v.* Milwaukee & St. P. R. Co., 22 Minn. 165; Smith *v.* Minneapolis & St. L. R. Co., 26 Minn. 419; Rheiner *v.* Chicago, St. P., M. & O. R. Co., 36 Minn. 170.

New Jersey Act of 1869 (Rev. p. 920, § 67), providing that if any person be injured by any engine or car while standing on a railroad such person shall be deemed to have contributed to the injury sustained, applies to side or drilling tracks as well as to main tracks. *Diebold* v. *Pennsylvania R. Co.*,

50 *N. J. L.* 478, 12 *Cent. Rep.* 799, 14 *Atl. Rep.* 576.

Where an engineer sees on the track, in front of the engine which he is moving, a person walking or standing whom he does not know at all or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury, and if such person is injured the law imputes it to his own negligence and holds the company blameless. *High* v. *Carolina C. R. Co.*, 112 *N. Car.* 385, 17 *S. E. Rep.* 79.—DISTINGUISHING Deans *v.* Wilmington & W. R. Co., 107 N. Car. 686; Bullock *v.* Wilmington & W. R. Co., 105 N. Car. 180; Clark *v.* Wilmington & W. R. Co., 109 N. Car. 430. FOLLOWING McAdoo *v.* Richmond & D. R. Co., 105 N. Car. 140.

95. Standing near track.—A man in the possession of his physical and mental powers cannot recover against a company for injuries caused while leaving a track, where he was walking as a trespasser, and standing within a few feet of the track, by reason of hot water being thrown from the engine on him, where it appears that he saw the train coming and knew that the engine was discharging water, and where the engineer testifies that it was necessary to discharge the water and steam, and that it was done on this occasion without any knowledge that the plaintiff was standing near the track. *St. Louis, A. & T. R. Co.* v. *Sharp*, 3 *Tex. App.* (*Civ. Cas.*) 394.—DISTINGUISHING Gulf, C. & S. F. R. Co. *v.* Evansich, 61 Tex. 3; Galveston, H. & H. R. Co. *v.* Moore, 59 Tex. 64.

96. Walking on track.*—A trespasser walking on a track in a short curve, where he could not be seen in time to stop an approaching train, is guilty of contributory negligence; and the fact that he was intoxicated does not relieve him of the charge, when it was not known to the persons in charge of the train. *Memphis & C. R. Co.* v. *Womack*, 37 *Am. & Eng. R. Cas.* 308, 84 *Ala.* 149, 4 *So. Rep.* 618.—FOLLOWED IN Columbus & W. R. Co. *v.* Wood, 86 Ala. 164.

Plaintiff started with her husband in a city to go to a depot, but instead of taking the streets to the place, walked down the railroad right of way, and, while on the track, was run over by a freight car which had made a flying switch. It appeared that the public generally used these tracks, or the space between them, as a footpath, without objection. *Held*, that the risk was voluntarily assumed and the company was not liable. *Grethen* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 342, 22 *Fed. Rep.* 609.—FOLLOWING Gaynor *v.* Old Colony & N. R. Co., 100 Mass. 208.—APPLIED IN Elliot v. Chicago, M. & St. P. R. Co., 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

It is negligence for a person to walk upon a track, whether laid in a street or upon an open field, and he who deliberately does so will be presumed to assume the risk of the peril he may encounter. *Illinois C. R. Co.* v. *Hall*, 72 *Ill.* 222.—QUOTED IN McAllister *v.* Burlington & N. W. R. Co., 19 Am. & Eng. R. Cas. 108, 64 Iowa 395.—*Illinois C. R. Co.* v. *Beard*, 49 *Ill. App.* 232.

Walking upon a track does not, *per se*, constitute such contributory negligence as will bar a recovery for injuries sustained from the negligence of the servants of the road. *Troy* v. *Cape Fear & Y. V. R. Co.*, 34 *Am. & Eng. R. Cas.* 13, 99 *N. Car.* 298, 6 *S. E. Rep.* 77, 6 *Am. St. Rep.* 521.—DISTINGUISHING State *v.* Baltimore & P. R. Co., 15 Am. & Eng. R. Cas. 409, 58 Md. 482. QUOTING Byrne *v.* New York C. & H. R. R. Co., 104 N. Y. 362, 58 Am. Rep. 512.—DISTINGUISHED IN Emry v. Raleigh & G. R. Co., 109 N. Car. 589.

97. Crippled person walking on track.—One cannot recover damages for an injury which by the exercise of reasonable care he might have avoided. So when it is uncontroverted that plaintiff, a cripple with a stiff leg, left a safe path along the sidewalk of a street, to pass hastily, in the night-time and without a light, diagonally over a railroad crossing, the condition of which he did not know, and stumbled along the rails and planking, fell, and was injured, it is error to refuse binding instructions that the verdict should be for defendant. *Delaware, L. & W. R. Co.* v. *Cadow*, 35 *Am. & Eng R. Cas.* 405, 120 *Pa. St.* 559, 14 *Atl. Rep.* 450.

98. Walking between tracks.—Plaintiff, in going to the post office, which was situated northeast of plaintiff's house, and on the east side of a railroad, instead of going east over the tracks at the street

*Contributory negligence of persons walking on track, see note, 15 AM. & ENG. R. CAS. 414.

crossing to the street on which the post office was situated and then going northward to his destination, his most direct route, went east to a point on defendant's right of way, and then turned northward, walking in a space eight feet wide between tracks. Just before plaintiff crossed the west track of the two an engine and caboose passed him going south, and soon after turning north an engine and stock train went south on the east and main track. The distance from plaintiff to where the west track joined the main track was only 1000 feet, and plaintiff knew that on account of the stock train the engine and caboose could only go that distance. He looked back once, and saw the engine and caboose still going south. The engine, however, after drawing the caboose south on the west track for a short distance, backed on the same track, finally giving the caboose a "kick," propelling it northward at a speed of ten or twelve miles an hour, and it struck plaintiff. *Held*, that, conceding defendant to have been negligent, plaintiff was guilty of contributory negligence, and was not entitled to recover. *Richards* v. *Chicago, St. P. & K. C. R. Co.*, 45 *Am. & Eng. R. Cas.* 54, 81 *Iowa* 426, 47 *N. W. Rep.* 63.—FOLLOWING McAllister *v.* Burlington & N. W. R. Co., 64 Iowa 398.

99. Walking alongside and near track.—Although plaintiff, while walking along a path near a track, on the company's right of way, was a trespasser, this did not constitute contributory negligence, if she made due use of her senses to discover an approaching train, and, on its nearer approach, used proper exertions to place herself beyond peril. *Alabama G. S. R. Co.* v. *Chapman*, 31 *Am. & Eng. R. Cas.* 394, 80 *Ala.* 615, 2 *So. Rep.* 738.

Plaintiff's own testimony showed that he was walking by the side of defendant's track, and sufficiently removed from it to be out of danger from passing trains, but was struck by a beam or tie which lay across a flat car. A "fair" was in progress, which brought an unusual crowd to the place, and plaintiff was on a footpath where pedestrians were accustomed to pass. *Held*, that the question of care was properly submitted to the jury. *Kansas Pac. R. Co.* v. *Ward*, 4 *Colo.* 30.

100. Walking on railroad bridge.—A father and son were walking on a track, and as they had about crossed an unplanked bridge a train approached them. The son stepped from the track, but perceiving his father still on the track, stepped back and took his father off, but was himself struck before he could again get off the track. The train was not moving more than four miles per hour, and after the danger was discovered the trainmen reversed the engine and made every effort to stop it. *Held*, that there was nothing to show a want of care on the part of the company, and it was not liable. *Evansville & C. R. Co.* v. *Hiatt*, 17 *Ind.* 102.—DISTINGUISHED IN Pennsylvania Co. *v.* Langdendorf, 48 Ohio St. 316. EXPLAINED IN Donahoe *v.* Wabash, St. L. & P. R. Co., 83 Mo. 560, 53 Am. Rep. 594.

101. —— or on trestle.—A person who undertakes to walk across a railroad trestle of considerable length and height, knowing that a train is due, is guilty of negligence which contributes to any injury he may receive, which will bar a recovery, unless it is shown that the injury was wanton, reckless, or intentional. *Bentley* v. *Georgia Pac. R. Co.*, 86 *Ala.* 484, 6 *So. Rep.* 37. *Central R. & B. Co.* v. *Vaughan*, 93 *Ala.* 209, 9 *So. Rep.* 468.

Where plaintiff's own evidence shows that he was injured while walking over defendant's trestle spanning a ravine, it is sufficient to show negligence proximately contributing to the injury, and a nonsuit is properly granted. *Tennenbroch* v. *South Pac. Coast R. Co.*, 6 *Am. & Eng. R. Cas.* 8, 59 *Cal.* 269.—APPROVED IN Toomey *v.* Southern Pac. R. Co., 86 Cal. 374.

It was gross negligence on the part of two women to attempt to walk upon a trestle 150 yards long and from 12 to 15 feet high, near the time when a train was due, it further appearing that the servants of the company did all that was possible to be done after they discovered the women on the trestle. *Phillips* v. *East Tenn., V. & G. R. Co.*, 48 *Am. & Eng. R. Cas.* 61, 87 *Ga.* 272, 13 *S. E. Rep.* 644.

Plaintiff, a woman, ventured to cross a trestle about 200 feet long, and from which a train could be seen for more than a mile. When about half across she heard an approaching train, and instead of leaping off, which was not perilous, she ran along the trestle and was overtaken and struck just as she reached its end. The engineer testified that as soon as he discovered her he sounded the whistle and used every means to stop

the train. *Held*, that plaintiff was guilty of contributory negligence and not entitled to recover. *Louisville, N. O. & T. R. Co.* v. *Cooper*, 68 *Miss.* 368, 8 *So. Rep.* 747.

102. Lying or sitting on track.—The body of plaintiff's intestate was found at the side of the track near a bridge after a night train had passed. There was no direct evidence as to how he was killed, but the marks on his body, and other signs, tended to show that he had been sitting or lying on the ends of the ties when he was struck by the train. *Held*, that the necessary inference was that his own carelessness was the proximate cause of his death. *Norwood* v. *Raleigh & G. R. Co.*, 111 *N. Car.* 236, 16 *S. E. Rep.* 4.

Whether intestate was a trespasser or a licensee, it was his duty to keep out of the way of a passing train, and his failure to do so would be considered the proximate cause of his death, in the absence of testimony tending to show that the engineer could, by proper watchfulness, have seen him lying apparently insensible on the track or in peril upon the bridge in time to have avoided the injury by using the appliances at his command, and without jeopardy to persons on the train. *Norwood* v. *Raleigh & G. R. Co.*, 111 *N. Car.* 236, 16 *S. E. Rep.* 4.

103. Falling asleep upon track.*—One who becomes intoxicated and lies down to sleep upon a track is guilty of such gross negligence as to preclude a recovery for injuries sustained. *Williams* v. *Southern Pac. R. Co.*, (*Cal.*) 9 *Pac. Rep.* 152.

Where a slave goes to sleep on a track, and is run over and killed, the slave's negligence in contributing to his own injury is imputed to the master, who is prevented thereby from recovering against the company. *Richardson* v. *Wilmington & M. R. Co.*, 8 *Rich.* (*So. Car.*) 120.

The proximate cause of the slave's death being his own voluntary imprudence, defendant company is not liable. *Richardson* v. *Wilmington & M. R. Co.*, 8 *Rich.* (*So. Car.*) 120.—APPLYING Felder *v.* Louisville, C. & C. R. Co., 2 McMull. 403. REVIEWING Herring *v.* Wilmington & R. R. Co., 10 Ired. (N. Car.) 402.—*Felder* v. *Louisville, C. & C. R. Co.*, 2 *McMull.* (*So. Car.*) 403.—APPLIED IN Richardson *v.* Wilmington & M. R. Co., 8 Rich. 120. REVIEWED IN Zemp *v.* Wilmington & M. R. Co., 9 Rich. 84.

104. Failure to heed warnings and signals.*—A person walking upon a track, but not in condition to be aware of his danger, was warned by a friend who was in his company that a train was approaching. He failed, however, to get off the track, whereupon the friend waved his hat to the engineer to stop. As soon as the engineer saw the waving he blew the whistle and applied the brakes. The train, nevertheless, ran over decedent. *Held*, that the company was not in fault, and that decedent had been guilty of such contributory negligence as precluded all right to recover damages for his death. *Louisville & N. R. Co.* v. *Watkins*, (*Ky.*) 12 *Am. & Eng. R. Cas.* 89.

In such case plaintiff could not avail himself of a failure on the part of the persons in charge of the train to put down brakes at the point where the accident occurred, which was on a descending grade, in accordance with the regulations of the company. *Louisville & N. R. Co.* v. *Watkins*, (*Ky.*) 12 *Am. & Eng. R. Cas.* 89.

A person walking on a track, away from any public crossing, was told by his companion, who heard the noise, that an engine was coming, and he replied, "I seen a train running up and down the other track this evening," and was immediately run over by the engine and killed. *Held*, that if the deceased, at the time he received the warning from his companion, could have left the track, and had sufficient time to do so, and would by doing so have escaped injury, then his remaining upon the track after such warning was such a want of due care and caution on his part as to debar a recovery, though there was negligence on the part of defendant's agents. *Baltimore & O. R. Co.* v. *State*, 36 *Md.* 366.

Where a person partially intoxicated leaves a safe path and walks on the track in a careless, indifferent manner, without using his ears or eyes, and without heeding the ringing of the train bell and warnings of others, he is guilty of gross negligence which will prevent any recovery for his death caused by being struck and killed by a backing engine, there being nothing to show negligence on the part of those in charge of the engine. *Norfolk & W. R. Co.* v. *Harman*, 83 *Va.* 553, 8 *S. E. Rep.* 251. — QUOTING Baltimore & O. R. Co. *v.* Sherman, 30 Gratt.

* Falling asleep on the track as contributory negligence, see note, 15 AM. & ENG. R. CAS. 478.

* Contributory negligence in failing to heed warnings and signals, see 41 AM. & ENG. R. CAS. 534, *abstr.*

(Va.) 602.—QUOTED IN Tyler *v.* Sites, 88 Va. 470. REVIEWED IN Tyler *v.* Kelley, 89 Va. 282.

105. Duty to look and listen.—(1) *In general.**— The fact that a company has been in the habit of moving its trains in a certain direction over one track is no excuse for the failure of one about to walk in the same direction along the ties of an adjoining track to note whether a train is approaching behind him. *Lake Shore & M. S. R. Co.* v. *Hart*, 87 *Ill.* 529, 19 *Am. Ry. Rep.* 249.

To walk upon a track without looking in both directions to discover approaching engines or trains, where the exercise of such precaution would discover the one or the other, is such negligence as will prevent a recovery, unless the injury was wilfully or wantonly inflicted. *Southeast & St. L. R. Co.* v. *Stotlar*, 43 *Ill. App.* 94.

A person who walks along a track as matter of convenience, without constant watchfulness for trains, is guilty of such negligence as will defeat a recovery for injury sustained if such negligence is a direct contributory cause; except where there has been a want of reasonable care, by the employés of the company, to avoid the injury, after becoming aware of the perilous situation of the party injured. *State* v. *Baltimore & O. R. Co.*, 69 *Md.* 494, 16 *Atl. Rep.* 210. —FOLLOWED IN Baltimore & O. R. Co. *v.* State, 69 Md. 551, 16 Atl. Rep. 212.—*Johnson* v. *Truesdale*, 46 *Minn.* 345, 48 *N. W. Rep.* 1136.

No recovery can be had for an injury to a trespasser going upon the track, at a time when he knew a train was due, without stopping to look or listen for it, unless some person in charge of the train saw him or knew of his presence on the track in time to have avoided the injury. *Barker* v. *Hannibal & St. J. R. Co.*, 37 *Am. & Eng. R. Cas.* 292, 98 *Mo.* 50, 11 *S. W. Rep.* 254.—DISTINGUISHED IN Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439.

One who walks along a railroad track without license must exercise extraordinary care to avoid injury, and if he goes along for a considerable distance without looking back for a train, he cannot recover for injuries sustained, in the absence of negligence by the employés of the company after they have discovered his presence. *Candelaria* v. *Atchison, T. & S. F. R. Co.*, 48 *Am. & Eng. R. Cas.* 565, 6 *N. Mex.* 266, 27 *Pac. Rep.* 497.

It is negligence *per se* for a person to board or alight from a moving train, or to attempt to cross a railroad track without looking for approaching trains, or to stand between the rails of a side track upon which cars are standing, or to be inattentive to his dangerous position when on a track, whether lawfully there or not. *Redmond* v. *Rome, W. & O. R. Co.*, 31 *N. Y. S. R.* 366, 10 *N. Y. Supp.* 330, 56 *Hun* 645.

A person injured while walking along a track, who could have avoided the injury if he had used his senses, cannot recover. *McAdoo* v. *Richmond & D. R. Co.*, 41 *Am. & Eng. R. Cas.* 524, 105 *N. Car.* 140, 11 *S. E. Rep.* 316. *Syme* v. *Richmond & D. R. Co.*, 113 *N. Car.* 558, 18 *S. E. Rep.* 114.

A person walking upon a track is not free from negligence if he omits to keep watch of the movement of trains, but relies upon a rule or custom of the railroad employés to give a signal of the movement of trains. The expectation that a signal will be given does not relieve the person from constant watchfulness for his own safety. *Baltimore & O. R. Co.* v. *Depew*, 12 *Am. & Eng. R. Cas.* 64, 40 *Ohio St.* 121.—APPLIED IN Elliot *v.* Chicago, M. & St. P. R. Co., 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

(2) *Illustrations.*—Plaintiff, an adult, was walking, for his own convenience, in a railroad yard, and, to avoid a train, stepped between the rails of an adjoining track, where there was nothing in the rear to break the view for a long distance. He failed to look behind him, and after walking about 300 feet was struck by an engine, the bell of which was not ringing, as required by a city ordinance. Walking upon the tracks in the yard by strangers was forbidden by statute, but persons did walk on the tracks daily without interference. *Held*, that plaintiff's injury resulted from his failure to exercise ordinary care, and that defendant was not liable. *Missouri Pac. R. Co.* v. *Moseley*, 57 *Fed. Rep.* 921.

In such case the act of plaintiff was the primary and efficient cause of the injury, and the failure to ring a bell was at most concurring or succeeding negligence, which failed to prevent the natural consequences of plaintiff's carelessness, but was not of it-

* Contributory negligence in failing to look for trains before going on track, see 41 AM. & ENG. R. CAS. 533, *abstr.*

self such negligence as would render defendant liable. *Missouri Pac. R. Co.* v. *Moseley*, 57 *Fed. Rep.* 921.

Plaintiff walked upon a track, only a few steps south of an approaching train, without looking north to see if there was danger, and paid so little heed as not to hear the bell or whistle when sounded or notice the calls of persons warning him of danger, and was run over by the engine, which was not moving at a high rate of speed; there was no proof that the servants of the company wantonly or wilfully caused the injury. *Held*, that plaintiff's negligence was so gross as to preclude a recovery. *Lake Shore & M. S. R. Co.* v. *Hart*, 87 *Ill.* 529, 19 *Am. Ry. Rep.* 249.—DISTINGUISHED IN Chicago & E. I. R. Co. *v.* O'Connor, 119 Ill. 586.

Where a party knowingly places himself in a place of great danger he is required to use vigilance correspondingly great. So where a party chooses to walk on a track where he knows that engines may approach him from behind, he must keep a lookout in that direction proportioned to the danger. *Lake Shore & M. S. R. Co.* v. *Blanchard*, 15 *Ill. App.* 582.—QUOTING Austin *v.* Chicago, R. I. & P. R. Co., 91 Ill. 35.

A person was walking along one of five parallel tracks, on which trains passed every few minutes, and to avoid a train stepped from one track upon another track on which an engine was approaching from behind, in plain sight, and proceeded on his way without looking and was run over and killed. *Held*, that he was guilty of contributory negligence such as to preclude a recovery for his death. *Michigan C. R. Co.* v. *Campau*, 35 *Mich.* 468, 15 *Am. Ry. Rep.* 314.—APPLIED IN O'Donnell *v.* Missouri Pac. R. Co., 7 Mo. App. 190. FOLLOWED IN Bresnahan *v.* Michigan C. R. Co., 8 Am. & Eng. R. Cas. 147, 49 Mich. 410. QUOTED IN Behrens *v.* Kansas Pac. R. Co. 8 Am. & Eng. R. Cas. 184, 5 Colo. 400.

Plaintiff, a simple-minded youth about nineteen years old, was with a crowd at a depot, as a spectator, when a local freight train arrived. The locomotive and a box car were detached, and moved forward beyond a switch, and the car, with brakes and a brakeman, was pushed or "kicked" in on the side track, and by its momentum it rolled back slowly, striking and injuring plaintiff, who was standing on the edge of the side track at a point where spectators or passengers were not invited to go or stand. There was no obstruction, and no warning was given, the brakeman not seeing him. It was due to plaintiff's inattention that he did not see or hear the car and step off the track. *Held*, that he could not recover. *Dooley* v. *Mobile & O. R. Co.*, 69 *Miss.* 648, 12 *So. Rep.* 956.

Deceased, a man of mature years, who, in going to his work, passed daily the point where he was struck, and who must have known that a train was due about that time, instead of walking between two tracks, stepped in broad daylight upon one of the tracks, the view of which was unobstructed for several hundred yards, and continued to walk on it without looking or listening, or paying any attention whatever to his situation. *Held*, that he was guilty of such negligence as would prevent a recovery, unless it appeared that after he had exposed himself to peril defendant's servants became aware of his perilous position, or by the exercise of ordinary care might have discovered it, in time to prevent injuring him, and thereafter, immediately before and up to the time of actual collision, failed to use such means as were within their power, with a proper degree of care, consistent with the safety of those on board the train, to avoid injuring him. *Guenther* v. *St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 47, 95 *Mo.* 286, 14 *West. Rep.* 735, 8 *S. W. Rep.* 371.—FOLLOWED IN Pope *v.* Kansas City Cable R. Co., 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891. QUOTED IN Prewitt *v.* Eddy, 54 Am & Eng. R. Cas. 138, 115 Mo. 283, 21 S. W. Rep. 742.

Where a person is walking on one track and passing a heavy train, on another track, which is exhausting so as to prevent his hearing the approach of an engine behind, it is his duty, if he cannot listen, to look; and if he fails to do so it is contributory negligence, and there can be no recovery for his death. *Syme* v. *Richmond & D. R. Co.*, 113 *N. Car.* 558, 18 *S. E. Rep.* 114.

Deceased was walking on a path by the side of a track. He knew that the train by which he was killed was due about that time, and therefore had reason to expect and look out for it; but he did not look and listen. He might have seen along the track for a distance of forty rods, and when the train came within forty feet of him, he attempted to cross the track, and was run over and killed. *Held*, that the failure of deceased to look and listen was the proximate cause

of his death, and that a nonsuit was properly granted, even though the engineer might have been negligent in some measure in failing to ring the bell. (Taylor, J., dissenting.) *Schilling* v. *Chicago, M. & St. P. R. Co.*, 34 *Am. & Eng. R. Cas.* 60, 71 *Wis.* 255, 37 *N. W. Rep.* 414, 40 *N. W. Rep.* 616.—QUOTING Hoye *v.* Chicago & N. W. R. Co., 67 Wis. 1; Baltimore & O. R. Co. *v.* State, 33 Md. 542; Frazer *v.* South & N. Ala. R. Co., 81 Ala. 185.

106. —— while walking on track in the night-time.—To walk along the middle of a track between crossings when it is dark, and without knowing and remembering whether a train is due or not, and without looking in both directions for trains, and without listening attentively and anxiously for the roar and rattle of machinery, as well as for the sound of bell or whistle, is gross negligence. *Central R. & B. Co.* v. *Smith*, 34 *Am. & Eng. R. Cas.* 1, 78 *Ga.* 694, 3 *S. E. Rep.* 397.

A person so trespassing must guard, not only against negligence on the part of the company, which he might discover in time to avoid the consequences, but also against the ordinary danger of there being negligence which he might not discover until too late. *Central R. & B. Co.* v. *Smith*, 34 *Am. & Eng. R. Cas.* 1, 78 *Ga.* 694, 3 *S. E. Rep.* 397.

One knowingly and needlessly walking at night upon a railroad track can, by the use of ordinary diligence, avoid being run over by a train, unless it appears that, owing to some special fact or circumstance, the use of such diligence would prove ineffectual. *Wilds* v. *Brunswick & W. R. Co.*, 82 *Ga.* 667, 9 *S. E. Rep.* 595.

One who walks on a track at night, knowing that a train is due, until he is struck and injured, is guilty of such negligence as to prevent a recovery, though the engine may have failed to carry a headlight. *Houston & T. C. R. Co.* v. *Richards*, 12 *Am. & Eng. R. Cas.* 70, 59 *Tex.* 373.—REVIEWING Houston & T. C. R. Co. *v.* Sympkins, 54 Tex. 615; McClaren *v.* Indianapolis & V. R. Co., 8 Am. & Eng. R. Cas. 217, 83 Ind. 319.—APPLIED IN Artusy *v.* Missouri Pac. R. Co., 37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177.

One who is injured on a stormy night while walking on the ends of the ties, with his hat drawn down over his eyes, and "looking straight down," as his own witness put it, cannot recover. *Gulf, C. & S. F. R. Co.* v. *York*, 74 *Tex.* 364, 12 *S. W. Rep.* 68.

There can be no recovery against a railroad for the killing of a person who goes upon its track in the night-time, at a place where there is no public crossing, where the company is using the track in the ordinary manner and without any neglect, and it further appears that the deceased might have seen the approaching train long before it reached him, and where there are other facts sufficient to warrant the inference that he entered upon the track at a point so near the approaching train that the exercise of the highest degree of care by those in charge of the train could not have saved him had he been seen when he first came on the track. *Texas & N. O. R. Co.* v. *Barfield*, (*Tex.*) 3 *S. W. Rep.* 665.—FOLLOWING Galveston, H. & S. A. R. Co. *v.* Bracken, 59 Tex. 74; Houston & T. C. R. Co. *v.* Smith, 52 Tex. 183; Hoover *v.* Texas & P. R. Co., 61 Tex. 503; Houston & T. C. R. Co. *v.* Richards, 59 Tex. 373; Houston & T. C. R. Co. *v.* Sympkins, 54 Tex. 618.

107. Rule where person is deaf or hard of hearing. — It appeared that a train struck plaintiff from behind; that he knew nothing of its presence until struck; that his hearing was defective, but he was not aware of the extent of the defect; and that the whistle was blown. He offered testimony that his son, who was aboard the train, had informed the conductor that plaintiff was traveling along the track, and was deaf or partially so; but the court excluded the evidence, and allowed a nonsuit. *Held*, that plaintiff's own evidence established contributory negligence on his part; that, had the testimony been admitted, a *prima facie* case of gross negligence or wantonness, requiring a submission to the jury, would not have been made; and that there was no ground for reversal. (Beck, C.J., dissenting.) *Kennady* v. *Denver, S. P. & P. R. Co.*, 34 *Am. & Eng. R. Cas.* 40, 10 *Colo.* 493, 16 *Pac. Rep.* 210.

One who is partially deaf and who walks on the ends of the ties just outside the rail, until he is struck by an engine approaching from behind, is guilty of such contributory negligence as to defeat a recovery, though the train employés may have been lacking in proper prudence and care. *Laicher* v. *New Orleans, J. & G. N. R. Co.*, 28 *La. Ann.* 320.

It is gross negligence for one who is deaf to walk along a track where trains are liable to pass. *Cogswell* v. *Oregon & C. R. Co.*, 6 *Oreg.* 417.

An aged man with defective hearing was struck by a train while upon a track, and was killed. His deafness was not known to those operating the train. The train was composed of about twenty cars in advance of the locomotive, and was moving slowly. The deceased was seen by the lookout upon the first car long before the train reached him, but it was supposed that when necessary for his safety he would leave the track. When the train was about 100 feet from him the lookout signalled to stop it, but before the cars could be stopped he was run over and fatally injured. *Held*, that the company was not guilty of negligence and was not liable. *Artusy* v. *Missouri Pac. R. Co.*, 37 *Am. & Eng. R. Cas.* 288, 73 *Tex.* 191, 11 *S. W. Rep.* 177.—FOLLOWING Missouri Pac. R. Co. *v.* Weisen, 65 Tex. 443.

108. Riding in wrong car. — If plaintiff, at the time of the accident, was riding in a car not provided for passengers, but where his presence was not required in order to protect his property, and one which he was prohibited from occupying, it might be claimed that he was guilty of such negligence as to preclude a recovery. But if it was absolutely necessary for him to ride in such car, and the company had waived the prohibition and consented that he might ride in the same car with his property, evidence tending to prove these facts was competent. *Chicago, B. & Q. R. Co.* v. *Dickson*, 143 *Ill.* 368, 32 *N. E. Rep.* 380.

109. Climbing upon car.—One who voluntarily and without right gets upon a freight car to ride is a mere intruder and trespasser, and the company owes to him no duty except the negative duty not to injure him wantonly or wilfully, or by such gross and reckless negligence in the management of the car, after he is discovered on it, as would be equivalent to intentional mischief. And even if the engineer knows of his being upon the car, and is negligent in his management of it, the company is not liable for an injury to him which could not be foreseen as a probable consequence. *St. Louis, I. M. & S. R. Co.* v. *Ledbetter*, 45 *Ark.* 246.—FOLLOWED IN Sibley *v.* Ratliffe, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477.

A boy able to take care of himself who tries to climb on to a moving train and is injured has no right of action against the railroad company. *Chicago, R. I. & P. R. Co.* v. *Eininger*, 114 *Ill.* 79, 29 *N. E. Rep.* 196. —QUOTED IN Chicago & W. I. R. Co. *v.* Roath, 35 Ill. App. 349.—QUOTED AND DISTINGUISHED IN Chicago & A. R. Co. *v.* Fisher, 141 Ill. 614.

A person who gets on a switch engine at the invitation of a brakeman, who is not authorized to invite any one on the engine, is not entitled to recover for an injury caused by the engine leaving the track. *Stringer* v. *Missouri Pac. R. Co.*, 96 *Mo.* 299, 9 *S. W. Rep.* 905.

110. Getting off car. — Plaintiff, a boy thirteen years old, unlawfully jumped on a moving train. *Held*, that the company owed him no duty and had a right to remove him, but in doing so it was not justified in subjecting him to any unnecessary hazard. Where the evidence permits the conclusion that water was thrown in his face in an improper manner, which caused him to fall or get off so as to be injured, there is sufficient evidence of negligence to submit to the jury. *Clark* v. *New York, L. E. & W. R. Co.*, 40 *Hun* 605, 2 *N. Y. S. R.* 249; *affirmed in* 113 *N. Y.* 670, *mem.*, 21 *N. E. Rep.* 1116, 23 *N. Y. S. R.* 994.—DISTINGUISHED IN Hogan *v.* Central Park, N. & E. R. R. Co., 36 N. Y. S. R. 352, 124 N. Y. 647.

111. Recovery notwithstanding contributory negligence. — Although plaintiff may have been at fault in the first instance, in getting on a track, yet, if he makes all proper efforts to escape when the danger becomes apparent, and the servants of the company fail to use all the proper means in their power by which the danger might be avoided, the company is responsible for the injury, and the original contributory negligence is no defense. *Tanner* v. *Louisville & N. R. Co.*, 60 *Ala.* 621.—QUOTING Tuff *v.* Warman, 5 C. B. N. S. 573; Spofford *v.* Harlow, 3 Allen (Mass.) 176. REVIEWING Government St. R. Co. *v.* Hanlon, 53 Ala. 70.

If a person was midway of a trestle when first seen by the engineer of a train, and the distance was great enough to permit the train to be stopped by a prompt resort to the proper appliances, but the engineer, instead of attempting at once to stop or check the train, acted on the assumption that the person crossing would reach the end of the trestle and step off before the engine reached that point, and did not dis-

cover his mistake until the traveler stopped, hesitated, and attempted to retrace his steps, and the train could not then be stopped in time to avert the injury, these facts would justify a verdict for plaintiff, notwithstanding the intestate's contributory negligence as a trespasser. *Central R. & B. Co.* v. *Vaughan*, 93 *Ala.* 209, 9 *So. Rep.* 468.

Though a person may be a trespasser on a track, yet if the train employés have reason to believe that he is drunk, or otherwise incapacitated, they have no right to presume that he will get off, but must use proper care to avoid injuring him; otherwise the company will be liable. *St. Louis, I. M. & S. R. Co.* v. *Wilkerson*, 46 *Ark.* 513.—FOLLOWED IN Sibley *v.* Ratliffe, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477.—*Lake Shore & M. S. R. Co.* v. *Bodemer*, 54 *Am. & Eng. R. Cas.* 177, 139 *Ill.* 596, 29 *N. E. Rep.* 692; *affirming* 33 *Ill. App.* 479. *Baltimore & O. R. Co.* v. *State*, 36 *Md.* 366. *Missouri Pac. R. Co.* v. *Weisen*, 65 *Tex.* 443.—FOLLOWED IN Artusy *v.* Missouri Pac. R. Co., 37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177. QUOTED IN Saldana *v.* Galveston, H. & S. A. R. Co., 43 Fed. Rep. 862.—*Everett* v. *Oregon S. L. & U. N. R. Co.*, 9 *Utah* 340, 34 *Pac. Rep.* 289.

One may be technically a trespasser and yet recover for an injury resulting from the wrongful act of another, if he has used due care to avoid the injury, or one may not be a trespasser and yet be guilty of such contributory negligence as to preclude him from recovering. *Vicksburg & M. R. Co.* v. *McGowan*, 62 *Miss.* 682.

If plaintiff's want of ordinary care is caused by defendant, it is involuntary, and therefore not contributory negligence. *So held*, where plaintiff went on a freight train, and was caused to fall or jump off while the train was in motion by an employé throwing water in his face. *Clark* v. *New York, L. E. & W. R. Co.*, 40 *Hun* 605, 2 *N. Y. S. R.* 249; *affirmed in* 113 *N. Y.* 670, *mem.*, 21 *N. E. Rep.* 1116, 23 *N. Y. S. R.* 994.

If the proximate cause of injury to one run over and maimed by a train is the negligence of the engineer in charge, and the party injured is prevented by a providential dispensation from the use of his faculties at the time of the injury, the fact that prior to the time of the injury, when no train was in view, and before being providentially disabled, the injured party placed himself wrongfully on the track of the road, would not constitute such contributory negligence as would prevent a recovery. *Houston & T. C. R. Co.* v. *Symphins*, 6 *Am. & Eng. R. Cas.* 11, 54 *Tex.* 615.

112. —— gross negligence or wilfulness. — When a person voluntarily and without authority undertakes to walk upon a track, he ought not to recover damages for an injury received, unless it appears that the injury was caused by the wanton and wilful misconduct of the employés of the company. *Chicago & A. R. Co.* v. *McKenna*, 14 *Ill. App.* 472.

Where the negligence of defendant was so gross as to imply a disregard of consequences, or a willingness to inflict the injury, plaintiff may recover, though he was a trespasser, or did not use ordinary care to avoid the injury. *Lafayette & I. R. Co.* v. *Adams*, 26 *Ind.* 76. — CRITICISED IN Cincinnati & M. R. Co. *v.* Eaton, 53 Ind. 307. DISTINGUISHED IN Lary *v.* Cleveland, C., C. & I. R. Co., 3 Am. & Eng. R. Cas. 498, 78 Ind. 323, 41 Am. Rep. 572; Cohen *v.* Eureka & P. R. Co., 14 Nev. 376.

Plaintiff jumped upon the platform of a baggage car on defendant's road, to ride to a place where the cars were being backed to make up a train. Defendant's rules forbade all persons, except certain employés, riding on baggage cars, and directed baggagemen rigidly to enforce the rule. As plaintiff's evidence tended to show, defendant's baggageman ordered plaintiff off while the car was in motion. A pile of wood was near the track. Plaintiff replied that he could not get off because of the wood, whereupon the baggage master kicked him off; he fell against the wood and then under the cars, and was injured. *Held*, that the fact that plaintiff was a trespasser was not a defense, and that the evidence was sufficient to authorize the submission of defendant's liability to a jury. *Rounds* v. *Delaware, L. & W. R. Co.*, 64 *N. Y.* 129, 21 *Am. Rep.* 597; *affirming* 3 *Hun* 329, 5 *T. & C.* 475.—NOT FOLLOWED IN Deans *v.* Wilmington & W. R. Co., 107 N. Car. 686. — See also *Porter* v. *Chicago, R. I. & P. R. Co.*, 41 *Iowa* 358.

As between the company and a trespasser or stranger, contributory negligence on the part of plaintiff renders defendant liable only for gross or wanton or wilful neglect, where otherwise he would be held liable for ordinary negligence. *Carrico* v. *West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12.

113. Question of law for court.—In a suit against a company for injuring one on the track by a running train, where there is no conflict of evidence, and it appears that the injury was not wilful, and that the negligence of the deceased contributed to it, the court may direct a verdict for the defendant. *McClaren* v. *Indianapolis & V. R. Co.*, 8 *Am. & Eng. R. Cas.* 217, 83 *Ind.* 319.—REVIEWED IN Houston & T. C. R. Co. *v.* Richards, 59 Tex. 373.

Both negligence and contributory negligence are questions of fact for the jury, where the facts are such that fair-minded men may differ in opinion on them; but where contributory negligence is clearly established, as where it appears that the plaintiff got on a train at an improper place and without leave or payment of fare, and was thrown off, the court should dismiss the complaint. *Buckley* v. *New York & H. R. Co.*, 11 *J. & S.* (*N. Y.*) 187.—APPLYING Fleming *v.* Brooklyn City R. Co., 1 Abb. N. Cas. (N. Y.) 433.—APPLIED IN Finley *v.* Hudson Elec. R. Co., 46 N. Y. S. R. 202.

114. Question of fact for the jury.—Plaintiff was a railroad laborer; it was the custom to take the men home at evening on a locomotive, but on the day in question the boss told them that they would have to walk. It was necessary to cross a bridge, and in doing so plaintiff was run over by a locomotive and injured. He testified that "he was walking at his ease, not thinking of anything," and did not see the engine when it came on the bridge; but also stated that he "never thought of it, for the reason that the boss told him there was nothing to come across." *Held*, that the question of his contributory negligence was for the jury. *Northern Pac. R. Co.* v. *Amato*, 49 *Fed. Rep.* 881, 1 *U. S. App.* 113, 1 *C. C. A.* 468; *affirming* 46 *Fed. Rep.* 561; *affirmed in* 144 *U. S.* 465, 12 *Sup. Ct. Rep.* 740.—FOLLOWING Bradley *v.* New York C. R. Co., 62 N. Y. 99; Oldenburg *v.* New York C. & H. R. R. Co., 124 N. Y. 414, 26 N. E. Rep. 1021.

After waiting a reasonable time for cars blocking the highway to be removed, a pedestrian may turn aside to avoid the obstruction and pass over the company's enclosed grounds. In doing so he will be no trespasser. *Smith* v. *Savannah, F. & W. R. Co.*, 42 *Am. & Eng. R. Cas.* 105, 84 *Ga.* 698, 11 *S. E. Rep.* 455.

While upon the company's grounds, under such circumstances, the diligence for his safety due from the company, as well as his own diligence in guarding against danger, is for the jury. If the jury think his presence ought to have been foreseen or anticipated, ignorance of it will make no difference. *Smith* v. *Savannah, F. & W. R. Co.*, 42 *Am. & Eng. R. Cas.* 105, 84 *Ga.* 698, 11 *S. E. Rep.* 455.

Plaintiff started to a depot, but to save distance and avoid mud walked for a distance on defendant's track, where it ran parallel with the track of another company. As he neared the depot a train on the other road came in, making considerable noise by ringing a bell and letting off steam, which attracted plaintiff's attention. Immediately behind this train a construction train suddenly appeared on defendant's track, going in the same direction. Whether plaintiff did not hear the approach of the construction train on account of the noise, and whether the engineer gave a signal, except just before plaintiff was struck, or whether he made any special effort to avoid running over plaintiff, were not clear from the evidence. *Held*, that the question of his negligence was for the jury. *Crow* v. *Wabash, St. L. & P. R. Co.*, 23 *Mo. App.* 357.—REVIEWING Bell *v.* Hannibal & St. J. R. Co., 86 Mo. 599.

Plaintiff, a boy fourteen years old, was injured while crossing the track to get water from a hydrant. There was evidence that the engineer saw him 100 feet away, approaching on a plank beside the track, intended for use of the railroad men only, but saw no more of him until after the injury. *Held*, that the question of contributory negligence was for the jury. *Corcoran* v. *New York El. R. Co.*, 19 *Hun* (*N. Y.*) 368.

Plaintiff and her husband were walking on a track when they discovered an engine about 900 feet behind them. They were about 150 feet from a platform where they could get off the track. By reversing the engine the engineer could easily have avoided running them down. There was low marshy ground on each side of the track and a ditch filled with water. *Held*, that it was a question for the jury what they might have done to avoid being run over, and whether they were justified in remaining on the track and attempting to reach the platform rather than to jump in the ditch or to adopt other means for their

safety. *Remer* v. *Long Island R. Co.*, 15 *N. Y. S. R.* 884, 1 *N. Y. Supp.* 124, 48 *Hun* 352; *affirmed in* 113 *N. Y.* 669, 23 *N. Y. S. R.* 994, 21 *N. E. Rep.* 1116.

Plaintiff undertook to ride across defendant's track at a foot crossing, but his horse caught his foot by reason of a defectively driven spike, and plaintiff could not get him on in time to avoid a collision with a car. Those in charge of the car were called on to stop when more than 100 yards away. *Held*, that the issue of contributory negligence should have been left to the jury. *Lay* v. *Richmond & D. R. Co.*, 42 *Am. & Eng. R. Cas.* 110, 106 *N. Car.* 404, 11 *S. E. Rep.* 412.

The mere fact that a person was a trespasser upon a track at the time he was injured does not necessarily constitute a bar to his recover for an injury. The fact, however, constitutes contributory negligence to be considered by the jury. *Patton* v. *East Tenn., V. & G. R. Co.*, 48 *Am. & Eng. R. Cas.* 581, 89 *Tenn.* 370, 15 *S. W. Rep.* 919.—APPROVING East Tenn., V. & G. R. Co. *v.* Fain, 12 Lea (Tenn.) 41.

115. Comparative negligence — Imputed negligence.—Where the servants of a company have been guilty of gross negligence or of wanton and wilful misconduct, and a trespasser on its track of slight contributory negligence only, the latter is, nevertheless, in case of injury, precluded from recovering. The doctrine of comparative negligence has no application in Indiana. *Terre Haute & I. R. Co.* v. *Graham*, 12 *Am. & Eng. R. Cas.* 77, 95 *Ind.* 286, 48 *Am. Rep.* 719.—REVIEWING Pennsylvania Co. *v.* Sinclair, 62 Ind. 301; Indianapolis & V. R. Co. *v.* McClaren, 62 Ind. 566.

Plaintiff and another were injured by a collision while driving in a wagon, engaged in an employment in which they had a common interest. They were driving at night on a highway where two tracks were laid, where there was sufficient passage on either side of the tracks. The companion was holding the lines, but plaintiff was fully aware of the danger of driving on the track, but made no objection. *Held*, that he was chargeable with the negligence of his companion, and could not recover. *Donnelly* v. *Brooklyn City R. Co.*, 34 *Am. & Eng. R. Cas.* 103, 109 *N. Y.* 16, 15 *N. E. Rep.* 733, 14 *N. Y. S. R.* 29, 11 *Cent. Rep.* 875; *reversing* 39 *Hun* 657, *mem.*— DISTINGUISHING Robinson *v.* New York C. & H. R. R. Co., 66 N. Y. 11; Dyer *v.* Erie R. Co., 71 N. Y. 228; Masterson *v.* New York C. & H. R. R. Co., 84 N. Y. 247.

116. Trespasser's negligence in mitigation of damages. — Under the Georgia statute giving a right to the recovery of partial damages from a company where a person injured has been guilty of contributory negligence, plaintiff cannot recover if he has trespassed upon the track and been grossly negligent in failing to anticipate and look out for the approach of trains. *Central R. & B. Co.* v. *Smith*, 34 *Am. & Eng. R. Cas.* 1, 78 *Ga.* 694, 3 *S. E. Rep.* 397.

Where the evidence shows that plaintiff went upon a track for the purpose of going to a house 200 yards distant; that he could have reached his destination by either of two roads which ran along the different sides of the railroad; that along each side of the track there were, in addition, smooth ways 7 and 10 feet wide respectively; that he failed to exercise proper care by looking and listening for the approach of the train, he is guilty of gross negligence which precludes recovery, although the employés in charge of the train failed to give proper signals, to check it at public crossings, and ran it at too high a rate of speed; and under such circumstances he has no right of recovery under the Georgia statute authorizing a verdict of partial damages where a person injured by a company has been guilty of contributory negligence. *Smith* v. *Central R. & B. Co.*, 41 *Am. & Eng. R. Cas.* 490, 82 *Ga.* 801, 10 *S. E. Rep.* 111.—DISTINGUISHING Western & A. R. Co. *v.* Main, 64 Ga. 649; Western & A. R. Co. *v.* Jones, 65 Ga. 631; Hankerson *v.* Southwestern R. Co., 59 Ga. 593; Vickers *v.* Atlanta & W. P. R. Co., 64 Ga. 306; Fraser *v.* Charleston & S. R. Co., 75 Ga. 222; Atlanta & W. P. R. Co. *v.* Wyly, 65 Ga. 120; Central R. Co. *v* Freeman, 66 Ga. 170; Cook *v.* Western & A. R. Co., 69 Ga. 619; Georgia R. Co. *v.* Pittman, 73 Ga. 325; Redding *v.* East Tenn., V. & G. R. Co., 74 Ga. 385; Georgia R. Co. *v.* Carr, 73 Ga. 557; Brunswick & W. R. Co. *v.* Hoover, 74 Ga. 429; Georgia R. Co. *v.* Williams, 74 Ga. 723; Western & A. R. Co. *v.* Meigs, 74 Ga. 857; Jackson *v.* Georgia R. Co., 77 Ga. 82.

Although a person is injured by a train while unlawfully on the track, or while contributing to the injury by his own carelessness, yet if the injury might have been

avoided by the use of ordinary care and caution by the company, it will be liable in damages, the negligence of the party injured being taken into consideration by way of mitigation of damages. *East Tenn., V. & G. R. Co.* v. *Fain*, 19 *Am. & Eng. R. Cas.* 102, 12 *Lea* (*Tenn.*) 35. — DISTINGUISHED IN East Tenn., V. & G. R. Co. *v.* Hull, 41 Am. & Eng. R. Cas. 495, 88 Tenn. 33, 12 S. W. Rep. 419; East Tenn., V. & G. R. Co. *v.* Aiken, 89 Tenn. 245.

The failure of a trespasser upon a track to look and listen for trains may be so far excused as to prevent an absolute bar to his suit, but not to exonerate him from contributory negligence, to be considered in mitigation of damages, when he was unexpectedly struck and injured by detached cars moving by impetus and gravitation just behind a regular train to which he had surrendered the track, having then resumed his journey, and when it appears that he was crossing a bridge, and probably could not have heard the approach of the cars on account of the noise of an adjacent waterfall. *Patton* v. *East Tenn., V. & G. R. Co.* 48 *Am. & Eng. R. Cas.* 581, 89 *Tenn.* 370. 15 *S. W. Rep.* 919.

IV. PROCEDURE

1. *Evidence.*

117. Admissibility. — The testimony of one who had for fourteen years been in defendant's employment as fireman, engineer, brakeman, and conductor, and who, at the time of the injury complained of, was a conductor on the branch of defendant's road where the injury occurred, to the effect that brakemen were subject to the orders of conductors, and that conductors' orders to brakemen were to eject trespassers from the trains, and that such were the orders of the conductor to the brakeman who did the wrong complained of, was competent to show the authority of the brakeman to remove a trespasser from a train, and so was the testimony of other witnesses that they had many times seen brakemen eject trespassers from trains. *Marion* v. *Chicago, R. I. & P. R. Co.*, 64 *Iowa* 568, 21 *N. W. Rep.* 86.

In an action against a company for causing the death of a trespasser upon its track, evidence tending to show that the accident might have been prevented had the company used certain improved air brakes in general use on railways is not admissible. *McKenna* v. *New York C. & H. R. R. Co.*, 8 *Daly* (*N. Y.*) 304.

Although Wis. Rev. St., § 1811, makes it unlawful for a person not connected with or employed upon a railroad to walk along the track thereof "except when the same shall be laid along public roads or streets," yet where the question is whether a person injured while walking upon a track was guilty of a want of ordinary care, it is error to reject evidence showing that many persons had, for years, been in the habit of passing up and down the same pathway on which the injured person was passing. *Townley* v. *Chicago, M. & St. P. R. Co.*, 4 *Am. & Eng. R. Cas.* 562, 53 *Wis.* 626, 11 *N. W. Rep.* 55.

118. Materiality.—A train at a station covered both a public crossing and what was called the depot crossing. Plaintiff, a boy, attempted to go to the station on the depot crossing, but finding the way closed started along the side of the train, intending to pass around the engine, but before he had passed it the train started and he was injured by falling and throwing his hand on the track. *Held*, that the fact that the company did not make an opening at the public crossing was immaterial. *Barkley* v. *Missouri Pac. R. Co.*, 96 *Mo.* 367, 9 *S. W. Rep.* 793.

119. Presumptions. — No presumption of fault arises against a company from a person being injured on the track; on the contrary, it is for the person injured to show that he had a lawful right to be there, and to enable him to claim damages he must also show that the company was guilty of some fault, neglect, or imprudence whereby the injury was caused. *Roy* v. *Grand Trunk R. Co.*, 1 *Montr. L. R.* 353.

120. Weight and sufficiency.—The rate of speed, the arrangement of tracks, the meeting of trains, and the absence of a fence are not circumstances which are entitled to much more weight when combined than when taken singly; and so far as they do strengthen each other they are affected by the fatal objection that the supposed duty has for its sole object the protection of wrong-doers, or at least of persons who have no excuse for being in the way of passing trains. *Nolan* v. *New York, N. H. & H. R. Co.*, 25 *Am. & Eng. R. Cas.* 342, 53 *Conn.* 461, 4 *Atl. Rep.* 106.

Evidence deemed insufficient to show negligence on the part of defendant, it ap-

pearing that the engineer gave proper signals, and attempted to stop when it became apparent that plaintiff would not get off the track. *Johnson* v. *Truesdale*, 46 *Minn.* 345, 48 *N. W. Rep.* 1136.

2. Instructions.

121. Proper. — Upon the claim made by defendant that from the evidence it appeared that plaintiff's intestate was a trespasser upon its tracks when struck by a locomotive, the court charged that, if the jury should so find, a recovery could not be had unless it was also found that the engineer in charge saw her in time to have avoided the accident, and was then guilty of such gross negligence in not attempting to avoid a collision as would evince a reckless disregard of human life. *Held*, correct. *Studley* v. *St. Paul & D. R. Co.*, 48 *Minn.* 249, 51 *N. W. Rep.* 115.

Where a person is killed in attempting to cross a track where there is no crossing, it is proper to instruct the jury that he was a trespasser upon the land of the company; that there was no obligation to blow the whistle or ring the bell to notify him, and that defendant owed to him no obligation or protection except that obligation which belongs ordinarily to the business of life. *Collis* v. *New York C. & H. R. R. Co.*, 71 *Hun* (*N. Y.*) 504. — QUOTING McAlpin *v.* Powell, 70 N. Y. 132.

122. Erroneous, generally.—An instruction that, although the person injured was unlawfully upon the track, "the company will be responsible if its employés are guilty of gross or reckless negligence, and could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness" is erroneous under any issue, the company being responsible only for wilfulness. *Chicago & E. I. R. Co.* v. *Hedges*, 25 *Am. & Eng. R. Cas.* 550, 105 *Ind.* 398, 7 *N. E. Rep.* 801.

A boy of sixteen, of average intelligence, who had all his life lived near a railroad, lay down upon the trestlework of a railroad bridge which was half a mile from a public crossing and remained there some three quarters of an hour. A train running thirty to thirty-five miles an hour on a down grade sounded its whistle on approaching the public crossing, and then continued on towards the bridge. The engineer first saw the boy when from 300 to 500 feet off, and immediately sounded the whistle and applied the brakes. The train, however, ran over and killed the boy and went on some distance beyond him before it could be stopped. The court charged that if the employés were negligent in not discovering the boy in time to avert the disaster the company was liable, notwithstanding the negligence of the boy. *Held*, that the instruction was error; that the company was not liable unless its servants, after discovering the perilous condition of the boy, might by the exercise of ordinary diligence and care have prevented the injury. *Louisville & N. R. Co.* v. *Greene*, (*Ky.*) 19 *Am. & Eng. R. Cas.* 95.— QUOTING Paducah & M. R. Co. *v.* Hoehl, 12 Bush (Ky.) 46. REVIEWING Kentucky C. R. Co. *v.* Dills, 4 Bush 593.

In an action against a company for an injury sustained by plaintiff in consequence of being struck and run over by a locomotive and tender, while walking upon the track in a city street, a charge to the jury that defendant was bound to use the utmost care and diligence to avoid collision with foot passengers, and that ordinary care was not sufficient to exonerate it from liability for an injury sustained by a collision, was erroneous. *Brand* v. *Schenectady & T. R. Co.*, 8 *Barb.* (*N. Y.*) 368. — APPROVED IN Baltimore & O. R. Co. *v.* Breinig, 25 Md. 378. DISAPPROVED IN Frick *v.* St. Louis, K. C. & N. R. Co., 8 Am. & Eng. R. Cas. 280, 75 Mo. 595. QUOTED IN New Orleans, J. & G. N. R. Co. *v.* Bailey, 40 Miss. 395. REVIEWED IN Goddard *v.* Grand Trunk R. Co., 57 Me. 202; Terry *v.* New York C. R. Co., 22 Barb. 574.

123. Assuming facts—Opinions of judge. — A judge may not convey to the jury his opinion as to any material fact at issue between the parties, but there is no error in stating to the jury the undisputed facts that defendant, on failure to pay his fare when demanded, refused to leave the train, and on being ejected attempted to board the train, and, as matter of law, that this conduct was unlawful. *Moore* v. *Columbia & G. R. Co.*, 38 *So. Car.* 1, 16 *S. E. Rep.* 781.

A company has the right to run special trains, at such times, on such terms, and at such increased rates of speed, within the limits of prudence and safety to its passengers, as the necessities or convenience of its business may require; and hence a charge of the court is erroneous which assumes or

implies that the running of trains off schedule time, or at increased rates of speed, is, *per se*, negligence. *East Tenn. &c. W. N. C. R. Co.* v. *Winters*, 85 *Tenn.* 240, 1 *S. W. Rep.* 790.

In an action by one struck by a train while intoxicated and walking on the track, an instruction that "if plaintiff was guilty of some slight degree of negligence not amounting to a want of ordinary care," and was injured in consequence of want of ordinary care on the part of defendant's agents, he could recover, is reversible error, as assuming his negligence to be slight only. *Houston &c. T. C. R. Co.* v. *Smith*, 52 *Tex.* 178.

124. Misleading.—It is the duty of a locomotive engineer to keep a steady lookout ahead for obstructions on the track, so far as consistent with the discharge of his other duties; and a charge which instructs the jury that it his duty "to keep a steady lookout," without limitation as to other conflicting duties, is not erroneous, though it may, without explanation, tend to mislead the jury. *Western R. Co.* v. *Lazarus*, 88 *Ala.* 453, 6 *So. Rep.* 877. *Mobile &c. G. R. Co.* v. *Caldwell*, 83 *Ala.* 196, 3 *So. Rep.* 445.

125. Not correctly stating the law.—Where the action is to recover for the death of one who was unlawfully on the track, an instruction to the effect that "defendant is liable in this case only if its servants failed to exercise ordinary care to prevent the injury, after they became aware of the danger to which the deceased was exposed, or after they might have become aware thereof by the exercise of ordinary care," is error. Under such circumstances the liability should be limited to negligence after the exposed and dangerous position of the injured party comes to the knowledge of those in charge of the train. *Rine* v. *Chicago &c. A. R. Co.*, 25 *Am. &c. Eng. R. Cas.* 545, 88 *Mo.* 392.—FOLLOWED IN Brooks *v.* Hannibal & St. J. R. Co., 35 Mo. App. 571. QUOTED AND DISTINGUISHED IN Dunkman *v.* Wabash, St. L. & P. R. Co., 95 Mo. 232, 10 West. Rep. 396, 4 S.W. Rep. 670.

126. Prayers properly refused.—In an action for running over a slave at a place not a public crossing, the court properly refused to instruct that the owner of the slave was not entitled to recover unless the defendant railroad was guilty of gross negligence. *Holmes* v. *Central R. &c. B. Co.*, 37 *Ga.* 593.

A request to charge that a company is not liable for an injury to a trespasser upon its track caused by an engine, unless it is shown that the acts of the company's servants in charge of the engine were wanton and malicious, or there was such gross negligence on their part as was tantamount to wilfulness, is rightfully refused. In such cases, the servants are required to use a degree of care which amounts to more than the mere absence of wantonness, malice, or reckless disregard of another's safety. *Western &c. A. R. Co.* v. *Meigs*, 74 *Ga.* 857.—QUOTING Baston *v.* Georgia R. Co., 60 Ga. 340. REVIEWING Central R. Co. *v.* Brinson, 70 Ga. 207.

An instruction is properly refused which directs the jury that unless the company's servants failed to make use of the means and appliances in their power to avert the accident after they became aware of the danger of deceased, the finding should be for the defendant. Such instruction is proper where the person injured is a trespasser on a railroad track and the circumstances are such that the company has both the right to have and the right to expect a clear track. *Eswin* v. *St. Louis, I. M. &c. S. R. Co.*, 35 *Am. &c. Eng. R. Cas.* 390, 96 *Mo.* 290, 9 *S. W. Rep.* 577. *Crow* v. *Wabash, St. L. &c. P. R. Co.*, 23 *Mo. App.* 357.

The court instructed the jury that "if as soon as the engineer saw plaintiff fall upon the track or discovered that for some reason she could not or might not get out of the way in time, he made diligent use of all the means at his command in order to stop the train, and avoid injuring plaintiff, he did all he was required to do and was guilty of no negligence." *Held*, that in view of this charge, and of plaintiff's condition, it was not error to refuse to charge that the engineer had a right to assume that plaintiff would step aside. *Spooner* v. *Delaware, L. &c. W. R. Co.*, 39 *Am. &c. Eng. R. Cas.* 599, 115 *N. Y.* 22, 21 *N. E. Rep.* 696, 23 *N. Y. S. R.* 554; *affirming* 41 *Hun* 643, *mem.*, 1 *N. Y. S. R.* 558.

In refusing to charge that a man who walks upon a track, except at a road crossing, does so at his peril, the circuit judge committed no error. Nor was there error in refusing to charge that "if the deceased was upon the track of defendant without lawful authority, and using it for his own convenience, he was a trespasser," and that "the company was under no obligation to

take precautions against possible injuries to trespassers." *Carter* v. *Columbia &* G. R. Co., 15 *Am. &* Eng. R. Cas. 414, 19 *So. Car.* 20, 45 *Am. Rep.* 754.

It is not error to refuse to charge that "a railroad company is not liable, where no evil intent or wanton conduct appears, for injuries by its trains to intruders who undertake to use the track for some business purpose of their own, or to persons who are unlawfully walking, remaining upon, or crossing its track." *East Tenn., V. &* G. R. Co. v. *Fain*, 19 *Am. &* Eng. R. Cas. 102, 12 *Lea* (*Tenn.*) 35.—APPROVED IN Patton *v.* East Tenn., V. & G. R. Co., 89 Tenn. 370.

Where a person is injured through the unsafe condition of tracks laid upon a public street, it is not error for the court to refuse to instruct the jury that railroad companies are not bound to use the highest degree of care to avoid injuring one who may possibly trespass upon its property, plaintiff in such action being in no sense a trespasser. *Gulf, C. &* S. F. R. Co. v. *Walker*, 37 *Am. &* Eng. R. Cas. 342, 70 *Tex.* 126, 7 *S. W. Rep.* 831.

Where there is no evidence on which to base a theory of pure accident, and the proof shows negligence, either upon the part of a passenger in alighting from a train, or on the part of the carrier, a charge to the effect that if plaintiff stepped carelessly or accidentally on or near the edge of a box and a fall was caused thereby the jury should find for defendant is properly refused. *Missouri Pac. R. Co.* v. *Wortham*, 37 *Am. &* Eng. R. Cas. 82, 73 *Tex.* 25, 3 *L. R. A.* 368, 10 *S. W. Rep.* 741.

TRESPASSING ANIMALS.

Liability of company for killing or injuring, see ANIMALS, INJURIES TO, **43-72; 152-159.**

TRESPASS TO TRY TITLE.

1. When the action lies.—The action of trespass to try title will lie against a railway company asserting a right-of-way claim to land. *Hays* v. *Texas &* P. R. Co., 23 *Am. &* Eng. R. Cas. 102, 62 *Tex.* 397.

This action, taking the place of the common-law action of ejectment, may be used where the object is to recover possession of land unlawfully withheld from the owner, and to which he has the right of immediate possession, whether the defendant claims under title or is a mere trespasser. *Hays* v. *Texas &* P. R. Co., 23 *Am. &* Eng. R. Cas. 102, 62 *Tex.* 397.

In a suit between the owner of the soil and a railway company whose title to an easement over the land is without foundation, and which is a trespasser, the owner is entitled to dispossess the latter altogether, and the action of trespass to try title is the appropriate remedy. *Texas &* P. R. Co. v. *Hays*, 3 *Tex. App.* (*Civ. Cas.*) 79.

2. Necessary title and possession in plaintiff.—In an action of trespass to try title, plaintiff, pending the suit, may buy from heirs of a party whose undivided interest plaintiff had claimed through a defective administration sale, and such purchase would meet the plea of outstanding title to such interest, if it could be made in such case. *Keyes* v. *Houston &* G. N. R. Co., 50 *Tex.* 169.

In an action of trespass to try title possession alone is sufficient in behalf of plaintiff to entitle him to recover against a mere trespasser. *Parker* v. *Ft. Worth &* D. C. R. Co., 71 *Tex.* 132, 8 *S. W. Rep.* 541.—FOLLOWING Kolb *v.* Bankhead, 18 Tex. 229; Alexander *v.* Gilliam, 39 Tex. 228.

Where one seeks to recover in trespass to try title a railway which extends over many miles, upon the ground of possession alone, he should go further with his allegations and proof than mere general statements which only show a possession that might not in fact extend beyond a very small part of the line. *Sulphur Springs &* M. P. R. Co. v. *St. Louis, A. &* T. R. Co., 2 *Tex. Civ. App.* 650, 22 *S. W. Rep.* 107, 23 *S. W. Rep.* 1012.

3. Condemning after judgment.—Where suit by trespass to try title is brought against a railroad company for land over which it claims an easement, in which judgment is rendered for the landowner, and subsequently proceedings to condemn the right of way are instituted, the measure of damages is the value of the land at the time it was taken, which does not include the value of the improvements placed thereon by the railroad. *Hays* v. *Texas &* P. R. Co., 23 *Am. &* Eng. R. Cas. 102, 62 *Tex.* 397. *Texas &* P. R. Co. v. *Hays*, 3 *Tex. App.* (*Civ. Cas.*) 79.

4. Statute of limitations.—That a railway company as a trespasser occupied the land long before plaintiff purchased will not affect his right to sue, nor will naked possession of the right of way over the land

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for ten years bar his recovery. *Hays* v. *Texas & P. R. Co.*, 23 *Am. & Eng. R. Cas.* 102, 62 *Tex.* 397. *Texas & P. R. Co.* v. *Hays*, 3 *Tex. App.* (*Civ. Cas.*) 79.

TRESTLES.

Contributory negligence in crossing in front of moving train, see EMPLOYÉS, INJURIES TO, **324.**

Cost of filling in flats crossed by, as an element of land damages, see EMINENT DOMAIN, **677.**

Duty of carrier as to construction and repair of, see CARRIAGE OF PASSENGERS, **172.**

— to employés as to safety of, see EMPLOYÉS, INJURIES TO, **61.**

Injuries to animals on, see ANIMALS, INJURIES TO, **78.**

Liability for flooding lands by, see FLOODING LANDS, **18.**

of lessee road for defects in, see LEASES, ETC., **65.**

Persons on, when deemed trespassers, see TRESPASSERS, INJURIES TO, **6.**

Walking on, when contributory negligence, see TRESPASSERS, INJURIES TO, **101.**

When subject to mechanic's lien, see LIENS, **24.**